**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court-appointed Monitor of 92834 Newfoundland and Labrador Inc. ("**92834**" of the "**Company**")

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

# FIFTEENTH REPORT OF GRANT THORNTON LIMITED, IN ITS CAPACITY AS MONITOR UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36 92834 NEWFOUNDLAND AND LABRADOR INC.

**April 15, 2024**

**Grant Thornton Limited,**
**Court Appointed Monitor**

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St. John's, NL A1A 0L4

#43804553.2

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## INTRODUCTION & PROCEEDINGS TO DATE

Interim Receivership

1. On February 21, 2022, upon the application of PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and Bridging Income Fund LP (collectively referred to as "**Bridging**"), Grant Thornton Limited ("**GTL**") was appointed as Interim Receiver (the "**Interim Receiver**") of all the current and future assets, undertakings and properties (the "**Property**") of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. by order of the Supreme Court of Newfoundland and Labrador (the "**Court**").

2. The Interim Receivership Order authorized the Interim Receiver, among other things, to:

   a) preserve, protect and maintain control over the Property;

   b) to retain or hire any employees on behalf of CFI;

   c) to report to, meet with and discuss with such Affected Persons (as defined in the Interim Receivership Order) as the Interim Receiver deems appropriate;

   d) to utilize monies on hand or borrowed by the Interim Receiver to fund payments of employee payroll obligations, rent, insurance, utilities, and other obligations determined by the Interim Receiver to be integral to the preservation of the Property;

   e) to commence proceedings for CFI pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**") or the *Companies' Creditors Arrangement Act* ("**CCAA**"); and

   f) to report to the Court and the creditors of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. regarding the status of the business and financial affairs of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc., including its assets, liabilities, accounts payable and other matters deemed relevant by the Interim Receiver.

CCAA Proceedings

3. On March 8, 2022, the Interim Receiver made an application to commence proceedings pursuant to the CCAA and the Court issued an order ("**Initial Order**") on March 11, 2022. Grant Thornton Limited was appointed Monitor ("**Monitor**").

4. The Initial Order imposed a stay of proceedings ("**Stay of Proceedings**") against Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively referred to as the "**New Entities**").

5. The Initial Order not only granted an initial Stay of Proceedings but also authorized the Monitor, among other things:

   a) Preserve and protect the Business and Property of the New Entities excluding certain property in favour of HSBC Bank of Canada ("**HSBC**");

   b) Providing the Monitor with certain enhanced powers;

   c) Approving the debtor in possession financing to allow the New Entities to continue to operate in the ordinary course pending the comeback hearing; and

   d) Setting down the comeback hearing for March 18, 2022, at 10am NL Time.

6. On March 18, 2022 (via Court order dated March 21, 2021), the Court issued an Amended and Restated Initial Order ("**ARIO**") which affirmed the terms of the Initial Order and granted the Monitor, among other things:

   a) Authority to file, if deemed appropriate, a plan of compromise and arrangement on behalf of the New Entities;

   b) Authority to implement operational changes and pursue restructuring opportunities on behalf the New Entities;

   c) Authority under s. 32 of the CCAA to disclaim or rescind agreements for real property;

   d) Granted an extension of the Stay of Proceedings to July 10, 2022;

   e) Empowered the Monitor to run a Sales and Investment Solicitation Process ("**SISP**"), with the terms being outlined in the SISP Process on behalf of the New Entities and approved by the Court via a SISP Order;

   f) Provided enhanced powers within the CCAA, due to the directors of the New Entities resigning and there being no officers;

g) Authorized an increase to the DIP Financing Agreement to borrow on behalf of the New Entities in accordance with the DIP Financing Agreement.

7. On June 10, 2022, the Monitor made an application to the Court to extend the Stay of Proceedings and extend the SISP. The Court issued an Order regarding the SISP, an extension of the Stay of Proceedings and, among other things:

a) Approved of the Monitor's activities to the date of the Third Report of the Monitor of May 30, 2022;

b) Granted an extension of the Stay of Proceedings to September 2, 2022;

c) Granted and declared that pursuant to section 5(5) of the *Wage Earners Protection Program Act* ("**WEPPA**") the Company's former employees meet the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 and are individuals to whom the WEPPA applies as of March 18, 2022;

d) Granted approval of amendments to the SISP Order; and

e) Granted approval of amendments to the ARIO Order.

8. On August 24, 2022, the Monitor made an application to the Court for, amongst other things, an extension of the Stay of Proceedings and to extend the timelines as outlined in the SISP. The purpose of the second extension was to provide additional time for the Monitor to finalize the Definitive Agreements as required by the SISP Order. The Court issued an Order that, among other things:

a) Approved the Monitor's activities to the date of the Fourth Report on August 24, 2022;

b) Granted approval of amendments to the SISP Order;

c) Granted approval of amendments to the ARIO Order; and,

d) Granted an extension of the Stay of Proceedings to October 17, 2022.

9. On October 6, 2022, the Monitor made an application to the Court for, amongst other things, an extension of the Stay of Proceedings to February 28, 2023. The purpose of the

third extension was to provide additional time for the Monitor to close a proposed transaction and proceed to terminate these CCAA proceedings as contemplated in the Fifth Report of Grant Thornton Limited in its Capacity as Monitor (the "**Fifth Report**"). However, as a result of a Material Adverse Change (**"MAC**"), this application was withdrawn.

10. On October 12, 2022, the Monitor filed with the Court a MAC as described in the Sixth Report of Grant Thornton Limited in its Capacity as Monitor (the "**Sixth Report**") when the previously selected successful bidder in the SISP did not provide the Monitor with a top up of the deposit as contemplated in the proposed transaction described in the Fifth Report. The purpose of the application for an extension of the Stay of Proceedings to February 26, 2023 was to determine next steps in the CCAA Proceedings in consultation with the DIP Lenders. On the same date, the Court issued an Order that, amount other things:

    a) Approved the Monitor's activities to the date of the Fifth Report;

    b) Granted approval of amendments to the ARIO Order; and

    c) Granted an extension of the Stay of Proceedings to February 26, 2023.

11. On February 16, 2023, the Monitor made an application to the Court for, amongst other things, an extension of the Stay of Proceedings. In addition, the Monitor disclosed to the Court that it had finalized a binding letter of intent ("**LOI**") with a new successful bidder (**"Purchaser"**). The purpose of the extension of the Stay of Proceedings was to allow the Monitor and the Purchaser to conduct due diligence and finalize Definitive Agreements for a Transaction ("**Transaction**") pursuant to the SISP Order. On February 21, 2023, the Court issued an Order that, among other things:

    a) Approved the Monitor's activities to the date of the Seventh Report;

    b) Granted approval of amendments to the ARIO Order;

    c) Granted an extension of the Stay of Proceedings to May 31, 2023; and

    d) Granted approval for the sealing of the Monitor's Second Confidential Report until the earlier of:

i. The closing of the Transaction for the sale of all of the assets or shares of the Company;

ii. The conclusion of the CCAA; or

iii. Further order of this Honourable Court.

12. On May 12, 2023, the Monitor made an application to the Court for, amongst other things, a short extension of the Stay of Proceedings and to add CFI Newspar Holdings Inc. to these CCAA proceedings (together with the New Entities, "**CFI**"). The purpose of the short extension was to allow the Monitor additional time to finalize Definitive Agreements for the Transaction with the Purchaser, while the addition of CFI Newspar Holdings Inc. into these CCAA Proceedings was to properly allow for the Purchaser the ability to acquire 100% of Newspar as part of the Transaction contemplated by the Definitive Agreements. On May 18, 2023, the Court issued an order that, among other things:

a) Approved the Monitor's activities to the date of the Eighth Report;

b) Granted approval of amendments to the ARIO Order;

c) Granted an extension of the Stay of Proceedings to June 16, 2023; and

d) Approved the inclusion of CFI Newspar Holdings Inc. into these CCAA proceedings.

<u>Approval of Transaction through Reverse Vesting Order</u>

13. On May 29, 2023, the Monitor advised the Court that it completed and executed Definitive Agreements for the Transaction with the Purchaser. The Monitor made an application to the Court for, amongst other things, approval of the Second Proposed Transaction, which contemplated closing in the form of a Reverse Vesting Order. On June 7, 2023, the Court issued an order that, among other things:

a) Approved the Monitor's activities to the date of the Ninth Report;

b) Granted approval of amendments to the ARIO Order;

c) Approved the Transaction and the RVO;

d) Replaced CFI with 92834 Newfoundland and Labrador Inc. ("**92834**" or the "**Company**") as the Applicant within these CCAA Proceedings, and

e) Granted an extension of the Stay of Proceedings to October 31, 2023

Distribution and Claims Identification Process

14. On October 11, 2023, the Monitor advised the Court that the Second Proposed Transaction had closed successfully and made an application to the Court to, amongst other things, approve an interim distribution to Bridging using the proceeds from the Second Proposed Transaction and requested the Courts approval for the Monitor to undertake a Claims Identification Process to identify any potential claims which may be in priority to Bridging.

15. On October 25, 2023, the Court issued a Distribution Order, that:

a) Approved the Monitor's activities to the date of the Tenth Report;

b) Approved fees and disbursements of the Monitor's and the Monitor's legal counsel to August 31, 2023;

c) Granted approval of an interim distribution to Bridging; and

d) Granted an extension of the Stay of Proceedings to March 31, 2024.

16. Also on October 25, 2023, the Court issued an order ("**Claims Identification Order**"), attached as **Appendix "A",** that:

a) Empowered the Monitor to undertake a Claims Identification Process with the objective to identify any potential claimants with priority claims to Bridging;

b) Approved a Pre-Filing Claims Bar Date of 5:00 p.m. Newfoundland Standard Time on November 25, 2023;

c) Approved a Restructuring Claims Bar Date of the later of:

i. The Pre-Filing Claims Bar Date; or

ii. 5:00 p.m. Newfoundland Standard Time thirty (30) days following when the Monitor provided a claims package to a possible restructuring claimant.

17. On January 25, 2024, the Court issued an order ("**Distribution and Appeal Period Order**"), attached as **Appendix "B"** that:

a) Provided an extension of the Stay of Proceedings to June 30, 2024;

b) Approved a distribution of funds by the Monitor in the amount of $500,878.46 to Bridging;

c) Approved a distribution of funds by the Monitor to the priority claimants identified by the Monitor within the Claims Identification Process;

d) Provided an appeal period to February 15, 2024 ("**Appeal Period**") for any claimants that disagreed with the Monitor's determination of their claim within the Claims Identification Process; and

e) Granted the Monitor the authority to file an assignment into bankruptcy of 92834 upon the distribution of the remaining funds held by the Monitor.

18. On March 7, 2024, and continued on March 15, 2024, the Court issued an order, attached as **Appendix "C"** authorizing the Monitor to pay certain disputed funds into Court pending the outcome of the appeal of the Town of St. Lawrence and Box L Mining and Ranching LLC, and in paragraph 5 that any determinations that are subject to an unresolved dispute between the Monitor and the claimant shall be submitted for adjudication to this Honourable Court.

19. The preceding reports of Grant Thornton Limited as Interim Receiver and Monitor, and all other information in respect of the interim receivership, and all other information in respect to the CCAA proceeding, are posted on the Interim Receiver's and Monitor's website at www.GrantThornton.ca/CFI. Readers are encouraged to read all previous reports of Grant Thornton Limited, the materials filed with the court in relation to the applications, and all orders of the Court to provide additional information.

20. On March 25, 2022, on application by HSBC Bank Canada, the Court appointed Deloitte Restructuring Inc. ("**Deloitte**") as receiver over the accounts receivable of the Company. On January 25, 2024, the Court granted a Distribution and Discharge Order which distributed all funds held by Deloitte and discharges Deloitte once certain terms and conditions are met. Stakeholders wishing additional information on that proceeding are encouraged to contact Deloitte.

21. This is the Fifteenth Report of the Monitor.

## PURPOSE OF THE REPORT

22. The purpose of this report (the "**Fifteenth Report**") is to provide the Court with the record of the Monitor with respect to the appeal of Inaminka Marine Services Limited ("**Inaminka**") and Richard A. Spellacy ("**Mr. Spellacy**") (collectively, the "**Claimants**") used in the Monitor's determination of both claims pursuant to the Claims Identification Order. Mr. Spellacy is a Director of Inaminka and both claimants are represented by the same counsel, Deborah L.J. Hutchings of Deborah L.J, Hutchings Law.

23. Pursuant to the Claims Identification Order, attached as **Appendix "A**", the intent of the claims process was to seek and adjudicate claims that ranked in priority to the Bridging first ranking secured claim, as there are insufficient funds for any distribution to a creditor who has a subordinate claim to Bridging.

## TERMS OF REFERENCE

24. In preparing this Fifteenth Report, the Monitor has relied upon unaudited financial information, certain records, financial information and projections, and discussions with Management of the Company and its legal advisors. While the Monitor reviewed various documents provided by the Company and its legal advisors (including, among other things, unaudited internal financial statements and financial projections) and believes that the information therein provides a fair summary of the transactions as reflected in the documents, such work does not constitute an audit or verification of such information for accuracy, completeness or compliance with Generally Accepted Accounting Principles ("**GAAP**") or International Financial Reporting Standards ("**IFRS**"). Accordingly, the Monitor expresses no opinion or other form of assurance pursuant to GAAP or IFRS with respect to such information.

25. In the course of its mandate, the Monitor has assumed the integrity and truthfulness of the information and explanations presented to it by the Company, its Management and other stakeholders, within the context in which such information was presented. To date, nothing has come to the Monitor's attention that would cause it to question the reasonableness of these assumptions, or accuracy of the information. The Monitor has requested that Management bring to its attention any significant matters which were not

addressed in the course of the Monitor's specific inquiries. Accordingly, this Fifteenth Report is based solely on the information (financial or otherwise) made available to the Monitor by the Company and its Management.

26. This Fifteenth Report has been prepared for the use of this Court and the Company's stakeholders as general information relating to the Company and to assist the Court in adjudicating Inaminka and Mr. Spellacy's appeals. Accordingly, the reader is cautioned that this Report may not be appropriate for any other purpose. The Monitor will not assume responsibility or liability for losses incurred by the reader as a result of the circulation, publication, reproduction or use of this Fifteenth Report contrary to the provisions of this paragraph.

27. All references to dollars are in Canadian currency unless otherwise noted.

**FEDERAL COURT APPLICATIONS AND RECORD**

28. Inaminka and Mr. Spellacy made two (2) applications to the Federal Court to lift the Stay of Proceedings to pursue their respective claims in Federal Court. Both applications were denied. The two (2) Federal Court applications were NOT intended to adjudicate the claims.

29. As requested by Inaminka and Mr. Spellacy, the Monitor is hereby submitting to the Court the Affidavits and Orders filed in relation to the two (2) Federal Court applications by the Claimants (the "**Federal Court Record**") which is attached hereto in the below noted appendices:

    a) **Appendix "D"** - The Federal Court Record for T-279-22

    b) **Appendix "E"** – Affidavit to Lead Warrant of Richard A. Spellacy – February 15, 2022;

    c) **Appendix "F"** – Affidavit of Phil Clarke – July 26, 2022;

    d) **Appendix "G"** – Affidavit of Phil Clarke – September 16, 2022;

    e) **Appendix "H"** – Affidavit of Richard A. Spellacy – September 26, 2022;

    f) **Appendix "I"** – Affidavit of Phil Clarke – September 27, 2022;

g) **Appendix "J"** – Order and Reasons – October 5, 2022;

h) **Appendix "K"** – Corrected Order and Reasons – October 5, 2022;

i) **Appendix "L"** – Affidavit of Richard A. Spellacy – October 24, 2022;

j) **Appendix "M"** – Affidavit of Richard A. Spellacy – February 8, 2023;

k) **Appendix "N"** – Affidavit of Phil Clarke – February 22, 2023;

l) **Appendix "O"** – Affidavit of Richard A. Spellacy – February 28, 2023;

m) **Appendix "P"** – Supplemental Affidavit of Phil Clarke – March 3, 2023;

n) **Appendix "Q"** – Transcript of the Cross Examination on Affidavit of Phil Clarke – March 10, 2023; and

o) **Appendix "R"** – Order and Reasons – April 20, 2023.

30. As noted above, both Federal Court applications by the Claimants against CFI were made in an effort to lift the Stay of Proceedings as granted by this Court with regards to a barge that is owned by CFI, vessel CFI Pontoon 1 (the "**Barge**"). Both applications were unsuccessful with CFI being awarded, in aggregate, $8,500 for costs as follows:

a) $3,500 to CFI as granted by the Federal Court on October 5, 2022 against Inaminka (**Appendix "J"** and **Appendix "K"**); and

b) $5,000 to CFI as granted by the Federal Court on April 20, 2023 against Inaminka (**Appendix "R"**).

31. The Monitor notes that both cost awards remain unpaid.

**CLAIM OF INAMINKA MARINE SERVICES LIMITED**

32. Prior to the issuance of the Claims Identification Order, on October 17, 2023, the Monitor received a memorandum from Inaminka and Mr. Spellacy, outlining each of their respective claims. This memorandum is attached hereto as **Appendix "S"**.

33. Pursuant to the Claims Identification Order, Inaminka filed a pre-filing secured claim in an amount of $146,870.02. The claim is attached hereto as **Appendix "T"**.

34. Inaminka's claim as filed with the Monitor is a secured claim on the basis of a maritime lien, ranking in priority to Bridging. The basis of the maritime lien is that Inaminka provided consulting services related to the Barge and CFI's port, the Blue Beach Terminal ("**Blue Beach**"). The consulting services were to develop a concept for a system whereby the Barge could remain at Blue Beach on a permanent basis. The existing system at the time had the Barge moored against the crib at Blue Beach. However this configuration required the barge to be towed to another port, usually Marystown, during winter and inclement weather as Blue Beach was not sheltered from the ocean and damage could be sustained by the barge if it hit the crib. The lack of shelter resulted in the Barge being damaged in a storm prior to the insolvency proceedings.

35. The purchase order for this service is attached hereto as Appendix "B" to the affidavit of Mr. Spellacy dated February 15, 2022. The CFI purchase order PO0021012 describes the service as "Review the BB barge mooring away from cribs".

36. The invoices submitted by Inaminka are attached hereto as Appendix "C" to the affidavit of Mr. Spellacy dated February 15, 2022. The claim of $146,870.02 is the sum of invoice 20209 dated November 30, 2021 ($48,331.50), invoice 20210 dated December 12, 2021 ($22,377.67), invoice 202111 dated December 31, 2021 ($42,926.85), invoice 202201 dated January 15th, 2022 ($16,445.00) and invoice 202202 dated February 1, 2022 ($16,789.00). All indicate services are for the "Re Consulting on loading barge".

37. The detailed design on the various concepts were never completed; CFI never chose a recommended solution nor decided to move forward with a solution; no vendors were retained; nothing was constructed, nor was equipment acquired, by CFI, or any other party.

**INAMINKA MARINE SERVICES LIMITED – MONITOR'S DETERMINATION OF CLAIM**

38. The Monitor reviewed Inaminka's claim in conjunction with its counsel and issued its determination on January 23, 2024, attached hereto as **Appendix "U"**.

39. The Monitor's determination was a disallowance of Inaminka's claim in its entirety for the following reasons:

a) There was no work, repair, betterment or otherwise, completed on the barge. In addition, CFI was not provided any equipment for the barge. No supporting documentation was provided in the claim; and

b) The Monitor's view was that the consulting services provided by Inaminka to CFI does not constitute a maritime lien.

40. On February 14, 2024, the Monitor received notice from Inaminka's counsel that it intended to appeal the Monitor's determination of its claim. A copy of this notice is attached hereto as **Appendix "V"**.

**CLAIM OF RICHARD A. SPELLACY**

41. Pursuant to the Claims Identification Order, Mr. Spellacy filed a pre-filing secured claim for $68,000 and a restructuring secured claim for $46,350. Mr. Spellacy's claim is attached hereto as **Appendix "W"**.

42. Mr. Spellacy's claim as filed with the Monitor is based on a claim for outstanding wages owed to Mr. Spellacy while he acted as master of the Barge on behalf of CFI as follows:

a) December 16, 2021 to February 21, 2022, being the date of the filing of the Interim Receivership application, which constitutes the pre-filing component of Mr. Spellacy's claim of 68 days at a rate of $1,000 per day (totals $68,000); and

b) February 22, 2022 to September 26, 2022 which constitutes the restructuring component of Mr. Spellacy's claim of 210 hours at $220 per hour (totals $46,200).

**RICHARD A. SPELLACY – MONITOR'S DETERMINATION OF CLAIM**

43. The Monitor reviewed Mr. Spellacy's claim in conjunction with its counsel and issued its determination on January 19, 2024, attached hereto as **Appendix "X"**.

44. The Monitor noted that the claim filed pursuant to the Claims Identification Order was materially different than the claim dated September 2, 2022 which was supported by an Affidavit of Mr. Spellacy and used to support a caveat. The Monitor reviewed the claim filed pursuant to the Claims Identification Order and not the proof of claim used to support the caveat filed.

45. The Monitor's determination was a disallowance of Mr. Spellacy's claim in its entirety for the following reasons:

a) Prefiling claim of 68 days of work at $1,000 per day (totals $68,000);

i. There is no written agreement or confirmation between CFI and Mr. Spellacy evidencing the hiring of Mr. Spellacy as an employee and/or Master of the Barge, nor any request from CFI for Mr. Spellacy to act as Master of the Barge;

ii. There is no evidence supporting a rate of $1,000 per day. Exhibit H of the proof of claim makes no reference to this rate or the claim for compensation from employment. It references, PO 21012 which is the PO issued by CFI to Inaminka, and not Mr. Spellacy in his personal capacity; and

iii. The operational logs provided in Exhibit F and Exhibit F1 of **Appendix "W"** provide a listing of days that sum to only 48 days between December 16, 2021 and February 21, 2022 and not 68.

b) The Monitor did note that in Exhibit "E" of **Appendix "W"**, the claimant provided a Ballast Water Record Book. That documentation indicates that Mr. Spellacy may have provided services on December 16, 17, 20 and 21, 2021 related to the transfer of ballast from tank to tank. While Mr. Spellacy has signed the document as master, there is no corroborating evidence to support that claim.

c) Restructuring claim of 210 hours at $220 per hour (totals $46,200):

i. There is no written agreement between the Monitor and Mr. Spellacy evidencing the hiring of Mr. Spellacy as an employee and/or Master of the Barge by the Monitor, nor any request from the Monitor for Mr. Spellacy to act as Master of the Barge, nor any disclosure to the Monitor by Mr. Spellacy of this claim prior to the filing of the caveat;

ii. There is no evidence supporting a rate of $220 per hour for an employment contract. Exhibit H or I of the proof of claim makes no reference to compensation from employment. It references, PO 21012 which is the PO issued by CFI to Inaminka, and not Mr. Spellacy in his personal capacity;

iii. There is no reference in Exhibit K of the proof of claim indicating Mr. Spellacy continued or was obligated to act as Master of the Barge, if he had been retained in that capacity;

iv. The operational logs provided in Exhibit F and Exhibit F1 of **Appendix "W"** provide a listing of hours that sum to only 202 hours between February 23, 2022 and September 26, 2022, most of which related to Mr. Spellacy's legal counsel; and

v. The operational logs provided in Exhibit F and Exhibit F1 of Mr. Spellacy's claim in **Appendix "W"** are claims for work on the same dates in December 2021 and January 2022 as Inaminka's claim in **Appendix "U"**, Exhibit F.

46. The Monitor has not been provided with an executed contract between Mr. Spellacy and CFI retaining Mr. Spellacy as Master for the Barge. Furthermore, the Monitor did not enter into a contract with Mr. Spellacy to act as Master of the Barge.

47. The Monitor also notes that the caveat filed in relation to this claim, and attached to the claim of Mr. Spellacy in **Appendix "W"**, Exhibit C was dated September 2, 2022 after the commencement of the CCAA proceeding and the granting of the stay on March 11, 2022.

48. The Monitor's determination was a disallowance of Mr. Spellacy's claim in its entirety on the basis that Mr. Spellacy has not provided to the Monitor written and sufficient support of his appointment as Master of the Barge, or that this appointment was ongoing.

49. On February 14, 2024, the Monitor received notice from Mr. Spellacy's counsel that he intended to appeal the Monitor's determination of his claim. A copy of this notice is attached hereto as **Appendix "Y"**.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 15th day of April, 2024.

**GRANT THORNTON LIMITED,**

**SOLELY IN ITS CAPACITY AS MONITOR OF 92834 NEWFOUNDLAND AND LABRADOR INC. AND NOT IN ITS PERSONAL CAPACITY**

Per: _____
Phil Clarke, CPA, CA, CIRP, LIT
Senior Vice-President

## Appendix A

Claims Identification Order

2022 01G 0709

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN BANKRUPTCY AND INSOLVENCY

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of 92834 Newfoundland and Labrador Inc. ("**92834**" or the "**Company**"); and

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

**ORDER**

Before the Honourable Justice MacDonald;

**THIS APPLICATION**, made by Grant Thornton Limited ("**GTL**" or the "**Monitor**"), in its capacity as Court-Appointed Monitor of the Company, pursuant to the CCAA for an Order substantially in the form filed with the Application heard on this 25th day of October 2023.

**ON READING** the affidavit of Phil Clarke sworn on the 26th day of September 2023 and the affidavit of Liam Murphy sworn on the 12th day of October, 2023 (collectively the "**Monitor Affidavit**") and the Exhibits thereto and the Monitor's Tenth Report;

**UPON HEARING** Counsel for the Monitor and other counsel as they may appear;

**IT IS HEREBY ORDERED:**

1. **THAT** the time for service of the within Notice of Motion and materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and this Court hereby dispenses with further service thereof.

2. **THAT** all terms not otherwise defined herein shall have the meaning ascribed to them in the Amended and Restated Initial Order of this Court dated March 18th, 2022 (the "**ARIO**"),

Filed Oct 25/23

Amendment #1 of ARIO dated June 10th, 2022 (the "**Amended ARIO**"), Amendment #2 to the ARIO dated August 30th, 2022 (" **2nd Amended ARIO** "), the Amendment #3 to the ARIO dated October 12th 2022 (" **3rd Amended ARIO**"), the Amendment # 4 to the ARIO dated February 21st, 2023 ("**4th Amended ARIO**"), the Amendment #5 to the ARIO dated the May 18, 2023 ("**5th Amended ARIO**") and the Amendment #6 to the ARIO dated June 7, 2023 ("**6th Amended ARIO**"), the Monitor Affidavit and the Monitor's Tenth Report filed on the __ day of October, 2023;

**CLAIM IDENTIFICATION ORDER**

1. **THIS COURT ORDERS** that the Claims Identification Order, as proposed by the Monitor, attached hereto as "**Exhibit A**", is hereby approved.

**EXTENSION OF THE STAY PERIOD**

2. **THIS COURT ORDERS** that the current Stay Period under the CCAA be and is hereby extended to and including the 31st day of March 2024.

**DISTRIBUTION OF FUNDS**

3. **THIS COURT ORDERS** that the interim distribution of funds by the Monitor in an amount of $14,100,000.00 as set out in the Monitor's Tenth Report is hereby approved.

**THIS COURT ORDERS** that the Monitor shall be entitled, without Court approval, to make further interim distributions to Bridging subject to the completion of the Claims Identification process as set out in the Claims Identification Order. For greater certainty, after the Claims Bar Date, the Monitor shall adjust the Distribution Holdback based on the actual claims received that may rank in priority to Bridging and distribute excess funds (if any) to Bridging, while maintaining a sufficient holdback amount to wind down these CCAA proceedings.

**APPROVAL OF ACTIVITES FEES AND DISBURSEMENTS**

4. **THIS COURT ORDERS** that the activities, fees and disbursements of the Monitor as described in the Monitor's Tenth Report are hereby approved, including, without limitation, the steps taken by the Monitor pursuant to the Interim Receivership Order, the Initial CCAA Order and the ARIO as amended, and the fees of the Monitor's legal counsel.

5. **THIS COURT ORDERS** that the Monitor's Statement of Receipts and Disbursements for the period from March 1, 2022 to August 29, 2023 attached to the Monitor's Tenth Report as Appendix "J" is hereby approved.

6. **THIS COURT ORDERS** that the Monitor's legal counsel fees as set out in the Monitor's Tenth Report are hereby approved.

7. **THIS COURT ORDERS** that the Monitor be at liberty to make further motions to this Court to pass its accounts and those of its legal counsel for the period from and after this Order.

**APPROVAL OF THE MONITOR'S TENTH REPORT**

8. **THIS COURT ORDERS** that the Monitor's Tenth Report and the activities of the Monitor and its counsel referred to therein be and are hereby approved; provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 25 day of October 2023.

COURT OFFICER

EXHIBIT "A"

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of
Grant Thornton Limited, as Court-Appointed
Monitor of 92834 Newfoundland and
Labrador Inc., ("**92834**" or the "**Company**")

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

**CLAIMS IDENTIFICATION ORDER**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION,** made by Grant Thornton Limited, in its capacity as Court-appointed Monitor of 92834 Newfoundland and Labrador Inc. (in such capacity, the "**Monitor**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order approving the Claims Identification Process (as defined below);

**UPON READING** the materials filed by the Applicant and the Monitor's Tenth Report to Court dated the 11th day of October, 2023; and

**AND UPON HEARING** the submissions of Geoffrey Spencer, counsel for the Applicant, and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service of Jennifer King, dated the 24th day of October, 2023;

**SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Application is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

**DEFINITIONS**

2. **THIS COURT ORDERS** that, for the purposes of this Claims Identification Order establishing a procedure for the submission of Claims against 92834, in addition to terms defined elsewhere herein, the following terms shall have the following meanings:

(a) **"Assessments"** means Claims of His Majesty the King in Right of Canada or of any Province or Territory or Municipality or any other taxation authority in any Canadian or foreign jurisdiction, including, without limitation, amounts which may arise or have arisen under any notice of assessment, notice of objection, notice of reassessment, notice of appeal, audit, investigation, demand or similar request from any taxation authority;

(b) **"Business Day"** means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are generally open for business in St. John's, Newfoundland and Labrador;

(c) **"CCAA Proceedings"** means the within proceedings in respect of 92834 Newfoundland and Labrador Inc. under the CCAA;

(d) **"Charges"** has the meaning given to that term in the Initial Order;

(e) **"Claim"** means:

(i) any right of claim of any Person against Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., CFI Newspar Holdings Inc. and Newspar (collectively "**CFI**"), which claim was vested out to 92834 pursuant to the Approval and Vesting Order issued by this court on the 7th day of June, 2023, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever in existence at the time of the Initial Order, and any interest accrued thereon or costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive, or otherwise), and whether or not such indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise against 92834 with respect to any matter, action, cause or chose in action, but subject to any counterclaim, set-off or right of compensation in favour of 92834 which may exist, whether existing at present or commenced in the future, which indebtedness, liability or obligation (A) is based in whole or in part on facts that existed prior to the Filing Date, (B) relates to a time period prior to the Filing Date, or (C) is a right or claim of any kind that would be a

claim provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**") had 92834 become bankrupt on the Filing Date '(each, a "**Pre-Filing Claim**"); and

(ii) any right of claim of any Person against 92834 in connection with any indebtedness, liability or obligation of any kind whatsoever owed by 92834 to such Person arising out of the restructuring, disclaimer, repudiation, resiliation, termination or breach by 92834 on or after the Filing Date of any contract, lease, other agreement or obligation whether written or oral '(a "**Restructuring Claim**");

provided, however, that in any case "Claim" shall not include an Excluded Claim;

(f) **"Claimant"** means any Person asserting a Claim and includes the transferee or assignee of a Claim recognized in accordance with paragraphs 26 and 27 herein or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person;

(g) **"Claims Identification Process"** means the process for identifying Claims outlined in this Claims Identification Order, including the Schedules hereto;

(h) **"Claims Package"** means the Proof of Claim form, the Notice to Claimants, the Instruction Letter, and any other documentation the Monitor may deem appropriate;

(i) **"Court"** means the Supreme Court of Newfoundland and Labrador;

(j) **"Excluded Claim"** means any claim secured by any of the Charges;

(k) **"Filing Date"** means February 21, 2022;

(l) **"Initial Order"** means the Initial Order of the Honourable Justice MacDonald made March 11, 2022 in these CCAA Proceedings, as amended, restated or varied from time to time;

(m) **"Instruction Letter"** means the instruction letter to Claimants, substantially in the form attached as Schedule "A" hereto, regarding the completion of a Proof of Claim by a Claimant and the Claims Identification Process described herein;

(n) **"Meeting"** means a meeting of the creditors of 92834 called for the purpose of considering and voting in respect of a Plan;

(o) **"Monitor"** means Grant Thornton Limited., in its capacity as the Court-appointed Monitor of 92834;

(p) **"Monitor's Website"** means: www.GrantThornton.ca/CFI;

(q) **"Notice to Claimants"** means the notice for publication by the Monitor as described in paragraph 16 hereof, in the form attached as Schedule "B";

(r) **"Orders"** means any and all orders issued by the Court within the CCAA Proceedings, including the Initial Order;

(s) **"Person"** means any individual, corporation, firm, limited or unlimited liability company, general or limited partnership, association (incorporated or unincorporated), trust, unincorporated organization, joint venture, trade union, government authority or any agency, regulatory body or officer thereof or any other entity, wherever situate or domiciled, and whether or not having legal status, and whether acting on its own or in a representative capacity;

(t) **"Plan"** means a plan of compromise or arrangement contemplated by the Initial Order;

(u) **"Pre-Filing Claims Bar Date"** means 5:00 p.m. (Newfoundland Time) on November 25, 2023;

(v) **"Pre-Filing Secured Debt"** means all indebtedness, liabilities and obligations owing by 92834 under CFI's agreements with:

(i) Bridging Finance Inc. Bridging Income Fund LP, Bridging Private Debt Institutional LP, Bridging Mid-Mark Debt Fund LP, Bridging Private Debt Lending Master Fund I.LP (Cayman), Bridging SMA 1 LP., and Bridging SMA 2 LP;

(ii) His Majesty in Right of Newfoundland and Labrador (as represented by the Minister of Industry, Energy and Technology); and

(iii) various equipment lessors in respect of capital leases;

(w) **"Priority Claim"** means any Claim that ranks in priority to the Pre-Filing Secured Debt;

(x) **"Priority Claimant"** means any Claimant asserting a Priority Claim and/or any Person who may be entitled to assert a Priority Claim, and includes any Person who has had a Proof of Claim asserting a Priority Claim filed on their behalf pursuant to the terms of this Claims Identification Order;

(y) **"Proof of Claim"** means the Proof of Claim referred to in paragraph 21 hereof to be filed by Claimants, substantially in the form attached hereto as Schedule "C"; and

(z) **"Restructuring Claims Bar Date"** means the later of:

(i) the Pre-Filing Claims Bar Date; and

d

(ii) 5:00 p.m. (Newfoundland Time) on the day which is thirty (30) days after the Monitor sends a Claims Package with respect to a Restructuring Claim in accordance with paragraph 19 of the Claims Identification Order.

**INTERPRETATION**

3. **THIS COURT ORDERS** that all references as to time herein shall mean local time in St. John's, Newfoundland and Labrador, Canada, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day unless otherwise indicated herein.

4. **THIS COURT ORDERS** that all references to the word "including" shall mean "including without limitation".

5. **THIS COURT ORDERS** that all references to the singular herein include the plural, the plural include the singular, and any gender includes the other gender.

**GENERAL PROVISIONS**

6. **THIS COURT ORDERS** that the Monitor is hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which forms delivered hereunder are completed and executed, and may waive strict compliance with the requirements of this Claims Identification Order as to completion, execution and submission of such forms and to request any further documentation from a Claimant that the Monitor may require.

7. **THIS COURT ORDERS** that all Claims shall be denominated in Canadian dollars. Any Claims denominated in a foreign currency shall be converted to Canadian dollars at the Bank of Canada daily average exchange rate on the Filing Date.

8. **THIS COURT ORDERS** that there shall be no presumption of validity or deeming of the amount due in respect of amounts claimed in any Assessments, with the exception of any

assessments raised by the Minster of National Revenue, pursuant to the Income Tax Act and/or the Excise Tax Act

9. **THIS COURT ORDERS** that notwithstanding any other provisions of this Order, the solicitation by the Monitor of Proofs of Claim and the filing by any Claimant of a Proof of Claim shall not, for that reason only, grant any Person any rights, including without limitation, in respect of its Claims or its standing in the CCAA Proceedings, except as specifically set out in this Order.

10. **THIS COURT ORDERS** that copies of all forms delivered hereunder, as applicable, shall be maintained by the Monitor.

**ROLE OF THE MONITOR**

11. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA, the Initial Order and any other orders of the Court in the CCAA Proceedings, shall administer the Claims Identification Process provided for herein and is hereby directed and empowered to take such other actions and fulfill such other roles as are contemplated by this Claims Identification Order.

12. **THIS COURT ORDERS** that the Monitor shall: (i) have all protections afforded to it by the CCAA, this Claims Identification Order, the Initial Order, any other Orders of the Court in the CCAA Proceedings and other applicable law in connection with its activities in respect of this Claims Identification Order, including the stay of proceedings in its favour provided pursuant to the Initial Order; and (ii) incur no liability or obligation as a result of carrying out the provisions of this Claims Identification Order, including in respect of its exercise of discretion as to the completion, execution or time of delivery of any documents to be delivered hereunder, other than in respect of gross negligence or wilful misconduct.

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13. **THIS COURT ORDERS** that 92834 and its employees, agents and representatives and any other Person given notice of this Claims Identification Order shall fully cooperate with the Monitor in the exercise of its powers and the discharge of its duties and obligations under this Claims Identification Order.

**NOTICE TO CLAIMANTS**

14. **THIS COURT ORDERS** that 92834 shall within two (2) days following the issuance of the Claims Identification Order provide to the Monitor a complete list of known potential Claimants, listed in the books and records of 92834 (the "**Known Claimants**" and each a "**Known Claimant**") as at the date of this Order, showing for each Known Claimant, its name, electronic address, or mailing address in the absence of an electronic address, and amount owed pursuant to 92834's books and records.

15. **THIS COURT ORDERS** that the Monitor shall send a Claims Package to each Known Claimant, each party that appears on the Service List, and any other Person that has requested a Claims Package, by ordinary mail or electronic mail to the last known address of the Known Claimant or the address as listed on the Service List, as applicable, within five (5) days following the issuance of the Claims Identification Order.

16. **THIS COURT ORDERS** that as soon as practicable, and without delay, the Monitor shall cause the Notice of Claimants to be published, for at least one (1) Business Day, in the Globe and Mail (National Edition) and the Telegram (Newfoundland and Labrador).

17. **THIS COURT ORDERS** that the Monitor shall cause the Notice to Claimants, the Claims Package and the Claims Identification Order to be posted to the Monitor's Website as soon as reasonably possible and cause it to remain posted thereon until its discharge as Monitor of 92834.

18. **THIS COURT ORDERS** that upon request by a Claimant for a Claims Package or documents or information relating to the Claims Identification Process prior to the Pre-Filing Claims Bar Date or Restructuring Claims Bar Date, as applicable, the Monitor shall forthwith send a Claims Package, direct such Person to the documents posted on the Monitor's Website, or otherwise respond to the request for information or documents as the Monitor considers appropriate in the circumstances.

19. **THIS COURT ORDERS** that with respect to any Restructuring Claims arising from the restructuring, disclaimer, resiliation, termination or breach of any lease, contracts, or other agreement or obligation, on or after the date of the Initial Order, the Monitor shall send to the counterparty(ies) to such lease, contract or other agreement or obligation a Claims Package:

(a) within five (5) days following the issuance of the Claims Identification Order if such Restructuring Claim arose prior to the date of the Claims Identification Order; or

(b) no later than two (2) days following the time the Monitor actually becomes aware of the effective date of such Restructuring Claim if such Restructuring Claim arises following the date of the Claims Identification Order.

20. **THIS COURT ORDERS** that the form and substance of each of the Notice to Claimants, Proof of Claim form, Instruction Letter, substantially in the forms attached as schedules hereto, are hereby approved. Despite the foregoing, the Monitor may, from time to time, make such minor changes to such forms as the Monitor considers necessary or desirable.

**PROOFS OF CLAIM**

21. **THIS COURT ORDERS** that any Person that wishes to assert a Pre-Filing Claim must deliver to the Monitor on or before the Pre-Filing Claims Bar Date a completed Proof of Claim,

including all relevant supporting documentation in respect of such Claim, in the manner set out in this Claims Identification Order.

22. **THIS COURT ORDERS** that any Person that wishes to assert a Restructuring Claim must deliver to the Monitor on or before the Restructuring Claims Bar Date a completed Proof of Claim form, together with all relevant supporting documentation in respect of such Claim, in the manner set out in this Claims Identification Order.

23. **THIS COURT ORDERS** that 92834 shall be authorized (but not obligated) to file a Proof of Claim on behalf of any or all Priority Claimants in respect of any potential Priority Claims.

24. **THIS COURT ORDERS** that any Person who does not file a Proof of Claim (including, with respect to a Priority Claimant, any Person who has not had a Proof of Claim filed on their behalf pursuant to the terms of this Claims Identification Order) such that it is received by the Monitor in accordance with this Claims Identification Order by the Pre-Filing Claims Bar Date or Restructuring Claims Bar Date, as applicable, shall:

(a) not be entitled to receive further notice with respect to, and shall not be entitled to participate as a Claimant or creditor in, the Claims Identification Process or the CCAA Proceedings in respect of such Claim;

(b) with respect to a Pre-Filing Claim or a Restructuring Claim, be forever barred, estopped and enjoined from asserting or enforcing such Claim against 92834 and 92834 shall not have any liability whatsoever in respect of such Claim and such Claim shall be extinguished without any further act or notification by 92834 or the Monitor;

(c) not be permitted to vote at any Meeting on account of such Claim; and

(d) not be permitted to participate in any distribution under any Plan related to such Claim or under these CCAA Proceedings.

**SET-OFF**

25. **THIS COURT ORDERS** that nothing in this Claims Identification Order shall affect any right of set-off that 92834 may have against any Person.

**TRANSFER OF CLAIMS**

26. **THIS COURT ORDERS** that if the holder of a Claim transfers or assigns the whole of such Claim to another Person, neither the Monitor nor 92834 shall be obligated to give notice or otherwise deal with the transferee or assignee of such Claim in respect thereof unless and until written notice of such transfer or assignment, together with evidence satisfactory to the Monitor, in its sole discretion, of such transfer or assignment, has been received by the Monitor and the Monitor has provided written confirmation acknowledging the transfer or assignment of such Claim, and thereafter such transferee or assignee shall for the purposes hereof constitute the "Claimant" in respect of such Claim. Any such transferee or assignee of a Claim shall be bound by any notices given or steps taken in respect of such Claim in accordance with this Claims Identification Order prior to receiving written confirmation by the Monitor acknowledging such assignment or transfer. After the Monitor has delivered a written confirmation acknowledging the notice of the transfer or assignment of a Claim, the Monitor shall thereafter be required only to deal with the transferee or assignee and not the original holder of the Claim. A transferee or assignee of a Claim takes the Claim subject to any defences and rights of set-off to which 92834 may be entitled with respect to such Claim. For greater certainty, a transferee or assignee of a Claim is not entitled to set-off, apply, merge, consolidate or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such

Person to 92834. Reference to transfer in this Claims Identification Order includes a transfer or assignment whether absolute or intended as security.

27. **THIS COURT ORDERS** that if a Claimant or any subsequent holder of a Claim, who in any such case has previously been acknowledged by the Monitor as the holder of the Claim, transfers or assigns the whole of such Claim to more than one Person or part of such Claim to another Person, such transfers or assignments shall not create separate Claims and such Claims shall continue to constitute and be dealt with as a single Claim notwithstanding such transfers or assignments. The Monitor shall not, in each case, be required to recognize or acknowledge any such transfers or assignments and shall be entitled to give notices to and to otherwise deal with such Claim only as a whole and then only to and with the Person last holding such Claim, provided such Claimant may, by notice in writing delivered to the Monitor, direct that subsequent dealings in respect of such Claim, but only as a whole, shall be dealt with by a specified Person and in such event, such Person shall be bound by any notices given or steps taken in respect of such Claim with such Claimant or in accordance with the provisions of this Claims Identification Order.

**DETERMINATION AND ADJUDICATION OF CLAIMS**

28. **THIS COURT ORDERS** that:

(a) the Monitor shall review all Proofs of Claim received, and is hereby empowered at its discretion to: (i) accept, revise or disallow each Claim as set out in each Proof of Claim, (ii) negotiate, settle or determine the amount of any Claim or the priority asserted by a Claimant with regard to a Claim, subject in each case to further determination by the Court in the event the Monitor and the applicable Claimant are unable to resolve any dispute with respect to a particular Claim;

(b) nothing in this paragraph 28 restricts the ability of the Monitor to apply to the Court to modify, supplement or replace the applicable procedures for reviewing, determining or adjudicating Claims, should that become necessary or appropriate in the circumstances.

**EXCLUDED CLAIMS**

29. **THIS COURT ORDERS** that, for greater certainty, no Person holding an Excluded Claim shall be required to file a Proof of Claim in respect of such Excluded Claim, and such Person shall be unaffected by this Order in respect of such Excluded Claim.

**SERVICE AND NOTICE**

30. **THIS COURT ORDERS** that the Monitor may, unless otherwise specified by this Claims Identification Order, serve and deliver or cause to be served and delivered the Claims Package, any letters, notices or other documents to Claimants or any other interested Person by forwarding true copies thereof by email, prepaid ordinary mail, courier, personal delivery, facsimile transmission or email to such Persons or their counsel (including counsel of record in any ongoing litigation) at the physical or electronic address, as applicable, last shown on the books and records of 92834 or set out in such Claimant's Proof of Claim if one has been filed. Any such service and delivery shall be deemed to have been received: (i) if sent by ordinary mail, on the third Business Day after mailing within Canada, and the fifth Business Day after mailing internationally; (ii) if sent by courier or personal delivery, on the next Business Day following dispatch; and (iii) if delivered by facsimile transmission or email by 5:00 p.m. on a Business Day, on such Business Day and if delivered after 5:00 p.m. or other than on a Business Day, on the following Business Day.

31. **THIS COURT ORDERS** that any notice or communication required to be provided or delivered by a Claimant to the Monitor under this Claims Identification Order shall be in writing

in substantially the form, if any, provided for in this Claims Identification Order and will be sufficiently given only if delivered by email, prepaid registered mail, courier, or personal delivery addressed to:

> **Grant Thornton Limited – The Court Appointed Monitor of 92834 Newfoundland and Labrador Inc.**
> **Nova Centre, North Tower**
> **Suite 1000 – 1675 Grafton Street**
> **Halifax, Nova Scotia B3J 0E9**
>
> Email: CanadaFluorspar@ca.gt.com

Any such notice or communication delivered by a Claimant shall be deemed to be received upon actual receipt thereof before 5:00 p.m. on a Business Day or if delivered outside of normal business hours, the next Business Day.

32. **THIS COURT ORDERS** that the posting of materials on the Monitor's Website pursuant to paragraph 17 herein, the publication of the Notice to Claimants and the sending of the Claims Packages as set out in this Claims Identification Order shall constitute good and sufficient notice to Claimants of the Claims Bar Date, the Restructuring Claims Bar Date and the other deadlines and procedures set forth herein, and that no other form of notice or service need be given or made on any Person, and no other document or material need be served on any Person in respect of the claims procedure described herein.

33. **THIS COURT ORDERS** that in the event that this Claims Identification Order is subsequently amended by further Order of the Court, the Monitor shall serve notice of such amendment on the Service List in these proceedings and the Monitor shall post such further Order on the Monitor's Website and such posting shall constitute adequate notice to all Persons of such amendment.

34. **THIS COURT ORDERS** that if during any period during which notices or other communications are being given pursuant to this Claims Identification Order, a postal strike or

postal work stoppage of general application should occur, such notices, notifications or other communications sent by ordinary or registered mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery, facsimile transmission or email in accordance with this Claims Identification Order.

**DIRECTIONS**

35. **THIS COURT ORDERS** that notwithstanding the terms of this Claims Identification Order, the Monitor may apply to this Court from time to time for directions from this Court with respect to this Claims Identification Order, or for such further Order or Orders as the Monitor may consider necessary or desirable to amend, supplement or clarify the terms of this Claims Identification Order.

**GENERAL**

36. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Monitor and its agents in carrying out the terms of this Order.

37. **THIS COURT ORDERS** that the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and

that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

38. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. on the date of this Order.

_____

**SCHEDULE "A"**

Please see attached.

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court-appointed Monitor of 92834 Newfoundland and Labrador Inc. ( "**92834**" or the "**Company**");

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

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**INSTRUCTION LETTER FOR THE CLAIMS IDENTIFICATION PROCESS**

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## I. CLAIMS IDENTIFICATION PROCESS

By Order of the Supreme Court of Newfoundland and Labrador dated _____, 2023 (the "**Claims Identification Order**"), Grant Thornton Limited, in its capacity as the Court-appointed monitor (in such capacity, the "**Monitor**") of 92834 Newfoundland and Labrador Inc. has been authorized to administer a claims identification process (the "**Claims Identification Process**") to **identify creditor(s) and amount of claims that have priority to the first secured creditor Bridging Finance Inc. and Bridging Income Fund LP (formerly Sprott Bridging Income Fund LP).** The Claims Identification Order governs the filing and identification of all Claims against 92834 Newfoundland and Labrador Inc., and Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., CFI Newspar Holdings Inc. and Newspar (a general partnership) (collectively referred to as "**CFI**").

Unless otherwise defined, all capitalized terms used herein shall have the meanings ascribed to them in the Claims Identification Order.

The Claims Identification Order, the Claims Package, a Proof of Claim form and related materials may be accessed from the Monitor's Website at www.GrantThornton.ca/CFI.

This letter provides instructions for completing the Proof of Claim. Reference should be made to the Claims Identification Order for a complete description of the Claims Identification Process.

The Claims Identification Process is intended for any Person with any Claims, other than Excluded Claims, of any kind or nature whatsoever against CFI, whether liquidated, unliquidated, contingent, or otherwise **that would have a priority to the first secured creditor Bridging Finance Inc. and Bridging Income Fund LP (formerly Sprott Bridging Income Fund LP).**. Please review the enclosed material for the complete definitions of "**Claim**", "**Pre-Filing Claim**", "**Restructuring Claim**" to which the Claims Identification Process applies.

All notices and enquiries with respect to the Claims Identification Process should be addressed to:

**Grant Thornton Limited - The Court Appointed Monitor of 92834 Newfoundland and Labrador Inc.**
**Nova Centre, North Tower**
**1675 Grafton Street, Suite 1000**
**Halifax, Nova Scotia B3J 0E9**
**Canada**

Telephone: 902-421-1734
Email: CanadaFluorspar@ca.gt.com

## II. FOR CLAIMANTS SUBMITTING A PROOF OF CLAIM

If you believe that you have a Claim (other than an Excluded Claim), you **MUST** file a Proof of Claim with the Monitor.

All Proofs of Claim for Pre-Filing Claims, which for greater certainty are Claims against CFI arising prior to the Filing Date of February 21, 2022, must be received by the Monitor **before 5:00 p.m. (Newfoundland Standard Time)** on **November 25, 2023** (the "**Pre-Filing Claims Bar Date**").

All Proofs of Claim for Restructuring Claims, which for greater certainty are Claims arising out of the restructuring, disclaimer, resiliation, termination or breach by CFI on or after the Filing Date of February 21, 2022, of any contract, lease or other agreement or arrangement whether written or oral, and (ii) claims for unpaid estate expenses which for greater certainty are Claims arising out of unpaid expenses incurred by the Interim Receiver or Monitor, must be received by the Monitor the later of (i) the Pre-Filing Claims Bar Date and (ii) 5:00 p.m. (Newfoundland Time) on the date that is thirty (30) days after the date on which the Monitor sends a Claims Package with respect to a Restructuring Claim **(the "Restructuring Claims Bar Date")**

**PROOFS OF CLAIM MUST BE RECEIVED BY THE PRE-FILING CLAIMS BAR DATE OR THE RESTRUCTURING CLAIMS BAR DATE, AS APPLICABLE, OR THE APPLICABLE CLAIM WILL BE FOREVER BARRED AND EXTINGUISHED.** If you are required to file a Proof of Claim pursuant to the Claims Identification Process but do not file a Proof of Claim in respect of a Claim by the Pre-Filing Claims Bar Date or Restructuring Claims Bar Date, as applicable, or a Proof of Claim is not filed on your behalf (as permitted by the terms of the Claims Identification Order in respect of Priority Claims), you shall not be entitled to vote at any Meeting regarding a Plan or participate in any distribution under a Plan or otherwise in respect of such Claims.

All Claims denominated in foreign currency shall be converted to Canadian dollars at the Bank of Canada daily average exchange rate in effect on the Filing Date of February 21, 2022.

Additional Proofs of Claim forms can be obtained by contacting the Monitor at the telephone number and address indicated above and providing particulars as to your name, address and facsimile number or email address. Further, Proofs of Claim and related materials may be accessed from the Monitor's Website at www.GrantThornton.ca/CFI.

DATED at Halifax, Nova Scotia, this_____day of_____, 2023.

Grant Thornton Limited,
solely in its capacity as Monitor of 92834 Newfoundland and Labrador Inc.,
and not in its personal nor corporate capacity.

**SCHEDULE "B"**

Please see attached.

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court-appointed Monitor of 92834 Newfoundland and Labrador Inc. ("**92834**" or the "**Company**")

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

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## NOTICE LETTER FOR THE CLAIMS IDENTIFICATION PROCESS

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**RE: NOTICE OF CLAIMS IDENTIFICATION PROCESS, PRE-FILING CLAIMS BAR DATE AND RESTRUCTURING CLAIMS BAR DATE**

This notice is being published pursuant to an Order of the Supreme Court of Newfoundland and Labrador General Division (the "Court") dated _____ (the "**Claims Identification Order**"), with respect to 92834's proceedings under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended. Pursuant to the Initial Order dated March 11, 2022, Grant Thornton Limited was appointed as monitor (in such capacity, the "**Monitor**"), and pursuant to the Claims Identification Order is required to assist with conducting a claims identification process (the "**Claims Identification Process**") with respect to claims against 92834 and Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., CFI Newspar Holdings Inc. and Newspar (a general partnership) (collectively referred to as "**CFI**") **that have priority to the first secured creditor Bridging Finance Inc. and Bridging Income Fund LP (formerly Sprott Bridging Income Fund LP)**. Additionally, the Monitor is required to send Claims Packages to, among others, CFI's known Claimants and Claimants having Restructuring Claims. All capitalized terms not defined herein shall have the meanings ascribed to them in the Claims Identification Order.

The Claims Identification Order, the Claims Package, a Proof of Claim and related materials may be accessed from the Monitor's Website at www.GrantThornton.ca/CFI.

**The pre-filing claims bar date is 5:00 p.m. (Newfoundland Time) on November 25, 2023** (the "**Pre-Filing Claims Bar Date**"). Proofs of Claim in respect of Pre-Filing Claims must be completed and filed with the Monitor on or before the Pre-Filing Claims Bar Date.

**The restructuring claims bar date is the later of (i) the Pre-Filing Claims Bar Date and (ii) 5:00 p.m. (Newfoundland Time) on the date that is thirty (30) days after the date on which the Monitor sends a Claims Package with respect to a Restructuring Claim** (the "**Restructuring Claims Bar Date**"). Proofs of Claim in respect of Restructuring Claims must be completed and filed with the Monitor on or before the Restructuring Claims Bar Date.

## I. SUBMISSION OF A PROOF OF CLAIM

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All persons wishing to assert a Claim (other than an Excluded Claim) against 92834 **MUST** file a Proof of Claim with the Monitor.

**PROOFS OF CLAIM MUST BE RECEIVED BY THE MONITOR BY THE PRE-FILING CLAIMS BAR DATE OR RESTRUCTURING CLAIMS BAR DATE, AS APPLICABLE, OR THE CLAIM WILL BE FOREVER BARRED AND EXTINGUISHED.** If you are required to file a Proof of Claim pursuant to the Claims Identification Process but do not file a Proof of Claim in respect of a Claim by the Pre-Filing Claims Bar Date or the Restructuring Claims Bar Date, as applicable, or a Proof of Claim is not filed on your behalf (as permitted by the terms of the Claims Identification Order in respect of Priority Claims), you shall not be entitled to vote at any Meeting regarding a Plan or participate in any distribution under a Plan, if any, or otherwise in respect of such Claims.

Reference should be made to the Claims Identification Order for the complete definitions of **"Claim"**, "**Pre-Filing Claim**" and "**Restructuring Claim**" to which the Claims Identification Process applies. Reference should also be made to the definition of **"Priority Claim"** set out in the Claims Identification Order.

## II. MONITOR CONTACT INFORMATION

The Monitor can be contacted at the following address to request a Claims Package or for any other notices or enquiries with respect to the Claims Identification Process

Grant Thornton Limited - The Court Appointed Monitor of 92834 Newfoundland and Labrador Inc.,
1675 Grafton St Suite 1000
Halifax, NS, B3J 0E9
Canada
Telephone: 902-421-1734
Email: CanadaFluorspar@ca.gt.com

DATED at Halifax, Nova Scotia this_____day of_____, 2023.

Grant Thornton Limited,
solely in its capacity as Monitor of
92834 and not in its personal nor corporate capacity.

**SCHEDULE "C"**

Please see attached.

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court-appointed Monitor of 92834 Newfoundland and Labrador Inc. ("**92834**" or the "**Company**");

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

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## PROOF OF CLAIM

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Please read carefully the enclosed Instruction Letter for completing this Proof of Claim. All capitalized terms not defined herein have the meanings ascribed to them in the Claims Identification Order dated _____, 2023.

**I. PARTICULARS OF CLAIMANT:**

1. Full Legal Name of Claimant:

   _____ (the "Claimant")

2. Full Mailing Address of the Claimant:

   _____

   _____

   _____

3. Telephone Number: _____

4. E-Mail Address: _____

5. Facsimile Number: _____

6. Attention (Contact Person): _____

7. Have you acquired this Claim by assignment?

   Yes; ☐ No: ☐ (if yes, attach documents evidencing assignment)

   If Yes, Full Legal Name of Original Claimant(s):

## II. PROOF OF CLAIM:

1. I,_____

(name of Claimant or Representative of the Claimant), of_____

_____ do hereby certify:
(city and province)

(a) that I [check (✓) one]

- ☐ am the Claimant; OR
- ☐ am _____ (state position or title) of

_____
(name of Claimant)

(b) that I have knowledge of all the circumstances connected with the Claim referred to below; and,

(c) that complete documentation in support of the Claim referred to below is attached;

| Debtor | Pre-Filing Claim Amount | Whether Claim is Secured, Priority Unsecured, or Unsecured | Value of Security Held, if any: |
|---|---|---|---|
| Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., CFI Newspar Holdings Inc. and Newspar | | | |

| Debtor | Restructuring Claim Amount | Whether Claim is Secured, Priority Unsecured, or Unsecured | Value of Security Held, if any: |
|---|---|---|---|
| Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., CFI Newspar Holdings Inc. and Newspar | | | |

## III. PARTICULARS OF CLAIM

The particulars of the undersigned's total Claim (including Pre-Filing Claims and Restructuring Claims) are attached.

*(Provide full particulars of the Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) or legal breach(es) giving rise to the Claim, name of any guarantor(s) which has guaranteed the Claim, particulars and copies of any security and amount of Claim allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed.)*

## IV. FILING OF CLAIM

**For Pre-Filing Claims, this Proof of Claim MUST be received by the Monitor before 5:00 p.m. (Newfoundland Time) on November 25, 2023 (the "Pre-Filing Claims Bar Date").**

**For Restructuring Claims, this Proof of Claim MUST be received by the Monitor before the later of (i) the Pre-Filing Claims Bar Date and (ii) 5:00 p.m. (Newfoundland Time) on the date that is thirty (30) days after the date on which the Monitor sends a Claims Package to you with respect to a Restructuring Claim (the "Restructuring Claims Bar Date").**

In either case, completed forms must be delivered by prepaid ordinary mail, registered mail, courier, personal delivery or email addressed:

Grant Thornton Limited - The Court Appointed
Monitor of 92834 Newfoundland and Labrador Inc.,
1675 Grafton St Suite 1000
Halifax, NS, B3J 0E9
Canada
Telephone: 902-421-1734
Email: CanadaFluorspar@ca.gt.com

**Failure to file your Proof of Claim as directed by the Pre-Filing Claims Bar Date or Restructuring Claims Bar Date, as applicable, will result in your Claim being extinguished and forever barred and in you being prevented from making or enforcing a Claim against 92834.**

DATED at _____ this _____ day of _____, 2023.

_____
Signature of Claimant

## Appendix B

Distribution and Appeal Period Order

2022 01G 0709

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN BANKRUPTCY AND INSOLVENCY

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of 92834 Newfoundland and Labrador Inc. ("**92834**" or the "**Company**"); and

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

**ORDER**

Before the Honourable Justice MacDonald;

**THIS APPLICATION,** made by Grant Thornton Limited ("**GTL**" or the "**Monitor**"), in its capacity as Court-Appointed Monitor of the Company, pursuant to the CCAA for an Order substantially in the form filed with the Application heard on this 25th day of January 2024.

**ON READING** the affidavit of Phil Clarke sworn on the 22nd day of January, 2024 (the "**Monitor Affidavit**") and the Exhibits thereto and the Monitor's Eleventh Report;

**UPON HEARING** Counsel for the Monitor and other counsel as they may appear;

**IT IS HEREBY ORDERED:**

1. **THAT** the time for service of the within Notice of Motion and materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and this Court hereby dispenses with further service thereof.

2. **THAT** all terms not otherwise defined herein shall have the meaning ascribed to them in the Amended and Restated Initial Order of this Court dated March 18th, 2022 (the "**ARIO**"), Amendment #1 of ARIO dated June 10th, 2022 (the "**Amended ARIO**"), Amendment #2 to the

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ARIO dated August 30th, 2022 (" **2nd Amended ARIO** "), the Amendment #3 to the ARIO dated October 12th 2022 (" **3rd Amended ARIO**"), the Amendment # 4 to the ARIO dated February 21st, 2023 ("**4th Amended ARIO**"), the Amendment #5 to the ARIO dated the May 18, 2023 ("**5th Amended ARIO**"), the Amendment #6 to the ARIO dated June 7, 2023 ("**6th Amended ARIO**"), and the Amendment #7 to the ARIO dated October 25, 2023 (" **7th Amended ARIO**"), the Monitor's Affidavit and the Monitor's Eleventh Report dated January 23, 2024;

**EXTENSION TO THE STAY PERIOD**

1. **THIS COURT ODERS** that the current Stay Period under the CCAA be and is hereby extended to and including the 30th day of June 2024.

**DISTRIBUTION OF FUNDS**

2. **THIS COURT ORDERS** that the distribution of funds by the Monitor in an amount of $773,771.22 being $272,892.76 to the priority claimants and $500,878.46 to Bridging as set out in the Monitor's Eleventh Report is hereby approved.

3. **THIS COURT ORDERS** that should any claimant appeal the Monitor's proposed distribution of funds by February 15, 2024, the Monitor shall remit the funds subject to the appeal to the Court and reduce the distribution to Bridging accordingly.

**BANKRUPTCY OF 92834**

4. **THIS COURT ORDERS** that upon distribution of funds by the Monitor as set out in the Monitor's Eleventh Report, the Stay of Proceedings is lifted such that the Monitor be and is hereby empowered to make an assignment into bankruptcy of 92384.

**APPROVAL OF THE MONITOR'S ELEVENTH REPORT**

5. **THIS COURT ORDERS** that the Monitor's Eleventh Report and the activities of the Monitor and its counsel referred to therein be and are hereby approved; provided, however, that only the

Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 25 day of Jan 2024.

COURT OFFICER

## Appendix C

Order for Payment of Disputed Funds into Court

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of 92834 Newfoundland and Labrador Inc. ("**92834**" or the "**Company**"); and

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

**ORDER**

Before the Honourable Justice MacDonald;

**THIS APPLICATION**, made by Grant Thornton Limited ("**GTL**" or the "**Monitor**"), in its capacity as Court-Appointed Monitor of the Company, pursuant to the CCAA for an Order substantially in the form filed with the Application heard on this 7th day of March 2024.

**ON READING** the affidavit of Liam Murphy sworn on the 1st day of March 2024 (the "**Monitor Affidavit**") and the Exhibits thereto and the Monitor's Twelfth Report;

**UPON HEARING** Counsel for the Monitor and other counsel as they may appear;

**IT IS HEREBY ORDERED:**

1. **THAT** the time for service of the within Notice of Motion and materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and this Court hereby dispenses with further service thereof.

2. **THAT** all terms not otherwise defined herein shall have the meaning ascribed to them in the Amended and Restated Initial Order of this Court dated March 18th, 2022 (the "**ARIO**"), Amendment #1 of ARIO dated June 10th, 2022 (the "**Amended ARIO**"), Amendment #2 to the ARIO



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dated August 30th, 2022 (" **2nd Amended ARIO** "), the Amendment #3 to the ARIO dated October 12th 2022 (" **3rd Amended ARIO**"), the Amendment # 4 to the ARIO dated February 21st, 2023 ("**4th Amended ARIO**"), the Amendment #5 to the ARIO dated the May 18, 2023 ("**5th Amended ARIO**"), the Amendment #6 to the ARIO dated June 7, 2023 ("**6th Amended ARIO**"),the Amendment #7 to the ARIO dated October 25, 2023 (" **7th Amended ARIO**"), the Amendment #8 to the ARIO dated January 25th, 2024 ("**8th Amended ARIO**"), the Monitor's Affidavit and the Monitor's Twelfth Report dated March 1, 2024.

**PAYMENT OF DISPUTED FUNDS INTO COURT**

3. **THIS COURT ORDERS** that the Monitor may remit $1,230,700.00 to this Honourable Court, which are funds representing the amount of the disputed claim of the Town of St. Lawrence, which funds shall be held by the court pending the outcome of the appeal by the Town of St. Lawrence.

4. **THIS COURT ORDERS** that the Monitor may remit $123,078.05 to this Honourable Court, which are funds representing the amount of the disputed claim of Box L. Mining and Ranching LLC., which funds shall be held by the court pending the outcome of the appeal by Box L. Mining and Ranching LLC.

**APPEAL PROCESS**

5. **THIS COURT ORDERS** that any determinations that are subject to an unresolved dispute between the Monitor and the claimant shall be submitted for adjudication to this Honourable Court.

**APPROVAL OF THE MONITOR'S TWELFTH REPORT**

6. **THIS COURT ORDERS** that the Monitor's Twelfth Report and the activities of the Monitor and its counsel referred to therein be and are hereby approved; provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 15 day of March, 2024.

Katherine Yates

COURT
OFFICER

#43489234.1

## Appendix D

Federal Court Record T-279-22

**Type :** Federal Court

**Type of Action :** Federal Court

**Nature of Proceeding :** Admiralty - Contract

**Filing Date :** 2022-02-16

**Office :** St. John's **Language :** English

# Recorded Entry Summary Information

Certain public documents in some proceedings are now available for online access in accordance with the Federal Court's Online Access to Court Records – Pilot Project. These documents are identified with a download icon (⬇) in the Download column below.

You may obtain copies of other public documents by contacting the Registry. Copies of public documents which are already in electronic format can be sent by e-mail, upon request to their local Registry office (see list of e-mail addresses in the Update #9 and Consolidated COVID-19 Practice Direction (June 24, 2022). Indicate the Court File number in the subject of your email. In the text, you must clearly identify the document number and its name (this information is located in the *Recorded Entry Summary* column).

The availability of documents from the Registry, including through online access, does not grant a copyright licence or permission. Your use of such materials must be in accordance with the *Copyright Act*, RSC 1985, c C-42.

**79 records found**

| Doc | Date Filed | Office | Recorded Entry Summary | Download |
|---|---|---|---|---|
| 37 | 2024-03-07 | Ottawa | Certified French language Translation of Reasons for Order and Order (Corrected) rendered on 05-OCT-2022 by The Honourable Mr. Justice Southcott filed on 07-MAR-2024 pursuant to s. 20 of the Official Languages Act. Certificate of Translation of Order entered in J. & O. Book, volume 1641 page(s) 402 - 403 and copy placed on file. | |
| null | 2023-07-14 | Ottawa | Acknowledgment of Receipt received from Ms. Hutchings for the Plaintiff and Mr. Cahill for the Defendant with respect to Registry's letter ID#76, by email placed on file on 14-JUL-2023 | |
| null | 2023-07-14 | Ottawa | Letter from Plaintiff dated 14-JUL-2023 (by email) in response to the Registry's request for a status update in this matter, and advising that they have been preparing their clients' more fulsome claims which will be submitted to the Monitor and this could possibly be the nof of her clients' actions in theFederal Court or they may appear before the SC of NL for its decision on the issues respecting their clients' claims for priority over the proceeds from the sale of the Shares. received on 14-JUL-2023 | |
| null | 2023-07-14 | Ottawa | Letter sent by Registry on 14-JUL-2023 to all parties requesting a status update in the matter. Copy placed on file. | |
| null | 2023-02-24 | Ottawa | Acknowledgment of Receipt received from all parties with respect to Order rendered 23-FEB-2023 placed on file on 24-FEB-2023 | |
| null | 2023-05-23 | Ottawa | Confirmation by proof of delivery letter of receipt by Defendants on May 23, 2023 of the Order and Reasons of the Court (Zinn, J.) rendered April 20, 2023. placed on file on 23-MAY-2023 | |
| null | 2023-05-23 | Ottawa | Confirmation by proof of delivery letter of receipt by the Plaintiff on May 23, 2023 of the Order and Reasons of the Court (Zinn, J.) rendered April 20, 2023. placed on file on 23-MAY-2023 | |
| 36 | 2023-04-20 | Ottawa | Reasons for Order and Order dated 20-APR-2023 rendered by The Honourable Mr. Justice Zinn Matter considered with personal appearance The Court's decision is with regard to Motion in writing Doc. No. 21 Result: dismissed "... the Plaintiff shall pay the Defendant, Canada Fluorspar (NL) Inc., costs of this motion in the all-inclusive amount of $5,000.00." Filed on 20-APR-2023 copies sent to parties Transmittal Letters placed on file. Interlocutory Decision Certificate of Order entered in J. & O. Book, volume 1591 page(s) 316 - 316 | ✓ |
| null | 2023-03-27 | Ottawa | Memorandum to file from K. Thompson dated 27-MAR-2023 re: Court's request for parties to discuss costs re: Hearing on 21-MAR-2023 parties have advised by email that they agree on $5000.00 for costs. -email forwarded to direct attention of Zinn,J for consideration placed on file. | |

| | | | | |
|---|---|---|---|---|
| null | 2023-03-21 | Ottawa | Ottawa 21-MAR-2023 BEFORE The Honourable Mr. Justice Zinn Language: E Before the Court: Motion Doc. No. 21 on behalf of Plaintiff Result of Hearing: Matter reserved held by way of video conference in chambers Duration per day: 21-MAR-2023 from 12:30 to 03:05 Courtroom : Judge's Chambers - Ottawa Court Registrar: Kadara Thompson Total Duration: 2.5h Appearances: Deborah L.J Hutchings (dhutchings@yourlegalteam.ca) 709-726-8844 representing Plaintiff William T. Cahill (wcahill@coxandpalmer.com) 709-570-5577 representing Defendants Comments: -parties to provide position on costs within 5 days Minutes of Hearing entered in Vol. 1093 page(s) 162 - 163 Abstract of Hearing placed on file | | |
| null | 2023-03-16 | St. John's | Transcript of cross-examination held on 10-MAR-2023 RE: Affidavit of Mr. P. Philip Clarke received on 16-MAR-2023 | ✓ | ✗ |
| 35 | 2023-03-03 | St. John's | Solicitor's certificate of service on behalf of William T. Cahill confirming service of Affidavit of Phil Clarke upon Plaintiff by email on 03-MAR-2023 filed on 03-MAR-2023 | | |
| 34 | 2023-03-03 | St. John's | Supplementary Affidavit of Phil Clarke sworn on 03-MAR-2023 on behalf of Grant Thorton Ltd. As per the Order of the Court (Zinn, J) dated 23-FEb-2023 filed on 03-MAR-2023 | ✓ | |
| 33 | 2023-02-28 | St. John's | Solicitor's certificate of service on behalf of Deborah L.J. Hutchings confirming service of Affidavit of Richard Spellacy upon Defendant by email on 28-FEB-2023 filed on 28-FEB-2023 | | |
| 32 | 2023-02-28 | St. John's | Affidavit of Richard A. Spellacy sworn on 28-FEB-2023 on behalf of Plaintiff As per the Order of the Court (Zinn, J.) dated 23-FEb-2023 with Exhibits "A" and "B" filed on 28-FEB-2023 | ✓ | |
| 31 | 2023-02-23 | Ottawa | Order dated 23-FEB-2023 rendered by The Honourable Mr. Justice Zinn Matter considered with personal appearance The Court's decision is with regard to Motion Doc. No. 21 Result: THIS COURT ORDERS that: 1. This motion is adjourned to be heard by Zoom platform on Tuesday, March 21, 2023, commencing at 2 p.m. NST, for a duration not exceeding three (3) hours; 2. The Plaintiff shall serve and file any further affidavit evidence on or before Tuesday, February 28, 2023; 3. The Defendants shall serve and file any further affidavit evidence on or before Friday, March 3, 2023; and 4. Cross-examinations, if any, shall be completed on or before Friday, March 10, 2023. Filed on 23-FEB-2023 copies sent to parties entered in J. & O. Book, volume 1583 page(s) 151 - 152 Interlocutory Decision | | |
| null | 2023-02-23 | Ottawa | St. John's 23-FEB-2023 BEFORE The Honourable Mr. Justice Zinn Language: E Before the Court: Motion Doc. No. 21 on behalf of Plaintiff Result of Hearing: Matter adjourned to March 21, 2023, at 2:00 pm (NST). Order will follow. held by way of video conference Duration per day: 23-FEB-2023 from 01:33 to 02:15 Courtroom : Ottawa (Zoom) Court Registrar: Joey Arseneault-Watters Total Duration: 42 min Appearances: Deborah L.J. Hutchings 709-726-8844 representing Plaintiff William T. Cahill & Allison Philpott 709-570-5577 representing Defendants Comments: Recorded on Zoom Minutes of Hearing entered in Vol. 1091 page(s) 447 - 448 Abstract of Hearing placed on file | | |
| 30 | 2023-02-22 | Ottawa | Solicitor's certificate of service on behalf of William T. Cahill confirming service of Defendants' Responding Motion Record filed 22-FEB-2023 upon Plaintiff by email on 22-FEB-2023 filed on 22-FEB-2023 | | |
| 29 | 2023-02-22 | Ottawa | Motion Record in response to Motion Doc. No. 21 containing the following original document(s): 27 28 Number of copies received: 1 on behalf of Defendant filed on 22-FEB-2023 | | |
| null | 2023-02-22 | Ottawa | Book of Authorities consisting of 1 volume(s) on behalf of Defendant received on 22-FEB-2023 Sent directly to Presiding Judge | | |
| 28 | 2023-02-22 | Ottawa | Written Representations contained within a Motion Record on behalf of Defendant concerning in opposition to Motion Record Doc 21 filed on 22-FEB-2023 | | |
| 27 | 2023-02-22 | Ottawa | Affidavit of Phil Clarke sworn on 22-FEB-2023 contained within a Motion Record on behalf of Defendant in opposition to Motion Doc. No. 21 with Exhibits A-I filed on 22-FEB-2023 | ✓ | |
| null | 2023-02-20 | Ottawa | Acknowledgment of Receipt received from parties via email with respect to Id No. 56: Directions of the Court (Presiding Judge) dated Feb 17, 2023 placed on file on 20-FEB-2023 | | |

| | | | | |
|---|---|---|---|---|
| null | 2023-02-17 | Ottawa | Oral directions received from the presiding judge dated 17-FEB-2023 directing that "The Plaintiff's motion for an Order lifting the stay of this action and re- instating its arrest of the Ship "Barge H-404" shall be heard by the Court on Thursday, February 23, 2023, via Zoom platform, commencing at 1:00 pm NST for a duration of 3 hours. The Defendants are to serve and file their responding materials (including electronic filing) by noon, Wednesday, , February 22, 2023." placed on file on 17-FEB-2023 | |
| 26 | 2023-02-17 | St. John's | Motion Record containing the following original document(s): 21 22 23 24 Number of copies received: 1 on behalf of Plaintiff filed on 17-FEB-2023 | |
| null | 2023-02-16 | St. John's | Communication to the Court from the Registry dated 16-FEB-2023 re: Rule 35 letter and Motion materials have been sent to Trial JA for action. | |
| null | 2023-02-15 | St. John's | Letter from Plaintiff dated 15-FEB-2023 Requesting a hearing pursuant to Rule 35(2) received on 15-FEB-2023 | |
| 25 | 2023-02-15 | St. John's | Solicitor's certificate of service on behalf of Deborah L.C. Hutchings confirming service of Motion Record upon Defendant by email on 13-FEB-2023 filed on 15-FEB-2023 | |
| null | 2023-02-15 | St. John's | Authorities consisting of 1 volume(s) on behalf of Plaintiff received on 15-FEB-2023 | |
| 24 | 2023-02-15 | St. John's | Memorandum contained within a Motion Record on behalf of Plaintiff filed on 15-FEB-2023 | |
| 23 | 2023-02-15 | St. John's | Affidavit of Richard A. Spellacy sworn on 08-FEB-2023 contained within a Motion Record on behalf of Plaintiff in support of Motion Doc. No. 21 with Exhibits "A" to "B" filed on 15-FEB-2023 | ✓ |
| 22 | 2023-02-15 | St. John's | Affidavit of Richard A. Spellacy sworn on 24-OCT-2022 contained within a Motion Record on behalf of Plaintiff in support of Motion Doc. No. 21 with Exhibits "A" to "L-2" filed on 15-FEB-2023 | ✓ |
| 21 | 2023-02-15 | St. John's | Notice of Motion contained within a Motion Record on behalf of Plaintiff returnable (but no hearing date indicated at this time) for an Order lifting the stay of the within action and an Order that the arrest of the "Barge H-404" be reinstated. and Costs of this motion filed on 15-FEB-2023 | |
| null | 2022-12-29 | Ottawa | Letter from Plaintiff dated 29-DEC-2022 advising that the Supreme Court of Newfoundland and Labrador approved an extension of the stay of proceedings to 26-FEB-2023 as requested by the Monitor (SISP not extended and sales effort continues). A further update will be provided after 16-JAN-2023 received on 29-DEC-2022 | |
| null | 2022-12-21 | Ottawa | Letter sent by Registry on 21-DEC-2022 to all parties Requesting a further status update Copy placed on file. | |
| null | 2022-11-15 | Ottawa | Letter sent by Registry on 15-NOV-2022 to all parties Request for status update, further to the Order and Reasons (Southcott, J) issued on October 5, 2022 Copy placed on file. | |
| null | 2022-10-07 | Ottawa | Acknowledgment of Receipt received from Defendant with respect to the Corrected Decision issued on October 7 2022 placed on file on 07-OCT-2022 | |
| null | 2022-10-07 | Ottawa | Acknowledgment of Receipt received from Plaintiff with respect to the Corrected Decision issued on October 7, 2022 placed on file on 07-OCT-2022 | |
| null | 2022-10-07 | Ottawa | Corrections to page(s) 1 25 of the Reasons of The Honourable Mr. Justice Southcott that were dated 05-OCT-2022 received on 07-OCT-2022 Corrected pages sent to parties | ✓ |
| null | 2022-10-05 | Ottawa | Acknowledgment of Receipt received from Defendant with respect to the Order and Reasons dated October 5, 2022 placed on file on 05-OCT-2022 | |
| null | 2022-10-05 | Ottawa | Acknowledgment of Receipt received from Plaintiff with respect to the Order and Reasons dated October 5, 2022 placed on file on 05-OCT-2022 | |

| | | | | |
|---|---|---|---|---|
| 20 | 2022-10-05 | Ottawa | Reasons Order and Reasons dated 05-OCT-2022 rendered by The Honourable Mr. Justice Southcott Matter considered with personal appearance The Court's decision is with regard to Motion Doc. No. 4 Result: 1.The Plaintiff's action is stayed, effective until October 17, 2022,or any later date to which the stay issued by the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency may be extended. 2.The Plaintiff shall have leave to apply to have the stay of its action lifted at an earlier time in the event of any material change in circumstances. 3.The Plaintiff shall pay the Defendant, Canada Fluorspar (NL) Inc., costs of this motion in the all-inclusive amount of $3500.00. Filed on 05-OCT-2022 copies sent to parties Interlocutory Decision Certificate of Order entered in J. & O. Book, volume 1558 page(s) 424 - 425 | ✓ |
| null | 2022-09-28 | Ottawa | Ottawa 28-SEP-2022 BEFORE The Honourable Mr. Justice Southcott Language: E Before the Court: Motion Doc. No. 4 on behalf of Defendant Result of Hearing: Matter reserved held by way of video conference Duration per day: 28-SEP-2022 from 09:12 to 12:45 Courtroom : Ottawa (Zoom) Court Registrar: Jonathan Macena Total Duration: 3h15min Appearances: Deborah Hutchings Q.C 709-726-8844 representing Plaintiff William T. Cahill & Allison Philpott 709-570-5577 representing Plaintiff Comments: Used Zoom to record Minutes of Hearing entered in Vol. 1084 page(s) 139 - 140 Abstract of Hearing placed on file | |
| 19 | 2022-09-27 | Saint John | Solicitor's certificate of service on behalf of William T. Cahill confirming service of Doc 18 upon Plaintiff by e-mail on 27-SEP-2022 filed on 27-SEP-2022 | |
| 18 | 2022-09-27 | Saint John | Supplementary Affidavit of Phil Clarke sworn on 27-SEP-2022 on behalf of Defendant in opposition to Motion Doc. No. 16 filed on 27-SEP-2022 | |
| null | 2022-09-27 | Ottawa | Covering letter from Plaintiff dated 27-SEP-2022 concerning Doc. Nos. 14 15 16 placed on file on 27-SEP-2022 | |
| 17 | 2022-09-26 | Ottawa | Solicitor's certificate of service on behalf of Deborah L. J. Hutchings confirming service of Plaintiff's Motion Record upon Defendant by email on 26-SEP-2022 filed on 26-SEP-2022 | |
| 16 | 2022-09-26 | Ottawa | Motion Record in response to Motion Doc. No. 4 containing the following original document(s): 14 15 Number of copies received: 1 on behalf of Plaintiff filed on 26-SEP-2022 | |
| 15 | 2022-09-26 | Ottawa | Affidavit of Richard A. Spellacy sworn on 26-SEP-2022 on behalf of Plaintiff in opposition to Motion Doc. No. 12 filed on 26-SEP-2022 | ✓ |
| null | 2022-09-26 | Ottawa | Book of Authorities consisting of 1 volume(s) on behalf of Plaintiff received on 26-SEP-2022 Sent directly to Presiding Judge | |
| 14 | 2022-09-26 | Ottawa | Memorandum of fact and law on behalf of Plaintiff filed on 26-SEP-2022 | |
| 13 | 2022-09-20 | St. John's | Solicitor's certificate of service on behalf of William T. Cahill confirming service of Motion Record (Doc. 12) upon Plaintiff by email on 17-SEP-2022 filed on 20-SEP-2022 | |
| null | 2022-09-20 | St. John's | Book of Authorities consisting of 1 volume(s) on behalf of Defendant (Canada Fluorspar (NL) Inc. received on 20-SEP-2022 | |
| 12 | 2022-09-20 | St. John's | Motion Record containing the following original document(s): 4 8 10 11 Number of copies received: 1 on behalf of Defendant (Canada Fluorspar (NL) Inc.) filed on 20-SEP-2022 | |
| 11 | 2022-09-20 | St. John's | Written Representations contained within a Motion Record on behalf of Defendant (Canada Fluorspar (NL) Inc.) concerning Motion Doc. No. 4 filed on 20-SEP-2022 | |
| 10 | 2022-09-20 | St. John's | Affidavit of Phil Clarke sworn on 26-JUL-2022 contained within a Motion Record on behalf of Defendant (Canada Fluorspar (NL) Inc.) in support of Motion Doc. No. 4 with Exhibits A to E filed on 20-SEP-2022 | ✓ |
| null | 2022-09-20 | Ottawa | Oral directions received from the Court: The Honourable Mr. Justice Southcott dated 20-SEP-2022 directing that "The Defendant's motion dated 2-AUG-2022, shall be heard by videoconference, employing the Zoom platform, on Wednesday, Sept 18, 2022 commencing at 10:30AM NL Time, for a duration not to exceed 4 hurs (....) placed on file on 20-SEP-2022 Confirmed in writing to the party(ies) | |

| | | | | |
|---|---|---|---|---|
| null | 2022-09-20 | Halifax | Halifax 20-SEP-2022 BEFORE The Honourable Mr. Justice Southcott Language: E Before the Court: Case Management Conference Result of Hearing: Dircetion to be issued setting the date and timelines for filing material on the Defendants' motion for a stay held Zoom Duration per day: 20-SEP-2022 from 10:03 to 10:32 Courtroom : St. John's (Zoom) Court Registrar: Michael Kowalchuk Total Duration: 29min Appearances: Deborah L.J. Hutchings, Q.C. (709)579-1143 representing Plaintiff William T. Cahill (Cox & Palmer) (709)570-5577 representing Defendants Comments: This CMC was held via Zoom. The Court will issue a Direction setting motion down for September 28, 2022 at a time to be confirmed by the Hearings Coordinator and scheduling the timetable for the parties to file responding motion material Minutes of Hearing entered in Vol. 1083 page(s) 412 - 413 Abstract of Hearing placed on file | |
| null | 2022-09-20 | Ottawa | Oral directions received from the Court: The Honourable Mr. Justice Southcott dated 20-SEP-2022 directing that "The Defendant¿s motion dated August 2, 2022, shall be heard by videocon- ference, employing the Zoom platform, on Wednesday, September 28, 2022, commencing at 10:30 a.m. NDT, for a duration not exeeding 4 hours. The responding motion materials of the Plaintiff and teh Caveator shall be served and filed by 1:00pm NL time on Monday, September 26, 2022. The Defendant¿s reply materials, if any, shall be served and filed by 1:00pm NL time on Tuesday, September 27, 2022." placed on file on 20-SEP-2022 | |
| null | 2022-09-16 | Halifax | Acknowledgment of Receipt received from Defendant with respect to the orals diections of the Presiding Judge dated 16-SEP-2022 (ID 19) placed on file on 16-SEP-2022 | |
| null | 2022-09-16 | Halifax | Oral directions received from the presiding judge dated 16-SEP-2022 directing that "The Court directs that the Defendant's motion material be served and filed on September 17, 2022". placed on file on 16-SEP-2022 | |
| 9 | 2022-09-16 | St. John's | Solicitor's certificate of service on behalf of William Cahill confirming service of Affidavit of Phil Clarke upon Plaintiff by email on 16-SEP-2022 filed on 16-SEP-2022 | |
| 8 | 2022-09-16 | St. John's | Affidavit of Phil Clarke sworn on 16-SEP-2022 on behalf of Canada Fluorspar (NL) Inc. pursuant to Direction of the Court dated September 15, 2022 with Exhibits A B C D filed on 16-SEP-2022 | ✓ |
| null | 2022-09-15 | St. John's | Letter from Plaintiff dated 15-SEP-2022 "We are legal counsel for Inaminka Marine Services Limited ("Inaminka"), the Plaintiff in the above-noted Federal Court action (the "Action") and, more recently, legal counsel for Captain R.A. Spellacy, the Caveator. We have the letter dated September 14, 2022 from Mr. William T. Cahill, counsel to Grant Thornton Limited ("GTL") in its capacity as Monitor of Canada Fluospar (NL) Inc. ("CFI"), seeking from the Federal Court a date upon which a motion of the monitor which he filed with the Federal Court on or about August 2, 2022 (the "Motion"), could be heard on an urgent basis...." received on 15-SEP-2022 | |
| null | 2022-09-16 | Ottawa | Acknowledgment of Receipt received from Defendant with respect to the oral Direction dated September 16, 2022 placed on file on 16-SEP-2022 | |
| null | 2022-09-16 | Ottawa | Acknowledgment of Receipt received from Plaintiff with respect to the Oral Direction dated September 16, 2022 placed on file on 16-SEP-2022 | |
| null | 2022-09-16 | Ottawa | Oral directions received from the presiding judge dated 16-SEP-2022 directing that "The teleconference (employing the Zoom platform) will take place at 9:00am EDT / 10:30am NDT on Tuesday, September 20, 2022, for a duration not exceeding on hour." placed on file on 16-SEP-2022 | |
| null | 2022-09-15 | Ottawa | Acknowledgment of Receipt received from all parties by email with respect to Direction dated Sept. 15, 2022 placed on file on 15-SEP-2022 | |

| | | | | |
|---|---|---|---|---|
| null | 2022-09-15 | Ottawa | Oral directions received from the presiding judge dated 15-SEP-2022 directing that "The Court has reviewed the correspondence from counsel dated September 14 and 15, 2022. The Court understands that the Defendant seeks the scheduling on an urgent basis of a special sitting for the hearing of a motion to be filed on September 16, 2022. the parties have been uable to agree on a date for the hearing, as a result of which the Plaintiff and Caveator request that this matter be case managed. The parties are redirected to consult with each other and advise the Registr by 1:00 pm NL time on Septemebr 16, 2022, as to times of mutual availability for a teleconference (employing the Zoom plateform) with the Court on Tuesday, September 20, 2022, for a duration not exceeding one hour, to discuss the scheduling of the Defendant¿s motion. It appears that the parties take divergent positions on the significance of certain upcoming steps (and related dates) in the bankruptcy proceeding in the Supreme Court of Newfoundland and Labrador. If either of the parties wishes to rely at the teleconference on any evidence relevant to those steps and dates in the bankruptcy proceeding, or any evidence otherwise relevant tp the scheduling of the motion, such evidence shall be served and filed by 4:000 pm NL time on September 16, 2022." placed on file on 15-SEP-2022 | |
| null | 2022-09-14 | St. John's | Letter from Defendant dated 14-SEP-2022 Requesting a special sitting pursuant to Rule 35(2). Motion materials will follow by CoB September 16, 2022. received on 14-SEP-2022 | |
| 7 | 2022-09-02 | St. John's | Solicitor's certificate of service on behalf of Deborah L.J. Hutchings confirming service of Notice of Caveat Release upon Defendant by email on 02-SEP-2022 filed on 02-SEP-2022 | |
| 6 | 2022-09-02 | St. John's | Notice for Caveat Release filed on 02-SEP-2022 by Counsel: DEBORAH L.J. HUTCHINGS Telephone No.: 709-726-8844 RE: Property Name: BARGE H-404 Property Nature: BARGE Tariff fee of $20.00. Entered in Caveat Release Book Vol. 6 page 231 Caveator: RICHARD A. SPELLACY, MM | |
| null | 2022-08-08 | St. John's | Communication to the Court from the Registry dated 08-AUG-2022 re: Rule 35 letter and Notice of Motion sent to Trial JA | |
| 5 | 2022-08-03 | St. John's | Solicitor's certificate of service on behalf of William T. Cahill confirming service of Notice of Motion and Rule 35 letter upon Plaintiff by fascimile on 02-AUG-2022 filed on 03-AUG-2022 | |
| 4 | 2022-08-03 | St. John's | Notice of Motion on behalf of Defendant, Canada Flurospar NL returnable at a Special Sitting at a time and place determined by the Court for an Order a stay of the Plaintiff's action, including an Order for Release of the Ship "Barge H-404", in the alternative, an Order striking the REM portion of IMS's action and an Order releasing the Barge H-404 from arrest. In the further alternative, an extension of time to serve and file the Defence. filed on 03-AUG-2022 | |
| null | 2022-08-03 | St. John's | Letter from Defendant, Canada FluroSpar NL dated 02-AUG-2022 Pursuant to Rule 35, requesting a special sitting for the hearing of the motion, at a time to be determined by the Court. received on 03-AUG-2022 | |
| 3 | 2022-02-16 | St. John's | Warrant for the arrest of THE SHIP "BARGE H-404" issued on 16-FEB-2022 Certified copy filed on 16-FEB-2022 | |
| 2 | 2022-02-16 | St. John's | Affidavit of Richard A. Spellacy sworn on 15-FEB-2022 on behalf of Plaintiff to lead warrant with Exhibits A to C filed on 16-FEB-2022 | ✓ |
| 1 | 2022-02-16 | St. John's | Statement of Claim filed on 16-FEB-2022 Tariff other action - $150.00 | |

## Appendix E

Affidavit to Lead Warrant of Richard A. Spellacy - February 15, 2022

e-document T-279-22-ID 2
FILED / DÉPOSÉ
FEDERAL COURT
COUR FÉDÉRALE
February 16, 2022
16 février 2022
Michael Kowalchuk
STJ 2

**Court File No. T-**

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.**, a body corporate

**Defendant**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

## AFFIDAVIT TO LEAD WARRANT

## (RULE 481)

I, Richard A. Spellacy, of the City of St. John's, in the Province of Newfoundland and Labrador, being duly sworn, do depose and say that:

1. I am the sole shareholder and director, and the President of the Plaintiff, Inaminka Marine Services Limited, and, as such, I am aware of the matters relating to the arrest of the ship "BARGE H-404" (the "Barge"), except where stated to be based upon information and belief.

2. The Plaintiff provides consultation and other services in the marine industry in the Province of Newfoundland and Labrador (the "Province") and elsewhere.

3. The claim of the Plaintiff is for the recovery of money owed by the Defendants for the Plaintiff's consultation and design services, as will be further described below, relating to the protection of the Barge from damage caused by inclement weather. The claim is presently due and owing to the Plaintiff by the Defendants. Accordingly, this will invoke

the *in rem* jurisdiction of the Federal Court pursuant to section 22(2) (m) and (n), and section 23 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

4. At all times material to this matter, Canada Fluorspar (NL) Inc. ("CFI") docked the Barge at its loading piers situate at its Blue Beach terminal (the "Terminal") at or near St. Lawrence, Burin Peninsula, in the Province. The Barge typically cannot be moved without the assistance of tugs. On the occasions of approaching inclement weather, CFI would be required to engage tugs to move the Barge from the Terminal to a safer and more protected location to avoid damage to the Barge from the inclement weather. It is my understanding from those I dealt with at CFI that engagement of tugs to move the Barge for this purpose was a great expense for CFI. Also, there were occasions when tugs were not immediately available, and the Barge would often sustain damage if left at the Terminal to ride out the inclement weather.

5. Therefore, in or about late summer or early fall of 2021 the Plaintiff was approached by CFI to provide a solution, through its consultation and design services, for the protection of the Barge from damage caused by inclement weather and without relying upon the tug service (the "Services").

6. On behalf of the Plaintiff, I completed a vendor registration with CFI on or about October 28, 2021 (the "Vendor Registration") wherein it was stated that the Plaintiff's terms for payment for its Services was 30 days of issuing its invoices (net 30 days). It was agreed to between the Plaintiff and CFI that the Plaintiff would provide the Services to CFI. Attached hereto as Exhibit "A" is a true copy of the Vendor Registration.

7. Through me, the Plaintiff provided the specific Services: consultation to CFI on the manner in which the Barge could be moved to safety from approaching inclement weather without the use of tugs; designed a system or process which would allow CFI to move the Barge on and off the loading piers; designed a set of storm moorings to facilitate the movement of the Barge on and off the loading piers; sourced all contractors for manufacturing the various components in the process of moving the Barge and for the installation of such components, respectively.

8. On or about November 5, 2021 the Plaintiff received from CFI one purchase requisition dated for November 5, 2021 in the amount of $90,000. Then on December 14, 2021, by which time the Plaintiff had delivered approximately 70% of the Services to the Defendants and most of the initial requisite amount for the Services had been used up, CFI provided the Plaintiff with two purchase orders of the same date. The Plaintiff states that the aggregate amount of the two purchase orders dated December 14, 2021 was approximately $143,000 plus tax. Contrary to the Plaintiff's terms, as noted above, the purchase orders stated that terms were 60 days net. Attached hereto as Exhibit "B" are true copies of the purchase orders.

9. The Services were completed and presented in its final form to CFI on or about January 20, 2022. The final budget was completed by the Plaintiff on January 30, 2022 and presented to CFI on the afternoon of January 31, 2022. Attached hereto as Exhibit "C" are true copies of the invoices issued by the Plaintiff to CFI for the Services rendered, which invoices total the sum of $146,870.02. I note that the invoices dated January 15, 2021 and February 1, 2021 should be January 15, 2022 and February 1, 2022, respectively.

10. The amount of $146,870.02, at the time of execution of this my Affidavit, remains owing by the Defendants to the Plaintiff, with interest accruing thereon as of today's date. In addition, expenses for legal fees have been incurred by the Plaintiff to proceed with this action plus additional expenses Which are expected for the issuance and service of the Statement of Claim and the Warrant for the arrest of the Barge. The Plaintiff's claim remains unsatisfied.

11. The nature of the property to be arrested is a ship, being a barge named H-404 and identified as CFI Pontoon 1. I am advised and do verily believe that the beneficial owner of the Barge is the Defendant Canada Fluorspar (NL) Inc. and that the Barge is currently tied up at the Marbase (the former Marystown Shipyard) in Marystown in the Province.

12. The Plaintiff's claim and action are to secure payment of the outstanding debt related to the Services it has provided to the Defendants for the benefit of protecting and preserving the Barge from damage resulting from inclement weather, which Services are described above in this my Affidavit.

13. All facts deposed above in this my Affidavit I believe to be true.

**SWORN** before me at the City of St. John's, in the Province of Newfoundland and Labrador, this 15th day February, 2022, before me:

Commissioner for Oaths / Barrister /Notary Public

**RICHARD A. SPELLACY**

# VENDOR REGISTRATION APPLICATION

## Canada Fluorspar (NL) Inc.

St Lawrence Newfoundland

**Notes to vendors :** Vendor registration is essential for procurement and payment purposes.
Please answer all questions fully so that your application may proceed without delay
INFORMATION PROVIDED REMAINS CONFIDENTIAL IN PERPETUITY

| Date of Application | Prepared by | Title |
|---|---|---|
| 28-Oct-21 | Richard Spellacy | President |

Full company name *: Inaminka Marine Services Ltd.

Currency *: Canadian Dollars

Business Address *: Suite 202, 130 Lemarchant Road

| City * | Province/State * | Country * |
|---|---|---|
| St. Johns | Newfoundland and Labrador | Canada |

| Postal/Zip Code | Company registration number * | Payment Terms * |
|---|---|---|
| A1C 2H2 | 38557 | Net 30 days |

**Contacts**

| Operations Contact Name | Phone Number | Email Address |
|---|---|---|
| Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |
| **PO Contact Name** | **Phone Number** | **Email Address** |
| Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |
| **A/R Contact Name** | **Phone Number** | **Email Address** |
| Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |

VOLUNTARY: Is your business owned by a member of an underrepresented group (mark X in all that apply)

| | | | |
|---|---|---|---|
| | Women | | Disability |
| | Aboriginal | | Visible Minority |

**Banking information**

Name to appear on cheques or wire transfers *: Inaminka Marine Services Ltd

| Name of bank | Address of bank |
|---|---|
| CIBC | 215 Water Street, St. Johns, NL, A1C6C9 |

| Institution # (3 digits) * | IBAN/Account Number * | Swift * |
|---|---|---|
| 390 | 00063-010-4811410 | CIBCCATT |

| Transit # (5 digits) * | Country |
|---|---|
| 63 | CANADA |

**Mailing Address for Cheque (If applicable)**

Full company name *: Inaminka Marine Srvices Ltd.

Business Address *: Suite 202, 130 Lemarchant Road

| City * | Province/State * | Country * |
|---|---|---|
| St. Johns | NL | CANADA |

Postal/Zip Code: A1C 2H2

**Internal use Only (CFI)**

Entered in Sage date: _____ /_____ /_____ Entered By: _____

This is exhibit A referred to in the affidavit of Richard A. Spellacy sworn or affirmed before me this 15th day of February, 2022

_____

Canada Fluorspar (NL) Inc.

# Purchase Requisition

| Date | Page |
|---|---|
| 2021-11-05 | 1 |
| Purchase Requisition Number | |
| RQN0012966 | |

| Reference | Description | Required Date | | Requested By |
|---|---|---|---|---|
| Blue Beach | Review BB barge mooring away f | | CAP2021-001 | Serena Hickey |

| Ship To | Bill To | Ship Via | FOB Point |
|---|---|---|---|
| | | | |

| Item | Description | Vendor | Expected Arrival | GL Account | Quantity | UOM | Unit Cost | Extended Cost |
|---|---|---|---|---|---|---|---|---|
| CAPDC | Review BB barge mooring away from cribs | | | 18343-505-033 | 60.00 | EA | 1,500.00 CAD | 90,000.00 |

This is exhibit "B" referred to in the affidavit of Richard A. Spellacy sworn or affirmed before me this 15th day of February, 2022.

Comment:
Vendor Richard Spellacy

Total Cost: 90,000.00

Approver Name: Approver Position / Title:

# Purchase Order

| Date | Page |
|---|---|
| Dec 14, 2021 | 1 |
| Purchase Order Number | |
| PO00021012 | |

Canada Fluorspar (NL) Inc.
P.O. Box 337
St. Lawrence, NL A0E 2V0

01/19/2022
7:27:52AM

REQUISITION # **RQN0012966**

**Vendor Address:**

Inaminka Marine Services Ltd.
Suite 202
130 Lemarchant Rd
St. John's, NL A1C 2H2
Canada

| Reference | Contact | Vendor Number | PO Date | Terms | Ship Via | Expected Arrival |
|---|---|---|---|---|---|---|
| Blue Beach | | INAMAR | Dec 14, 2021 | NET60 | | |

| Qty. Ordered | Vendor Item Number | Description | CFI Item Number | Unit Cost | UOM | Extended Price |
|---|---|---|---|---|---|---|
| 0.0000 | CAPDC | Review BB barge mooring away from cribs $220.00 PER HOUR<br>**Instructions:** Requisitioner: SHICKEY RQN0012966 | CAPDC | 1.000000 | EA | 0.00 |
| 0.0000 | CAPDC | MILELAGE .60 PER KM<br>**Instructions:** Requisitioner: SHICKEY RQN0012966 | CAPDC | 1.000000 | MT | 0.00 |
| 50,000.0000 | RQN13616 | Review BB Barge Mooring Away from Crib (220.00 per hr) | CAPDC | 1.000000 | EA | 50,000.00 |
| 3,000.0000 | CAPDC | MILELAGE | CAPDC | 1.000000 | EA | 3,000.00 |

**Comments:**
Richard Spellacy to SUBMIT DAILY RECORD OF WORK DONE WITH INVOICE

**Tax Summary:**
HSTGST 7,950.00

| | |
|---|---|
| **Less: included tax** | **0.00** |
| **Subtotal** | **53,000.00** |
| **Total tax** | **7,950.00** |
| **Total purchase order** | **60,950.00** |

CFI
CANADA FLUORSPAR INC.

# Purchase Order

| Date | Page |
|---|---|
| Dec 14, 2021 | 1 |

Purchase Order Number
PO00021012

12/14/2021
8:14:19AM

REQUISITION # RQN0012966

**Vendor Address:**

Inaminka Marine Services Ltd.
Suite 202
130 Lemarchant Rd
St. John's, NL A1C 2H2
Canada

Contact : Richard Spellacy
Phone: 7096851725
Email: richardspellacy@hotmail.com

**Ship To/Biling address**

**Canada Fluorspar (NL) Inc**
**141 Director Drive**
**P.O. Box 337**
**St. Lawrence, NL**
**A0E 2V0**
**Phone: (709) 873-3331**
**Fax: (709) 873-3335**

| Reference | Contact | Vendor Number | PO Date | Terms | Ship Via | Expected Arrival |
|---|---|---|---|---|---|---|
| Blue Beach | | INAMAR | 12/14/2021 | NET60 | | |

| Vendor Item Number | Description | CFI Item Number | Qty. Ordered | Expected Arrival | Unit Cost | UOM | Extended Price |
|---|---|---|---|---|---|---|---|
| GL ACCT: | Review BB barge mooring away from cribs $220.00 PER HOUR 18343-505-033 | CAPDC | 87,000.00 | | 1.000000 | EA | 87,000.00 |
| GL ACCT: | MILELAGE .60 PER KM 18343-505-033 | CAPDC | 3,000.00 | | 1.000000 | MT | 3,000.00 |

**Comments:**
Richard Spellacy to SUBMIT DAILY RECORD OF WORK DONE WITH INVOICE

**Tax Summary:**
HSTGST 13,500.00

| | |
|---|---|
| **Subtotal** | **90,000.00** |
| **Total tax** | **13,500.00** |
| **Total purchase order** | **103,500.00** |

**Approver Name:** **Approver Position / Title:**

Bill Dobbs
Jason Flood
Patrick Gannon
Ron Milmine
Serena Hickey
Terry Fleming

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #301
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

November 30th 2021

**Canada Fluorspar (NL) Inc.**
**PO Box 337**
**St. Lawrence, NL**
**A0E2V0**

This is exhibit "C" referred to in the affidavit of Richard Spellacy sworn or affirmed before me this 1st day of February, 2022.

RQN #N0012966
Inaminka 20209

Attention: Jason Flood

Re Consulting on loading Barge

| | |
|---|---|
| 27.5 days @ C$1,500.00 per day | $41,250.00 |
| HST @15% | $6,187.50 |
| Expences as attached | $894.00 |
| **Total** | **$48,331.50** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #301
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

December 12th 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 20210

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 64.5 hours @$220.00/hour | $14,190.00 |
| A. Barclay 24 hours @$200.00/hour | $4,800.00 |
| HST @15% | $2,848.50 |
| Expences as attached | $539.17 |
| **Total** | **$22,377.67** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

December 31st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202111

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 140.0 hours @$220.00/hour | $30,800.00 |
| A. Barclay 30 hours @$200.00/hour | $6,000.00 |
| HST @15% | $5,520.00 |
| Expences as attached | $606.85 |
| **Total** | **$42,926.85** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

January 15th. 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202201

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 65.0 hours @$220.00/hour | $14,300.00 |
| HST @15% | $2,145.00 |
| **Total** | **$16,445.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

February 1st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202202

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 66.0 hours @$220.00/hour | $14,520.00 |
| Expences as attached | $91.00 |
| HST @15% | $2,178.00 |
| **Total** | **$16,789.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**Appendix F**

Affidavit of Phil Clarke - July 26, 2022

Court File No. T-279-22

**FEDERAL COURT**

**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.,** a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.,** a body corporate

**Defendants**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

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## NOTICE OF MOTION

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**TAKE NOTICE THAT** Canada Fluorspar (NL) Inc. ("**CFI**") will make a motion to the Federal Court under Court to be heard orally under Rule 359 and Rule 488 of the *Federal Courts Rules* at a time and place to be determined.

**THE MOTION IS FOR:**

1. A stay of the Plaintiff's, Inaminka Marine Services Limited ("**IMS**"), action including an Order that the Ship "Barge H-404" (the "**Barge**") be released from arrest pursuant to Rule 488 of the *Federal Court Rules*; or

2. In the alternative, an Order to strike the in rem portion of IMS's action and an Order releasing the Barge from arrest pursuant to Rule 488 of the *Federal Court Rules* on the basis that the claims put forth by IMS do not fall within the scope of section 22(2)(m) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 (the "***Federal Courts Act***"); or

3. In the further alternative, an Order extending the time to file a defence to IMS's action; and

4. Such further and other relief as this Honourable Court may deem just.

**THE GROUNDS FOR THE MOTION ARE:**

1. Pursuant to an order dated February 22, 2022 (the "**Interim Receivership Order**"), the Supreme Court of Newfoundland and Labrador General Division appointed Grant Thornton Limited ("**GTL**") interim receiver of all of the current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, save and except for the Excluded Property (as defined therein) of Canada Fluorspar Inc. and CFI.

2. Section 11 of the Interim Receivership Order states:

> 11. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Interim Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor of the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall: (i) preference any Person from commencing a proceedings regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph; and (ii) affect a Regulatory Body's investigation in respect of the debtor or an action, suit or proceeding that is taken in respect of the debtor by or before

the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "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.

3. Section 37 of the Interim Receivership Order states:

> 37. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction to give effect to this Order and to assist the Interim Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Interim Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Interim Receiver in any foreign proceeding, or to assist the Interim Receiver and its agents in carrying out the terms of this Order.

4. Pursuant to an initial order dated March 11, 2022, which was order was subsequently amended and restated on March 18, 2022 (the "**CCAA Order**") the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency appointed GTL the monitor for Canada Fluorspar Inc., CFI, and Newspar (a General Partnership) pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "**CCAA**").

5. Section 5 of the CCAA Order states, in part:

> 5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property…

6. Section 14 of the CCAA Order states:

> 14. **THIS COURT ORDERS** that until and including the 10th day of July, 2022 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court of tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company of the Monitor, or affecting the Business or the Property, (save and except the Excluded Property),

> except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

7. Section 50 of the CCAA Order states:

> 50. **THIS COURT ORDERS** that each of the Company and the Monitor shall be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

8. Pursuant to an order dated June 10, 2022, the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency extended the stay period granted pursuant to Section 14 of the CCAA Order to September 2, 2022.

9. On the basis of the foregoing and in recognition of the CCAA proceedings, CFI submits that the Court should exercise its discretion pursuant to Section 50(1) of the *Federal Courts Act* to stay the within action commenced by IMS. CFI further requests that the Barge be released from arrest pursuant to Rule 488(1) of the *Federal Court Rules*.

10. In the alternative, CFI submits that the consulting services provided to CFI by IMS do not constitute "goods, materials or services supplied to a ship" within the meaning of Section 22(2)(m) of the *Federal Courts Act* and, as such, do not fall within the *in rem* jurisdiction of the Federal Court. As such, CFI submits that the *in rem* portions of IMS's claim together with the warrant of arrest against the Barge should be struck and the arrest of the barge should be declared invalid.

11. In the further alternative, should CFI not be successful in the above, CFI requests an Order extending the time to file a defence to IMS's action.

12. CFI pleads Section 50(1) of the *Federal Courts Act* and Rule 488(1) of the *Federal Court Rules*.

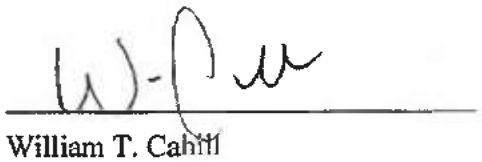
13. Such other further or other grounds as counsel may advise and this Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

(a) The Affidavit of Phil Clarke, CPA, CA,CIRP, LIT, Partner of GTL; and

(b) Such further other material counsel may deem appropriate and the Court allows.

**DATED** at St. John's, in the Province of Newfoundland and Labrador this 2nd day of August, 2022.



William T. Cahill
COX & PALMER
Solicitors for the Defendant
1100-235 Water Street
St. John's, NL A1C 1B6
Tel: 709-570-5577
Fax: 709-726-3156
Email: wcahill@coxandpalmer.com

**TO:** Registry of the Federal Court of Canada
354 Water Street, Suite 209
St. John's, NL A1C 1C4

**AND TO:** Deborah Hutchings, Q.C.
MACNAB, FAGAN & MURPHY
Solicitors for the Plaintiff
Prince Charles Building
W240 - 120 Torbay Road
St. John's, NL A1A 2G8
Tel: 709-726-8844
Fax: 709-726-5705
Email: dhuchings@yourlegalteam.ca

Court File No. T-279-22

**FEDERAL COURT**

**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.**, a body corporate

**Defendants**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

---

**AFFIDAVIT OF PHIL CLARKE**

---

I, Phil Clarke, CPA, CA, CIRP, LIT, of the City of Halifax, in the Province of Nova Scotia, MAKE OATH AND SAY AS FOLLOWS:

1. I am a Partner with Grant Thornton Limited ("**GTL**") and have personal knowledge of the matters deposed of herein.

2. Pursuant to an order dated February 21, 2022 (the "**Interim Receivership Order**"), the Supreme Court of Newfoundland and Labrador General Division appointed GTL as interim receiver of all of the current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, save and except

for the Excluded Property (as defined therein) of Canada Fluorspar Inc. and Canada Fluorspar (NL) Inc. ("**CFI**"). A copy of the Interim Receivership Order is attached hereto as **Exhibit "A"**.

3. Pursuant to an initial order dated March 11, 2022, which was order was subsequently amended and restated on March 18, 2022 (the "**CCAA Order**") the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency appointed GTL the monitor for Canada Fluorspar Inc., Canada Fluorspar (NL) Inc. ("**CFI**"), and Newspar (a General Partnership) pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C36. A copy of the CCAA Order filed on March 22, 2022 is attached hereto as **Exhibit "B"**.

4. Pursuant to an order on March 18, 2022 (the "**SISP Order**"), the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency approved a Sale and Investment Solicitation Process. A copy of the SISP Order filed on March 22, 2022 is attached hereto as **Exhibit "C"**.

5. Pursuant to an order dated June 10, 2022 (the "**Extension Order**") the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency extended the stay period granted pursuant to Section 14 of the CCAA Order to extended to September 2, 2022. A copy of the Extension Order is attached hereto as **Exhibit "D"**.

6. To the best of my knowledge, information and belief, the services provided by Inaminka Marine Services Limited ("**IMS**") to CFI were limited to consulting services in relation possible options to utilize Barge H-404 (the "**Barge**") at its Blue Beach port facility. No goods, materials or services were supplied by IMS to the Barge for its operation or maintenance. Copies of all invoices received from IMS are attached hereto as **Exhibit "E"**.

7. I make this Affidavit in good faith and in support of the motion brought by CFI for a stay of proceedings pursuant to Section 50(1) of the *Federal Courts Act*.

**SWORN** before me at the City of Halifax, in the Province of Nova Scotia, on the 26th day of July, 2022.

Notary Public or Commissioner for Oaths (affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the Province of Nova Scotia

**PHIL CLARKE**

**This is Exhibit "A" referred to in the affidavit of Phil Clarke sworn before me this 25th day of July, 2022**

Notary Public or Commissioner of Oaths (affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

**SCHEDULE "I"**

**2022 01G 0709**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**GENERAL DIVISION**

**BETWEEN:**

**PRICEWATERHOUSECOOPERS INC. in its capacity as court-appointed receiver and manager of BRIDGING FINANCE INC. and BRIDGING INCOME FUND LP**

**APPLICANT**

**AND:**

**CANADA FLUORSPAR (NL) INC. and CANADA FLUORSPAR INC.**

**RESPONDENTS**

**INTERIM RECEIVERSHIP ORDER**

**BEFORE THE HONOURABLE CHIEF JUSTICE RAYMOND P. WHALEN:**

**UPON** The application of PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and Bridging Income Fund LP (formerly Sprott Bridging Income Fund LP) (the "**Applicant**"), for appointment of an interim receiver in respect of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. (collectively, the "**Debtor**");

**AND UPON READING** the Originating Application and the affidavit of Graham Page sworn February 19, 2022, and the consent of Grant Thornton Limited to act as interim receiver (in such capacity, the "**Interim Receiver**") of the Debtor;

**AND UPON HEARING** counsel for the Applicant any other counsel or other interested parties present;

Filed Feb 22, 22

R.W.

**IT IS HEREBY ORDERED THAT:**

SERVICE

1. The time for service of the notice of application and the material filed herein for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today and any further service thereof is hereby dispensed.

APPOINTMENT

2. Pursuant to section 47(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "*BIA*") Grant Thornton Limited is hereby appointed Interim Receiver, without security, of all of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, save and except for the Excluded Property (the "**Property**").

3. For greater certainty, the Interim Receiver will not take possession of the Property except to the extent necessary to carry out its obligations hereunder.

DEFINED TERMS

4. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in **Schedule "A"**.

INTERIM RECEIVER'S POWERS

5. The Interim Receiver is not authorized or permitted to operate or conduct the business of the Debtor; provided, however, that the Receiver is hereby empowered and authorized, but not obligated, to take such steps as are necessary (or cause the Debtor to take such steps as are necessary) to protect, preserve, and secure the Property.

6. The Interim Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Interim Receiver is hereby expressly empowered and authorized to do any of the following where the Interim Receiver considers it necessary or desirable:

(a) to exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, protect, and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, preserve and protect the assets of the Debtor, including the power to incur any obligations in the ordinary course of business, and the powers to enter into any agreements, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

(d) to retain or hire any employees on behalf of the Debtor for any period of time on substantially the same terms and conditions as those existing between such employees and the Debtor, if applicable, prior to the appointment of the Interim Receiver;

(e) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Interim

Receiver's powers and duties, including without limitation those conferred by this Order;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor. For greater certainty, this provision shall not apply to the Excluded Property;

(g) to settle, extend or compromise any indebtedness owing to or by the Debtor;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Interim Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Interim Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to report to, meet with and discuss with such affected Persons (as defined below) as the Interim Receiver deems appropriate all matters relating to the Property and the interim receivership, and to share information, subject to such terms as to confidentiality as the Interim Receiver deems advisable;

(k) to register a copy of this Order and any other orders in respect of the Property against title to any of the Property, and when submitted by the Interim Receiver for registration this Order shall be immediately registered by the Registrar of Deeds

for the Province of Newfoundland and Labrador or any other similar government authority, notwithstanding Section 7 of the *Registration of Deeds Act*, 2009, SNL 2009, c R-10.01, or the provisions of any other similar legislation in any other province or territory, and notwithstanding that the appeal period in respect of this Order has not elapsed and the Registrar of deeds shall accept all Affidavits of Corporate Signing Authority submitted by the Interim Receiver in its capacity as Interim Receiver of the Debtor and not in its personal capacity;

(l) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Interim Receiver, in the name of the Debtor;

(m) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(n) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have;

(o) to commence proceedings for the Debtor pursuant to the *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act*; and

(p) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Interim Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons, including the Debtor, and without interference from any other Person (as defined below).

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE INTERIM RECEIVER

7. (i) The Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Interim Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Interim Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependent on maintaining possession) to the Interim Receiver upon the Interim Receiver's request.

8. All Persons shall forthwith advise the Interim Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records (and all transaction related thereof), and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Interim Receiver or permit the Interim Receiver to make, retain and take away copies thereof and grant to the Interim Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph or in paragraphs 7 and 9 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Interim Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

9. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Interim Receiver for the purpose of allowing the Interim Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Interim Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Interim Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Interim Receiver with all such assistance in gaining immediate access to the information in the Records as the Interim Receiver may in its discretion require including providing the Interim Receiver with instructions on the use of any computer or other system and providing the Interim Receiver with any and all access codes, account names, and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE INTERIM RECEIVER

10. Without leave of the Court no action lies against the interim receiver with respect to any report made under, or any action taken pursuant to *BIA*.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

11. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Interim Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing

agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph; and (ii) affect a Regulatory Body's investigation in respect of the debtor or an action, suit or proceeding that is taken in respect of the debtor by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "**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.

NO EXERCISE OF RIGHTS OR REMEDIES

12. All rights and remedies of any Person, whether judicial or extra-judicial, statutory or non-statutory (including, without limitation, set-off rights) against or in respect of the Debtor or the Interim Receiver or affecting the Property are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided, however, that nothing in this Order shall:

    (a) empower the Debtor to carry on any business that the Debtor is not lawfully entitled to carry on;

    (b) prevent the filing of any registration to preserve or perfect a security interest;

    (c) prevent the registration of a claim for lien; or

    (d) exempt the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment.

13. Nothing in this Order shall prevent any party from taking an action against the Applicant where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such

party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Interim Receiver at the first available opportunity.

14. Nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Debtor with respect to the Excluded Property.

NO INTERFERENCE WITH THE INTERIM RECEIVER

15. No Person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, except with the written consent of the Debtor and the Interim Receiver, or leave of this Court.

CONTINUATION OF SERVICES

16. All persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Debtor, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Debtor

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Debtor or exercising any other remedy provided under such agreements or arrangements. The Debtor shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain

names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Debtor in accordance with the payment practices of the Debtor, or such other practices as may be agreed upon by the supplier or service provider and each of the Debtor and the Interim Receiver, or as may be ordered by this Court.

INTERIM RECEIVER TO HOLD FUNDS

17. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Interim Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, but excluding the Excluded Property, shall be deposited into one or more new accounts to be opened by the Interim Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Interim Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

EMPLOYEES

18. Subject to employees' rights to terminate their employment, all employees of the Debtor shall remain the employees of the Debtor until such time as the Interim Receiver, on the Debtor's behalf, may terminate the employment of such employees.

19. Despite anything in federal or provincial law, if the Interim Receiver, in that position, carries on the business of the Debtor or continues the employment of a debtor's employees, the interim receiver is not by reason of that fact personally liable in respect of a liability,

including one as a successor employer, that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees and that exists before the interim receiver is appointed or that is calculated by reference to a period before the appointment.

LIMITATION ON ENVIRONMENTAL LIABILITIES

20. Nothing herein contained shall require the Interim Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination (collectively, the "Environmental Legislation"), provided however that nothing herein shall exempt the Interim Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Interim Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

21. The Interim Receiver shall not be liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Interim Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Interim Receiver's appointment; or

(ii) after the Interim Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Interim Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Interim Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring the Interim Receiver to remedy any environmental condition or environmental damage affecting the Property, the Interim Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Interim Receiver, if the order is in effect when the Interim Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Interim Receiver:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Interim Receiver, if the order is in effect when the Interim Receiver is appointed, by.

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Interim Receiver to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Interim Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

LIMITATION ON THE INTERIM RECEIVER'S LIABILITY

22. Except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of this Order the Interim Receiver shall incur no liability or obligation that exceeds an amount for which it may obtain full indemnity from the Property provided that the interim receiver shall act honestly and in good faith and deal with the Property in a commercially reasonable manner. Nothing in this Order shall derogate from any

limitation on liability or other protection afforded to the Interim Receiver under any applicable law.

INTERIM RECEIVER'S ACCOUNTS

23. The Interim Receiver and counsel to the Interim Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges.

24. The Interim Receiver and counsel to the Interim Receiver shall be entitled to the benefits of and are hereby granted a charge (the "**Interim Receiver's Charge**") on the Property, which charge shall not exceed an aggregate amount of $250,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Interim Receiver and such counsel, both before and after the making of this Order in respect of these proceedings, and the Interim Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person but subject to sections 14.06(7), 81.4(4) and 81.6(2) of the BIA.

25. The Interim Receiver and its legal counsel shall pass their accounts from time to time.

26. Prior to the passing of its accounts, the Interim Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Interim Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE INTERIM RECEIVERSHIP

27. Subject to prior approval of the Applicant, the Interim Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $2,000,000 (or such greater amount as this Court may by further order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Interim Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Interim Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Interim Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) of the BIA.

28. Neither the Interim Receiver's Borrowings Charge nor any other security granted by the Interim Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

29. The Interim Receiver is at liberty and authorized to issue certificates substantially in the form annexed as **Schedule "B"** hereto (the "**Interim Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

30. The monies from time to time borrowed by the Interim Receiver pursuant to this Order or any further order of this Court and any and all Interim Receiver's Certificates evidencing the same or any part thereof shall rank on a pari passu basis, unless otherwise agreed to by the holders of any prior issued Interim Receiver's Certificates.

31. The Interim Receiver shall be allowed to repay any amounts borrowed by way of Interim Receiver's Certificates out of the Property or any proceeds, including any proceeds from the sale of any assets without further approval of this Court.

ALLOCATION

32. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Interim Receiver's Charge and the Interim Receiver's Borrowings Charge amongst the various assets comprising the Property.

GENERAL

33. For greater certainty, neither the Interim Receiver's Charge nor the Interim Receiver's Borrowing Charge shall apply or attach to the Excluded Property.

34. The Interim Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

35. Unless otherwise ordered by this Court, the Interim Receiver will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Interim Receiver's reports shall be filed by the registry notwithstanding that they do not include an original signature.

36. Nothing in this Order shall prevent the Interim Receiver from acting as a receiver, a receiver and manager, a trustee in bankruptcy, or a monitor of the Debtor.

37. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction to give effect to this Order and to assist the Interim Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby

respectfully requested to make such orders and to provide such assistance to the Interim Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Interim Receiver in any foreign proceeding, or to assist the Interim Receiver and its agents in carrying out the terms of this Order.

38. The Interim Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Interim Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

39. The Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis, including legal costs on a solicitor-client full indemnity basis, to be paid by the Interim Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

40. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Interim Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

FILING

41. The Interim Receiver shall establish and maintain a website in respect of these proceedings at www.grantthornton.ca/cfi (the "**Interim Receiver's Website**") and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publicly available; and

(b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Interim Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

42. Service of this Order shall be deemed good and sufficient by:

a. serving the same on:

(i) the persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order; and

b. posting a copy of this Order on the Interim Receiver's Website.

and service on any other person is hereby dispensed with.

43. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 21 day of February, 2022.

COURT OFFICER

SCHEDULE "A"

**Defined Terms**

"**Excluded Property**" means: (i) any and all Receivables and / or Financed Receivables, as such terms are defined pursuant to a Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc. dated May 25, 2018, as amended, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favour of HSBC.

"**HSBC**" means HSBC Bank Canada.

SCHEDULE "B"

**Interim Receiver Certificate**

Certificate No.

Amount $

This is to certify that Grant Thornton Limited, the interim receiver (the "**Interim Receiver**") of the assets, undertakings, and properties of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Debtors**") acquired for, or used in relation to, a business carried on by the Debtors, including all proceeds thereof (collectively, the "**Property**") appointed by order of the Supreme Court of Newfoundland and Labrador (the "**Court**") dated the day of February, 2022 (the "**Order**") made in an action having court file number 2022 01G 0709, has received as such Interim Receiver from the holder of this certificate (the "**Lender**") the principal sum of $ , being part of the total principal sum of $ which the Interim Receiver is authorized to borrow under and pursuant to the Order.

The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [*monthly/semi-annually/annually/other*] not in advance on the day of each month after the date hereof at a rate per annum equal to the rate of per cent above the prime commercial lending rate of from time to time.

Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Interim Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Interim Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at

Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Interim Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

The charge securing this certificate shall operate so as to permit the Interim Receiver to deal with the Property (as defined in the Order) as authorized by the Order and as authorized by any further or other order of the Court.

The Interim Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

[*signature page to follow*]

Dated the day of , 2022.

Grant Thornton Limited, solely in its capacity as Interim Receiver of the Property, and not in its personal capacity

Per:

Name:
Title:

**This is Exhibit "B" referred to in the affidavit of Phil Clarke sworn before me this 26 day of July, 2022**

Notary Public or Commissioner of Oaths (affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

**SERVICE**

Filed March 21, 22

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

   (b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

   (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect

of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

**RESTRUCTURING**

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

(a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

(b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

(c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants

during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

**NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY**

14. **THIS COURT ORDERS** that until and including the 10th day of July, 2022 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

## NO INTERFERENCE WITH RIGHTS

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

## CONTINUATION OF SERVICES

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

## NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to

advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

**APPOINTMENT OF MONITOR**

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

    (d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

    (e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to

the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

2

(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the

"Administration Charge") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

## ENHANCEMENT OF MONITOR'S POWERS

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other

data storage media containing any such information ("**Records**") of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

**LIMITATION ON THE MONITOR'S LIABILITY**

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

**DIP FINANCING**

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the "**DIP Financing Agreement**") dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as

made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

    (a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

    (b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

    (c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

## SERVICE AND NOTICE

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

## GENERAL

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

COURT OFFICER

Schedule "A"

Defined Terms

**"Excluded Inventory"** means inventory representing a value in the amount of USD2,500,000

**"Excluded Property"** means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

**"HSBC"** means HSBC Bank Canada; and

**"RFA"** means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.

**This is Exhibit "C" referred to in the affidavit of Phil Clarke sworn before me this 26 day of July, 2022**

Notary Public or Commissioner of Oaths (affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

MAR 15 '22 14:15

**2022 01G 0709**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**IN BANKRUPTCY AND INSOLVENCY**

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

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

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## ORDER APPROVING A SALE AND INVESTMENT SOLICITATION PROCESS

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[1] **CONSIDERING** the Applicant's *Application for the issuance of (i) an Initial Order, (ii) an Amended and Restated Initial Order, (iii) an Order approving the DIP Financing Agreement ;and (iv) an Order approving a Sale and Investment Solicitation Process* (the "**Application**"), the affidavit of Phil Clarke dated the 8th day of March, 2022 and the exhibits in support thereof;

[2] **CONSIDERING** the submissions of counsel;

[3] **CONSIDERING** the pre-filing report prepared by Grant Thornton Limited (the "**Monitor**");

[4] **CONSIDERING** the provisions of the *Companies' Creditors Arrangement Act* ("**CCAA**");

**THE COURT:**

[5] **GRANTS** the Application.

**DEFINITIONS**

[6] **DECLARES** that all capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Bidding Procedures (as defined below).

**SERVICE**

[7] **DECLARES** that sufficient prior notice of the presentation of the Application has been given by the Applicant to interested parties, and that further service thereof is hereby dispensed with.

[8] **PERMITS** the service of the present Order (this "**Order**") at any time and place and by any means whatsoever.

Filed Mar. 21/22 KA

**SISP**

[9] **APPROVES** and **RATIFIES** the Sale and Investment Solicitation Process ("**SISP**") set forth in the Procedures for the Sale and Investment Solicitation Process attached as Schedule "A" hereto (the "**Bidding Procedures**").

[10] **AUTHORIZES** the Applicant and the Company, to the extent the Company assists with the SISP, to implement the SISP and to take such steps and execute such documentation as may be necessary or incidental thereto, the whole in accordance with the Bidding Procedures.

[11] **ORDERS** that the Applicant and the Company, as well as respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of performing their duties under the SISP, except to the extent of such losses, claims, damages or liabilities resulting from gross negligence or wilful misconduct of any such person or entity, as applicable, as determined by this Court.

**GENERAL**

[12] **ORDERS** that the Applicant and the Company, to the extent the Company assists with the SISP are authorized and permitted under applicable law to disclose and transfer to Potential Bidders and to their advisors personal information in the custody or control of the Company relating to the operation of the business, including human resources and payroll information, records pertaining to the Company's past and current employees, and information about any consumer, website visitor or other individual (collectively, "**Personal Information**"), but only to the extent necessary to negotiate, determine whether to proceed with, and attempt to complete a transaction in accordance with the SISP (a "**Transaction**"). Each Potential Bidder to whom any Personal Information is disclosed shall maintain and protect the Personal Information with security safeguards appropriate to the sensitivity of the Personal Information and as may otherwise be required by applicable federal or provincial privacy legislation and limit the use of such information to its evaluation of a Transaction, and if it does not complete a Transaction with the Applicant, shall return all such information to the Applicant, or in the alternative permanently destroy all such information.

[13] **ORDERS** that the Applicant may from time to time apply to this Court for advice and directions in the discharge of their respective powers and duties hereunder or under the SISP.

[14] **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or elsewhere, to give effect to this Order and to assist the Applicant, as applicable, and their respective agents in carrying out the terms of this Order.

[15] **ORDERS** the provisional execution of this Order notwithstanding appeal and without any security or provision for costs whatsoever.

[16] **WITHOUT COSTS.**

C. Foley

COURT
OFFICER

# Schedule "A"

## Procedures for the Sale and Investment Solicitation Process

On March 7, 2022, Canada Fluorspar Inc., and Canada Fluorspar (NL) Inc., by their Interim Receiver, Grant Thornton Limited, and Newspar (a General Partnership) (collectively the "**Company**" or the "**Applicant**") commenced proceedings (the "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") before the Supreme Court of Newfoundland and Labrador (in Bankruptcy and Insolvency) in the City of St. John's, in the Province of Newfoundland and Labrador (the "**Court**") pursuant to an order granted by the Court on March 11, 2022. Said order was amended and restated by the Court on March 18, 2022 (collectively, as further amended or restated from time to time, the "**Initial Order**").

Pursuant to the Initial Order, Grant Thornton Limited was appointed as monitor in the CCAA Proceedings (in such capacity, the "**Monitor**").

On March 18, 2022, the Court granted an order (the "**Bidding Procedures Order**"), authorizing the Applicant to undertake a sale and investment solicitation process ("**SISP**") for the sale of the Company's business, property, assets and undertakings (collectively, the "**Business**"). The SISP shall be conducted by the Monitor, supported by the Company as required, in the manner set forth herein.

Among other things, the Bidding Procedures Order authorizes and directs the Monitor and the Company to conduct the SISP in accordance with the bidding procedures set out herein (the "**Bidding Procedures**") governing the solicitation of offers or proposals (each a "**Bid**") for the acquisition of the Business or some portion thereof.

### Defined Terms

1. Capitalized terms used in this SISP have the meanings given thereto in Appendix A.

### Bidding Procedures

***Opportunity***

2. The SISP is intended to solicit interest in, and opportunities for: (i) one or more sales or partial sales of all, substantially all, or certain portions of the Business; and/or (ii) for an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Company or its Business. Bids considered pursuant to the SISP may include one or more of an investment, restructuring, recapitalization, refinancing or other form of reorganization of the business and affairs of the Company as a going concern or a sale (or partial sales) of all, substantially all, or certain aspects of the Business, or a combination thereof (the "**Opportunity**").

3. All interested parties are encouraged to submit bids based on any form of Opportunity that they may elect to advance pursuant to the SISP, including as a Sale Proposal or an Investment Proposal.

4. The Bidding Procedures describe the manner in which prospective bidders may gain access to due diligence materials concerning the Company and the Business, the manner in which

bidders may participate in the SISP, the requirement of and the receipt and negotiation of bids received, the ultimate selection of a Successful Bidder and the requisite approvals to be sought from the Court in connection therewith. The Monitor shall conduct the SISP in the manner set forth herein.

The Monitor, in consultation with the Company and the DIP Lenders, may at any time and from time to time, modify, amend, vary or supplement, whether material or immaterial the SISP or the Bidding Procedures, if necessary or useful in order to give effect to the substance of the SISP, the Bidding Procedures and the Bidding Procedures Order.

The Monitor shall post on the Monitor's website, as soon as practicable, any such modification, amendment, variation or supplement to the Bidding Procedures and inform the bidders impacted by such modifications.

In the event of a dispute as to the interpretation or application of the SISP or Bidding Procedures, the Court will have exclusive jurisdiction to hear and resolve such dispute.

5. No bidder may request or receive any form of bid protection as part of any bid made pursuant to the SISP.

As more particularly set out herein, a summary of the key dates pursuant to the SISP are as follows:[1]

| Event | Date |
|---|---|
| **1. Solicitation Letter**<br>Monitor to distribute Solicitation Letter, to potentially interested parties | By no later than March 20 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **2. CIM and VDR**<br>Monitor to prepare and have available for parties having executed the NDA (Potential Bidders) the CIM and VDR | By no later than March 23, 2022, at 5:00 p.m. (Newfoundland Standard Time), or at such later time as the Monitor, in consultation with the Company, deems appropriate |
| **3. Phase 1 Qualified Bidders & Bid Deadline**<br>Phase 1 Bid Deadline (for delivery of non-binding LOIs by Phase 1 Qualified Bidders in accordance with the requirement of paragraph 14 of the Bidding Procedures) | By no later than April 17, 2022, at 5:00 p.m. (Newfoundland Standard Time) |

[1] All capitalized terms not already defined are defined further below. Titles in the chart are for presentation purposes only.

| Event | Date |
|---|---|
| | |
| **4. Phase 1 Successful Bid**<br>Monitor to notify each Phase 1 Qualified Bidder in writing as to whether its bid constituted a Phase 1 Successful Bid | By no later than April 24, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **5. Phase 2 Bid Deadline & Qualified Bidders**<br>Phase 2 Bid Deadline (for delivery of definitive offers by Phase 2 Qualified Bidders in accordance with the requirement of paragraph 22 of the Bidding Procedures) | By no later than June 12, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **6. Auction**<br>Auction Commencement Date (if needed) | By no later than June 19, 2022 |
| **7. Selection of final Successful Bid**<br>Deadline for selection of final Successful Bid | By no later than June 19, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **8. Definitive Documentation**<br>Deadline for completion of definitive documentation in respect of Successful Bid | By no later than June 26, 2022 |
| **9. Approval Motion – Successful Bid**<br>Deadline for filing of Approval Motion in respect of Successful Bid | By no later than July 3, 2022 |
| **10. Closing – Successful Bid**<br>Anticipated deadline for closing of Successful Bid being the Target Closing Date | July 10, 2022 or such earlier date as is achievable |
| **11. Outside Date – Closing**<br>Outside Date by which the Successful Bid must close | July 10, 2022 |

*Solicitation of Interest: Notice of the SISP*

6. As soon as reasonably practicable after the granting of the Bidding Procedures Order:

   (a) a notice of the SISP and such other relevant information which the Company, in consultation with the Monitor and the DIP Lenders, considers appropriate shall be published in the *National Post*, the *Telegram (NL)* and *The Globe & Mail* and such other publications as may be considered appropriate;

   (b) a press release setting out the notice and such other relevant information regarding the Opportunity as may be considered appropriate, shall be issued with *Canada Newswire* designating dissemination in Canada; and

   (c) any parties that have already reached out to the Monitor expressing their interest.

7. The Monitor shall send a letter describing the Opportunity (a "**Solicitation Letter**"), outlining the SISP and inviting recipients of the Solicitation Letter to express their interest pursuant to the SISP, for distribution to potential bidders as soon as practical.

*Virtual Data Room*

8. A confidential virtual data room (the "**VDR**") in relation to the Opportunity will be made available by the Company or the Monitor to Potential Bidders that have executed the NDA (as defined below) in accordance with paragraph 9 herein. The VDR will be made available as soon as practicable. Following the completion of "**Phase 1**", but prior to the completion of "**Phase 2**", additional information may be added to the VDR to enable Phase 2 Qualified Bidders to complete any confirmatory due diligence in respect of the Company and the Opportunity. The Monitor, in consultation with the Company and the DIP Lenders, may establish or cause the Company to establish separate VDRs (including "**clean rooms**"), if the Monitor reasonably determines that doing so would further the Company's and any Potential Bidders' compliance with applicable antitrust and competition laws, or would prevent the distribution of commercially sensitive competitive information. The Monitor may also, in consultation with the Company and the DIP Lenders, limit the access of any Potential Bidder to any confidential information in the VDR where the Monitor reasonably determines that such access could negatively impact the SISP, the ability to maintain the confidentiality of the information, the Business or its value.

**PHASE 1: NON-BINDING LOIS**

*Phase 1 Qualified Bidders and Delivery of Confidential Information Memorandum*

9. In order to participate in the SISP, and prior to the distribution of any confidential information to an interested party (including access to the VDR), such interested party must deliver to the Monitor at the address specified in Appendix B hereto (including by email) a Non Disclosure Agreement (an "**NDA**") which shall enure to the benefit of any Successful Bidder that closes a transaction contemplated by the Successful Bid. Pursuant to the terms of the NDA to be signed by a potential bidder (each potential bidder who has executed an NDA with the Monitor, a "**Potential Bidder**"), each Potential Bidder will be

prohibited from communicating with any other Potential Bidder regarding the Opportunity during the term of the SISP, without the consent of the Monitor. Prior to the Monitor executing an NDA with any potential bidder, any potential bidder may be required to provide evidence, reasonably satisfactory to the Monitor, in consultation with the Company, of its financial wherewithal to complete a transaction in respect of the Opportunity (either with existing capital or with capital reasonably anticipated to be raised prior to closing) and/or to disclose details of their ownership and/or investors. For the avoidance of doubt, a party who has executed an NDA or a joinder with a Potential Bidder for the purpose of providing financing to a Potential Bidder in connection with the Opportunity (such party a "**Financing Party**") shall not be deemed a Potential Bidder for purposes of the SISP, provided that such Financing Party undertakes to inform the Monitor in the event that it elects to act as a Potential Bidder.

10. A Potential Bidder that has executed an NDA and provided any additional information required pursuant to paragraph 9, will be deemed a "**Phase 1 Qualified Bidder**" and will be promptly notified of such classification by the Monitor.

11. The Monitor with the assistance of the Company and the DIP Lenders, as required, will prepare and send to each Phase 1 Qualified Bidder a confidential information memorandum providing additional information considered relevant to the Opportunity (a "**CIM**") as soon as practicable. The Monitor, the Company, the DIP Lenders and their respective advisors make no representation or warranty as to the information contained in the CIM or otherwise made available pursuant to the SISP.

12. The Monitor shall provide any person deemed to be a Phase 1 Qualified Bidder with access to the VDR. The Monitor, the Company, the DIP Lenders and their respective advisors make no representation or warranty as to the information contained in the VDR. The VDR shall contain a template letter of intent (the "**Template LOI**") and a template purchase and sale agreement ("**Template PSA**").

13. If a Phase 1 Qualified Bidder wishes to submit a bid, it must deliver a non-binding letter of intent (an "**LOI**") (each such LOI, provided in accordance with paragraph 14 below, a "**Phase 1 Qualified Bid**"), to the Monitor at the address specified in Appendix B hereto (including by email) so as to be received by the Monitor not later than 5:00 p.m. (Newfoundland Standard Time) on April 17, 2022, or such other date or time as may be agreed by the Monitor in consultation with the Company and the DIP Lenders (the "**Phase 1 Bid Deadline**"). To the extent possible, the Phase 1 Qualified Bid should follow the format as set out in the Template LOI.

14. An LOI submitted by a Phase 1 Qualified Bidder will only be considered a "**Phase 1 Qualified Bid**" if the LOI complies at a minimum with the following:

    (a) it has been duly executed by all required parties;

    (b) it is received by the Phase 1 Bid Deadline;

    (c) it provides written evidence, satisfactory to the Monitor, in consultation with the Company and the DIP Lenders, of the ability to consummate the transaction within

the timeframe contemplated by the SISP and to satisfy any obligations or liabilities to be assumed on closing of the transaction, including, without limitation, a specific indication of the sources of capital;

(d) it identifies all proposed material conditions to closing including, without limitation, any internal, regulatory or other approvals and any form of agreement or other document required from a government body, stakeholder or other third party, and an estimate of the anticipated timeframe and any anticipated impediments for obtaining such approvals;

(e) it: (i) identifies the Qualified Phase 1 Bidder and representatives thereof who are authorized to appear and act on behalf of the Qualified Phase 1 Bidder for all purposes regarding the contemplated transaction; and (ii) fully discloses the identity of each entity or person that will be sponsoring, participating in or benefiting from the transaction contemplated by the LOI;

(f) an outline of any additional due diligence required to be conducted in order to submit a binding offer;

(g) it clearly indicates:

(i) that the Phase 1 Qualified Bidder is seeking to acquire all or substantially all of the Business whether through an asset purchase, a share purchase or a combination thereof (either one being, a "**Sale Proposal**") or some other portion of the Business (a "**Partial Sale Proposal**"); and/or

(ii) whether the Phase 1 Qualified Bidder is offering to make an investment in, restructure, recapitalize, reorganize or refinance the Company or their business (an "**Investment Proposal**");

(h) it contains such other information as may be reasonably requested by the Monitor, in consultation with the Company and the DIP Lenders;

(i) it does not provide for any break fee or expense reimbursement;

(j) in the case of a Sale Proposal, it identifies or contains the following:

(i) the purchase price or price range and key assumptions supporting the valuation and the anticipated amount of cash payable on closing of the proposed transaction;

(ii) any contemplated purchase price adjustment;

(iii) a description of the specific assets that are expected to be subject to the transaction and any assets or obligations expected to be excluded;

(iv) a description of those liabilities and obligations (including operating liabilities, obligations to employees, and reclamation obligations) which the

Phase 1 Qualified Bidder intends to assume and which such liabilities and obligations it does not intend to assume;

(v) information sufficient for the Monitor, in consultation with the Company and the DIP Lenders, to determine that the Phase 1 Qualified Bidder has sufficient ability to satisfy and perform any liabilities or obligations assumed pursuant to subparagraph (iv) above; and

(vi) any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the transaction; and

(k) in the case of an Investment Proposal, it identifies the following:

(i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment, restructuring, recapitalization, refinancing or reorganization;

(ii) the aggregate amount of the equity and/or debt investment to be made in the Company or their business;

(iii) the underlying assumptions regarding the *pro forma* capital structure;

(iv) a description of those liabilities and obligations (including operating liabilities, obligations to employees, and reclamation obligations) which the Phase 1 Qualified Bidder intends to assume and which such liabilities and obligations it does not intend to assume;

(v) information sufficient for the Monitor, in consultation with the Company, to determine that the Phase 1 Qualified Bidder has sufficient ability to satisfy and perform any liabilities or obligations assumed pursuant to subparagraph (iv) above; and

(vi) any other terms or conditions of the Investment Proposal that the Phase 1 Qualified Bidder believes are material to the transaction.

15. Notwithstanding the foregoing, the Monitor in consultation with the Company and the DIP Lenders may waive compliance with any one or more of the requirements in paragraph 14 and deem any such non-compliant LOI to be a Phase 1 Qualified Bid, provided that doing so shall not constitute a waiver by the Monitor of the requirements of paragraph 14 or an obligation on the part of the Monitor to designate any other LOI as a Phase 1 Qualified Bid. The Monitor will be under no obligation to negotiate identical terms with, or extend identical terms to, each Phase 1 Qualified Bidder;

*Assessment of Phase 1 Qualified Bids and Subsequent Process*

16. The Monitor, in consultation with the Company and the DIP Lenders, may, following the receipt of any LOI, seek clarification with respect to any of the terms or conditions of such LOI and/or request and negotiate one or more amendments to such LOI prior to

determining if the LOI should be considered a Phase 1 Qualified Bid or a Phase 1 Successful Bid (as defined below).

17. Following the Phase 1 Bid Deadline, the Monitor shall determine, in accordance with the requirements of paragraph 14 and in consultation with the Company, the LOI(s) that are selected as the most favourable Phase 1 Qualified Bid(s), which Phase 1 Qualified Bid(s) shall be deemed a "**Phase 1 Successful Bid(s)**" and which Phase 1 Qualified Bidder(s) accordingly shall be deemed a "**Phase 2 Qualified Bidder(s)**". For greater certainty, there can be more than one Phase 1 Qualified Bid that may be determined as being a Phase 1 Successful Bid, and more than one Phase 1 Qualified Bidder that may be determined as being a Phase 2 Qualified Bidder.

18. Only Phase 2 Qualified Bidders – being those that have submitted a Phase 1 Successful Bid – shall be permitted to proceed to Phase 2 of the SISP.

19. The Monitor shall notify each Phase 1 Qualified Bidder in writing as to whether its Phase 1 Qualified Bid constituted a Phase 1 Successful Bid – such that it is a Phase 2 Qualified Bidder – within five (5) Business Days of the Phase 1 Bid Deadline, or at such later time as the Monitor deems appropriate, in consultation with the Company.

20. Without limiting the provisions governing amendment of the SISP set out in paragraph 33 below, and notwithstanding the process and timeline for Phase 1, the process to identify and designate Phase 2 Qualified Bidders and the terms upon which Phase 2 may be continued as described below, the Monitor may at any time before or after the Phase 1 Bid Deadline, determine that Phase 2 is not required and may proceed to execute a definitive agreement (which shall be subject to Court approval) with respect to a transaction contemplated in a Phase 1 Qualified Bid submitted at any time on or before the Phase 1 Bid Deadline.

## PHASE 2: FORMAL OFFERS AND REMOVAL OF CONDITIONS

### *Formal Binding Offers*

21. Any Phase 2 Qualified Bidder that wishes to make a formal offer with respect to his/her/its Sale Proposal or Investment Proposal shall submit a binding offer (a "**Binding Offer**"): (a) in the case of a Sale Proposal, in the form of the Template PSA provided in the VDR, along with a marked version showing edits to the original form of Template PSA provided in the VDR; or (b) in the case of an Investment Proposal, a plan or restructuring support agreement in form and substance satisfactory to the Monitor, in consultation with the Company and the DIP Lenders (each, such Binding Offer submitted in accordance with paragraph 22 below, a "**Phase 2 Qualified Bid**") in each case to the Monitor, at the address specified in Appendix B hereto (including by email) so as to be received by the Monitor not later than 5:00 p.m. (Newfoundland Standard Time) on June 12, 2022, or such other date or time as may be agreed by the Monitor in consultation with the Company and the DIP Lenders (as may be extended, the "**Phase 2 Bid Deadline**").

22. A Binding Offer will only be considered as a Phase 2 Qualified Bid if the Binding Offer:

(a) has been received by the Phase 2 Bid Deadline;

(b) is a Binding Offer: (i) to purchase all, substantially all, or a portion of the Business; and/or (ii) to make an investment in, restructure, recapitalize, reorganize or refinance the Company or their business, on terms and conditions reasonably acceptable to the Company and the DIP Lenders;

(c) identifies all executory contracts of the Company that the Phase 2 Qualified Bidder will assume and clearly describes, for each contract or on an aggregate basis, how all monetary defaults and non-monetary defaults will be remedied, as applicable;

(d) is not subject to any financing conditionality;

(e) is unconditional, other than upon the receipt of the Approval Order(s) (as defined below) and satisfaction of any other conditions expressly set forth in the binding offer;

(f) includes acknowledgments and representations of the Phase 2 Qualified Bidder that it: (i) has had an opportunity to conduct any and all due diligence regarding the Opportunity prior to making its Binding Offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Business in making its Binding Offer; (iii) did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Opportunity or the completeness of any information provided in connection therewith, other than as expressly set forth in the Binding Offer or other transaction document submitted with the Binding Offer; and (iv) promptly will commence any governmental or regulatory review of the proposed transaction by the applicable competition, antitrust or other applicable governmental authorities;

(g) the Binding Offer must be accompanied by a letter that confirms that the Binding Offer: (i) may be accepted by the Monitor by countersigning the Binding Offer, and (ii) is irrevocable and capable of acceptance until the earlier of (A) two business days after the date of closing of the Successful Bid; and (B) the Outside Date;

(h) does not provide for any break fee or expense reimbursement;

(i) is accompanied by a deposit in the amount of not less than 5% of the cash purchase price payable on closing or total new investment contemplated, as the case may be (the "Deposit"), along with acknowledgement that if the Phase 2 Qualified Bidder is selected as the Successful Bidder (as defined below), that the Deposit will be non-refundable subject to approval of the Successful Bid (as defined below) by the Court and the terms described in paragraph 32 below;

(j) contemplates and reasonably demonstrates a capacity to consummate a closing of the transaction set out therein on or before July 10 2022, or such earlier date as is practical for the parties to close the contemplated transaction, following the satisfaction or waiver of the conditions to closing (the "**Target Closing Date**") and in any event no later than July 10, 2022 (the "**Outside Date**"); and

(k) contains an agreement that the Phase 2 Qualified Bidder submitting such bid, if not chosen as the Successful Bidder, shall serve, without modification to such bid, as a Backup Bidder (as defined below), in the event the Successful Bidder fails to close.

23. The Monitor shall not purport to waive strict compliance with any one or more of the requirements specified above (for greater certainty, other than paragraph 22(c) above and paragraph 32 below and deem any such non-compliant Binding Offer to be a Phase 2 Qualified Bid.

*Selection of Successful Bid*

24. The Monitor, in consultation with the Company and the DIP Lenders, may, following the receipt of any Binding Offer, seek clarification with respect to any of the terms or conditions of such Binding Offer and/or request and negotiate one or more amendments to such Binding Offer prior to determining if the Binding Offer should be considered a Phase 2 Qualified Bid.

25. The Monitor, in consultation with the Company and the DIP Lenders, will: (a) review and evaluate each Phase 2 Qualified Bid; and (b) identify the highest or otherwise best bid (the "**Successful Bid**", and the Phase 2 Qualified Bidder making such Successful Bid, the "**Successful Bidder**") pursuant to the paragraphs below. Any Successful Bid shall be subject to approval by the Court.

26. In the event there is at least two Phase 2 Qualified Bids, the Successful Bid shall be identified through an Auction.

27. Auction: In the event that an auction (the "**Auction**") is required in accordance with the terms of this SISP, it shall be conducted in accordance with the procedures set forth in this paragraph:

(a) The Auction shall commence at a time to be designated by the Monitor, no later than June 19, 2022, and may, in the discretion of the Monitor, be held virtually due to the COVID-19 pandemic via videoconference, teleconference or such other reasonable means as the Monitor deems appropriate. The Monitor and the Company shall work in good faith with the parties entitled to attend the Auction to arrange for the Auction to be so held. The Monitor reserves the right to cancel or postpone the Auction in the consultation with the DIP Lenders.

(b) The identity of each Phase 2 Qualified Bidder participating in the Auction will be disclosed, on a confidential basis, to each other Phase 2 Qualified Bidder participating in the Auction.

(c) Except as otherwise permitted in the Monitor's discretion, only the Company, the Dip Lenders, the Monitor and the Phase 2 Qualified Bidders, and, in each case, their respective professionals shall be entitled to attend the Auction. Only a Phase 2 Qualified Bidder is eligible to participate in the Auction.

(d) Phase 2 Qualified Bidders shall appear at the Auction, or through a duly authorized representative.

(e) Except as otherwise set forth herein, the Monitor, in consultation with the Company and the DIP Lenders, may waive and/or employ and announce at the Auction additional rules, including rules to facilitate the participation of parties participating in an aggregated bid, that are reasonable under the circumstances for conducting the Auction, provided that such rules are: (i) not inconsistent with the Initial Order, the SISP, the Bidding Procedures, the DIP, the CCAA, or any order of the Court entered in connection with the CCAA Proceedings; (ii) disclosed to each Phase 2 Qualified Bidder; and (iii) designed, in the Monitor's business judgment, to result in the highest and otherwise best offer.

(f) The Monitor will arrange for the actual bidding at the Auction to be transcribed or recorded. Each Phase 2 Qualified Bidder participating in the Auction shall designate a single individual to be its spokesperson during the Auction.

(g) Each Phase 2 Qualified Bidder participating in the Auction must confirm on the record, at the commencement of the Auction and again at the conclusion of the Auction, that it has not engaged in any collusion with the Company or any other person regarding the SISP that has not been disclosed to all other Phase 2 Qualified Bidders.

(h) Prior to the Auction, the Monitor shall identify, in consultation with the Company and the DIP Lenders, the highest and best of the Phase 2 Qualified Bids received and such Phase 2 Qualified Bid shall constitute the opening bid for the purposes of the Auction (the "**Opening Bid**"). Subsequent bidding will continue in minimum increments valued at not less than $[250,000] cash in excess of the Opening Bid. For the purposes of facilitating bidding, the Monitor may ascribe a monetary value to non-cash considerations, including by way of example, to different levels of conditionality to closing. Each Phase 2 Qualified Bidder shall provide evidence of its financial wherewithal and ability to consummate the transaction at the increased purchase price, if so requested by the Monitor. Further, in the event that an Aggregated Bid qualifies to participate in the Auction, modifications to the bidding requirements may be made by the Monitor to facilitate bidding by the participants in the Aggregated Bid.

(i) All Phase 2 Qualified Bidders shall have the right to, at any time, request that the Monitor announce, subject to any potential new bids, the then-current highest and best bid and, to the extent requested by any Phase 2 Qualified Bidder, use reasonable efforts to clarify any and all questions such Phase 2 Qualified Bidder

may have regarding the Monitor's announcement of the then-current highest and best bid.

(j) Each participating Phase 2 Qualified Bidder shall be given reasonable opportunity to submit an overbid at the Auction to any then-existing overbids. The Auction shall continue until the bidding has concluded and there is one remaining Phase 2 Qualified Bidder that the Monitor, in consultation with the Company and the DIP Lenders, determine has submitted the highest and otherwise best Phase 2 Qualified Bid of the Auction. At such time and upon the conclusion of the bidding, the Auction shall be closed and the final remaining Phase 2 Qualified Bidder shall be the Successful Bidder.

(k) Upon selection of a Successful Bidder, the Monitor shall require the Successful Bidder to deliver as soon as practicable an amended and executed transaction document that reflects its final bid and any other modifications submitted and agreed to during the Auction, prior to the filing of the application material for the hearing to consider the Approval Motion (as defined below).

(l) The Monitor shall not consider any bids submitted after the conclusion of the Auction.

28. The final Successful Bid and the Backup Bid (as defined below) shall be selected by no later than June 19, 2022 and the definitive documentation in respect of the Successful Bid must be finalized and executed no later than June 26, 2022, which definitive documentation shall be conditional only upon the receipt of the Approval Order(s) and the express conditions set out therein and shall provide that the Successful Bidder shall use all reasonable efforts to close the proposed transaction by no later than the Target Closing Date, or such longer period as shall be agreed to by the Monitor in consultation with the Company, the DIP Lenders and the Successful Bidder. In any event, the Successful Bid must be closed by no later than the Outside Date, unless with the authorization of the DIP Lenders, acting reasonably.

29. Notwithstanding anything in the SISP to the contrary, if an Auction is conducted, the Phase 2 Qualified Bidder with the next highest or otherwise best Phase 2 Qualified Bid at the Auction, as determined by the Monitor will be designated as the backup bidder (the "**Backup Bidder**"). The Backup Bidder shall be required to keep its initial Phase 2 Qualified Bid (or if the Backup Bidder submitted one or more overbids at the Auction, the Backup Bidder's final overbid) (the "**Backup Bid**") open until the earlier of: (A) two business days after the date of closing of the Successful Bid; and (B) the Outside Date.

*Approval of Successful Bid*

30. The Monitor shall apply to the Court (the "**Approval Motion**") for one or more orders: (i) approving the Successful Bid and the Backup Bid (as applicable) and authorizing the taking of such steps and actions and completing such transactions as are set out therein or required thereby; and (ii) granting a vesting order and/or reverse vesting order to the extent that such relief is contemplated by the Successful Bid or the Backup Bid, as applicable, so

as to vest title to any purchased assets in the name of the Successful Bidder or the Backup Bidder (as applicable) and/or vesting unwanted liabilities out of one or more of the Company (collectively, the "Approval Order(s)"). The Approval Motion will be held on a date to be scheduled by the Monitor and confirmed by the Court upon application by the Monitor, who shall use their best efforts to schedule the Approval Motion on or before July 3, 2022, subject to Court availability. The Approval Motion may be adjourned or rescheduled by the Monitor without further notice, by an announcement of the adjourned date at the Approval Motion or in a notice to the service list of the CCAA Proceedings prior to the Approval Motion.

31. All Phase 2 Qualified Bids (other than the Successful Bid) shall be deemed rejected on and as of the date of the closing of the Successful Bid, with no further or continuing obligation of the Monitor to any unsuccessful Phase 2 Qualified Bidders.

***Deposits***

32. The Deposit(s):

(a) shall, upon receipt from the Phase 2 Qualified Bidder(s), be retained by the Monitor and deposited in a non-interest-bearing trust account.

(b) received from the Successful Bidder, shall:

(i) be applied to the purchase price to be paid by the applicable Successful Bidder whose Successful Bid is the subject of the Approval Order(s), upon closing of the approved transaction; and

(ii) shall otherwise be held and refundable in accordance with the terms of the definitive documentation in respect of any Successful Bid, provided that all such documentation shall provide that the Deposit shall be retained by the Monitor and forfeited by the Successful Bidder, if the Successful Bid fails to close by the Outside Date, and such failure is attributable directly to any failure or omission of the Successful Bidder to fulfil its obligations under the terms of the Successful Bid;

(c) received from the Backup Bidder, unless it is subsequently selected as the Successful Bidder, shall be fully refunded, to the Backup Bidder on or before the earlier of: (i) two (2) Business Days after the date of the closing to the Successful Bid; or (ii) July 17, 2022; and

(d) received from the Phase 2 Qualified Bidder(s) that are not the Successful Bidder or the Backup Bidder shall be fully refunded, to the Phase 2 Qualified Bidder(s) that paid the Deposit(s) as soon as practical following the selection of the Successful Bidder and in any event no later than July 17, 2022.

**Amendment**

33. The Monitor shall have the right at any time, in consultation with the Company and the DIP Lenders, to: (i) make material amendments to the SISP (including by extending the Phase 1 Bid Deadline or the Phase 2 Bid Deadline); and (ii) make non-material amendments to the SISP, in each case if, in the Monitor's reasonable judgment in consultation with the Company and/or the DIP Lenders, such material or non-material amendment will enhance the procedure for conducting the SISP or maximize the value of a transaction pursuant to the SISP. The Monitor shall advise the Service List in the CCAA Proceedings of any material amendment to the SISP. Without limiting the foregoing and notwithstanding the process and timeline for Phase 1 and the continuation of the SISP into Phase 2, the Monitor may at any time during Phase 1 or Phase 2: (i) subject to Court approval, enter into a stalking horse agreement involving a transaction with respect to some or all of the Business with a party identified through the SISP or otherwise; or (ii) subject to Court approval, enter into a definitive agreement with respect to a transaction involving some or all of the Business with a party identified through the SISP or otherwise and suspend or terminate the SISP.

**"As is, Where is"**

34. Any sale (or sales) of the Business will be on an **"as is, where is"** basis except for representations and warranties that are customarily provided in purchase agreements for a company subject to CCAA proceedings and any such representations and warranties provided for in the definitive documents shall not survive closing.

**Free of Any and All Claims And Interests**

35. In the event of a sale, to the extent permitted by law, all of the rights, title and interests of the Company in and to the Business to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the **"Claims and Interests"**) pursuant to section 36(6) of the CCAA, such Claims and Interests to attach to the net proceeds of the sale of such Business (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof), except to the extent otherwise set forth in the relevant transaction documents with a Successful Bidder.

**Credit Bidding**

36. Any party or parties holding a valid, enforceable, and properly perfected security interest in the Business may, subject in all respects to such party's compliance with the Bidding Procedures, credit bid the amount of debt secured by such lien as part of any transaction contemplated by the Bidding Procedures; provided, however, that such transaction shall also provide for the indefeasible and irrevocable repayment in full in cash on the date of closing of any such transaction of any and all obligations: (i) owing to the DIP Lenders; (ii) owing pursuant to any charges granted by the Court in the CCAA Proceedings; and (iii) secured by a security interest in the Business that is to be acquired under such transaction that is senior to the security interest held in such Business by the party

submitting such credit bid unless the holder or indenture trustee or agent of any such senior security interest otherwise agrees. Nothing contained in this paragraph 36 is intended to, or shall, alter or amend the rights, terms or obligations under any intercreditor agreement or other form of agreement in respect of existing indebtedness of the Company.

**Confidentiality**

37. For greater certainty other than as shall be required in connection with any Auction or Approval Motion, neither the Company nor the Monitor will share: (i) the identity of any Potential Bidder, or Phase 1 Qualified Bidder; or (ii) the terms of any bid, LOI, Phase 1 Qualified Bid, Sale Proposal, Investment Proposal or Phase 2 Qualified Bid, with any other bidder without the consent of such party (including by way of email).

**Further Orders**

38. At any time during the SISP, the Monitor may apply to the Court for advice and directions with respect to any aspect of this SISP and the Bidding Procedures including, but not limited to, the continuation of the SISP or with respect to the discharge of its powers and duties hereunder.

**Additional Terms**

39. In addition to any other requirement of these Bidding Procedures:

    (a) The Monitor, as applicable, shall at all times prior to the selection of a Successful Bid use commercially reasonable efforts to facilitate a competitive bidding process in the SISP including, without limitation, by actively soliciting participation by all persons who would be customarily identified as high potential bidders in a process of this kind or who may be reasonably proposed by any of the Monitor, the DIP Lenders or the Company's stakeholders as a high potential bidder.

    (b) Any consent, approval or confirmation to be provided by the Company and/or the Monitor is ineffective unless provided in writing and any approval required pursuant to the terms hereof is in addition to, and not in substitution for, any other approvals required by the CCAA or as otherwise required at law in order to implement a Successful Bid. For the avoidance of doubt, a consent, approval or confirmation provided by email shall be deemed to have been provided in writing for the purposes of this paragraph.

    (c) All Phase 1 Qualified Bidders and Phase 2 Qualified Bidders shall at all times be granted information, access and facilitation that is no less complete and timely than is granted by the Monitor, or their representatives, to other Phase 1 Qualified Bidders and Phase 2 Qualified Bidders pursuant to the SISP. This shall include, without limitation, reasonable access to the Company's books, records, financial information, management, advisors and business partners. The Monitor shall review all information and materials provided by the Company or its representatives to the DIP Lenders or their representatives pursuant to the DIP and, to the extent that the Monitor, in consultation with the Company, is of the view that

any such information or materials are materially relevant to a Potential Bidder or Phase 1 Qualified Bidder or Phase 2 Qualified Bidder, then such information or materials shall be promptly posted to the VDR or otherwise made available to all Potential Bidders, Phase 1 Qualified Bidders and Phase 2 Qualified Bidders. Nothing in this paragraph creates binding obligations of third parties.

(d) Nothing in this SISP shall require that a Successful Bid, Backup Bid or any other bid must be approved by the Court. The Court at all times retains the discretion to direct the clarification, termination, extension or modification of the SISP and Bidding Procedures on application of any interested party.

(e) Prior to the seeking of Court approval for any transaction or bid contemplated by this SISP, the Monitor will provide a report to the Court on the SISP process, parts of which may be filed under seal, including in respect of any and all bids received.

## APPENDIX A
## DEFINED TERMS

**"Applicant"** shall have the meaning set forth in the preamble.

**"Approval Motion"** shall have the meaning set forth in paragraph 30.

**"Approval Order(s)"** shall have the meaning set forth in paragraph 30.

**"Auction"** shall have the meaning set forth in paragraph 27.

**"Backup Bid"** shall have the meaning set forth in paragraph 29.

**"Backup Bidder"** shall have the meaning set forth in paragraph 29.

**"Bid"** shall have the meaning set forth in the preamble.

**"Bidding Procedures"** shall have the meaning set forth in the preamble.

**"Bidding Procedures Order"** shall have the meaning set forth in the preamble.

**"Binding Offer"** shall have the meaning set forth in paragraph 21.

**"Business"** shall have the meaning set forth in the preamble.

**"Business Day"** means a day on which banks are open for business in St. John's, Newfoundland and Labrador but does not include a Saturday, Sunday or statutory holiday in the Province of Newfoundland and Labrador.

**"CCAA"** shall have the meaning set forth in the preamble.

**"CCAA Proceedings"** shall have the meaning set forth in the preamble.

**"CIM"** "shall have the meaning set forth in paragraph 11.

**"Claims and Interests"** shall have the meaning set forth in paragraph 35.

**"Court"** shall have the meaning set forth in the preamble.

**"Deposit"** shall have the meaning set forth in paragraph 22(i).

**"DIP"** means the DIP Financing Agreement dated March 7, 2022 among Grant Thornton Limited, as the Monitor/Interim Receiver of the Company and the lenders party thereto from time to time providing for DIP financing.

**"DIP Lenders"** means, collectively, Bridging Finance Inc. and/or an affiliate to be named, and Her Majesty in Right of Newfoundland and Labrador, as represented by the Minister of Industry, Energy and Technology, each in its capacity as lender under the DIP.

**"Financing Party"** shall have the meaning set forth in paragraph 9.

**"Initial Order"** shall have the meaning set forth in the preamble.

**"Investment Proposal"** shall have the meaning set forth in paragraph 14(g)(ii).

**"LOI"** shall have the meaning set forth in paragraph 13.

**"Monitor"** shall have the meaning set forth in the preamble.

**"NDA"** shall have the meaning set forth in paragraph 9.

**"Opening Bid"** shall have the meaning set forth in paragraph 27(h)27(h).

**"Opportunity"** shall have the meaning set forth in paragraph 2.

**"Outside Date"** shall have the meaning set forth in paragraph 22(j).

**"Partial Sale Proposal"** shall have the meaning set forth in paragraph 14(g)(i).

**"Phase 1"** shall have the meaning set forth in paragraph 8.

**"Phase 1 Bid Deadline"** shall have the meaning set forth in paragraph 13.

**"Phase 1 Qualified Bid"** shall have the meaning set forth in paragraph 13.

**"Phase 1 Qualified Bidder"** shall have the meaning set forth in paragraph 10.

**"Phase 1 Successful Bid"** shall have the meaning set forth in paragraph 17.

**"Phase 2"** shall have the meaning set forth in paragraph 8.

**"Phase 2 Bid Deadline"** shall have the meaning set forth in paragraph 21.

**"Phase 2 Qualified Bid"** shall have the meaning set forth in paragraph 21.

**"Phase 2 Qualified Bidder"** shall have the meaning set forth in paragraph 17.

**"Potential Bidder"** shall have the meaning set forth in paragraph 9.

**"Sale Proposal"** shall have the meaning set forth in paragraph 14(g)(i).

**"SISP"** shall have the meaning set forth in the preamble.

**"Successful Bid"** shall have the meaning set forth in paragraph 25.

**"Successful Bidder"** shall have the meaning set forth in paragraph 25.

**"Target Closing Date"** shall have the meaning set forth in paragraph 22(j).

**"Solicitation Letter"** shall have the meaning set forth in paragraph 7.

**"Template LOI"** shall have the meaning set forth in paragraph 12.

**"Template PSA"** shall have the meaning set forth in paragraph 12.

**"VDR"** shall have the meaning set forth in paragraph 8.

## APPENDIX B

**TO the Company:**

**Canada Fluorspar Inc., Canada Fluorspar (NL) Inc. and Newspar (a General Partnership)**

with a copy to:

**Cox & Palmer**

**Attention:** **Darren O'Keefe and Allison Philpott**
Email: dokeefe@coxandpalmer.com and aphilpott@coxandpalmer.com

**TO THE MONITOR:**

**Grant Thornton Limited**

**Attention:** **Phil Clarke and Sean MacNeil**
Email: phil.clarke@ca.gt.com and sean.macneil@ca.gt.com

with a copy to:

**McInnes Cooper**

**Attention:** **Meghan King and Geoff Spencer**
Email: meghan.king@mcinnescooper.com and geoffrey.spencer@mcinnescooper.com

**This is Exhibit "D" referred to in the affidavit of Phil Clarke sworn before me this 26 day of July, 2022**

Notary Public or Commissioner of Oaths (affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

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

**AND IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**"); and

**AND IN THE MATTER OF** a Plan of Compromise or Arrangement of the Company;

**ORDER**

Before the Honourable Justice MacDonald;

**THIS APPLICATION**, made by Grant Thornton Limited ("**GTL**" or the "**Monitor**"), in its capacity as Court-Appointed Monitor of the Company, pursuant to the *Companies Creditors Arrangement Act* R.S.C., 1985 c. C-36 as Amended ("**CCAA**") and *Wage Earners Protection Program Act* S.C. 2005, c. 47, s. 1 ("**WEPPA**") for an Order substantially in the form filed with the Application was heard on this 10th day of June, 2022.

**ON READING** the affidavits of Phil Clarke sworn on the 30th day of May, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and of Melissa Spearns sworn on the 27th day of May, 2022 (the "**Spearns Affidavit**") and the Exhibits thereto, and the Monitor's Third Report;

**UPON HEARING** Meghan M. King of Counsel for the Monitor, Darren D. O'Keefe of Counsel for the Company, other counsel as they may appear, no one else appearing for any party duly served as outlined in the affidavit of service dated the __ day of _____, 2022 ,

**IT IS HEREBY ORDERED:**

1. **THAT** the time for service of the within Notice of Motion and materials filed, as set out in

Filed Jun 9/22

the affidavit of served is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

2. **THAT** all terms not otherwise defined herein shall have the meaning ascribed to them in the Amended and Restated Initial Order of this Court dated March 18th, 2022 (the "**ARIO**"), the order of this Court dated March 18th, 2022, approving the Sales, Solicitation and Investment Process (the "**SISP Order**"), the Clarke Affidavit, the Spearns Affidavit, and the Third Report of the Monitor filed on May 30th, 2022 (the "**Monitors Third Report**");

**EXTENSION OF THE STAY PERIOD**

3. **THIS COURT ORDERS** that the current Stay Period under the CCAA be and is hereby extended to and including September 2, 2022.

**WAGE EARNER PROTECTION PROGRAM ACT**

4. **THIS COURT ORDERS AND DECLARES** that pursuant to section 5(5) of WEPPA the Company and their collective former employees meet the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations,* SOR/2008-222 and are a former employer, employees and individuals to whom the WEPPA applies as of March 21, 2022.

**AMENDMENTS TO THE SISP AND ARIO**

5. **THIS COURT ORDERS** that the amendments to the SISP Order as proposed by the Monitor attached hereto as **Exhibit "A"**, and the amendments to the ARIO as proposed by the Monitor, attached hereto as **Exhibit "B"**, are hereby approved.

6. **THIS COURT ORDERS** that in carrying out the terms of this Order, the Monitor whether in its personal capacity or in its capacity as the Monitor:

   (a) shall have all the protections provided to it as an officer of the Court, including the protections granted pursuant to the CCAA and other orders granted in

these CCAA proceedings, including the stay of proceedings; and

(b) shall incur no liability or obligation as a result of carrying out any duties or work in connection with this Order, save and except for any gross negligence or willful misconduct on its part.

**APPROVAL OF THE MONITORS THIRD REPORT**

7. **THIS COURT ORDERS** that the Third Report, and the activities of the Monitor and its counsel referred to therein be and are hereby approved; provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 10 day of June, 2022.

# Exhibit "A"

**2022 01G 0709**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**IN BANKRUPTCY AND INSOLVENCY**

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

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

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**ORDER APPROVING A REVISED SALE AND INVESTMENT SOLICITATION PROCESS**

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[1] **CONSIDERING** the Applicant's *Application for the issuance of (i) an Initial Order, (ii) an Amended and Restated Initial Order, (iii) an Order –approving the DIP Financing Agreement-; and (iv) an Order approving a Sale and Investment Solicitation Process* (the "**Application**"), the affidavit of Phil Clarke dated the 8th day of March, 2022 and the exhibits in support thereof;

[2] **CONSIDERING** the submissions of counsel;

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[3] **CONSIDERING** the pre-filing report prepared by Grant Thornton Limited (the "**Monitor**");

[4] CONSIDERING the further materials filed with this Court since March 8th, 2022, including the First, Second and Third Reports of the Monitor, and the affidavit of Phil Clarke dated the 30th day of May, 2022 and Melissa Spearns dated May 26th, 2022 and the exhibits thereto;

[4][5] **CONSIDERING** the provisions of the *Companies' Creditors Arrangement Act* ("**CCAA**");

**THE COURT:**

~~[5] GRANTS the Application.~~

[6] CONFIRMS ITS GRANT of the original Order dated March 18th, 2022, in connection with the Application (defined above), with the modifications blacklined herein being approved and deemed effective as of the date of the Order to which this revised Order is attached as Exhibit "A"

**DEFINITIONS**

[6][7] **DECLARES** that all capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Bidding Procedures (as defined below).

**SERVICE**

~~[7]~~[8] **DECLARES** that sufficient prior notice of the presentation of the Application has been given by the Applicant to interested parties, and that further service thereof is hereby dispensed with.

~~[8]~~[9] **PERMITS** the service of the present Order (this "**Order**") at any time and place and by any means whatsoever.

**SISP**

~~[9]~~[10] **APPROVES** and **RATIFIES** the Revised Sale and Investment Solicitation Process ("**SISP**") set forth in the Procedures for the Sale and Investment Solicitation Process attached as Schedule "A" hereto (the "**Bidding Procedures**").

~~[10]~~[11] **AUTHORIZES** the Applicant and the Company, to the extent the Company assists with the SISP, to implement the SISP and to take such steps and execute such documentation as may be necessary or incidental thereto, the whole in accordance with the Bidding Procedures.

~~[11]~~[12] **ORDERS** that the Applicant and the Company, as well as respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of performing their duties under the SISP, except to the extent of such losses, claims, damages or liabilities resulting from gross negligence or willful misconduct of any such person or entity, as applicable, as determined by this Court.

**GENERAL**

~~[12]~~[13] **ORDERS** that the Applicant and the Company, to the extent the Company assists with the SISP are authorized and permitted under applicable law to disclose and transfer to Potential Bidders and to their advisors personal information in the custody or control of the Company relating to the operation of the business, including human resources and payroll information, records pertaining to the Company's past and current employees, and information about any consumer, website visitor or other individual (collectively, "**Personal Information**"), but only to the extent necessary to negotiate, determine whether to proceed with, and attempt to complete a transaction in accordance with the SISP (a "**Transaction**"). Each Potential Bidder to whom any Personal Information is disclosed shall maintain and protect the Personal Information with security safeguards appropriate to the sensitivity of the Personal Information and as may otherwise be required by applicable federal or provincial privacy legislation and limit the use of such information to its evaluation of a Transaction, and if it does not complete a Transaction with the Applicant, shall return all such information to the Applicant, or in the alternative permanently destroy all such information.

~~[13]~~[14] **ORDERS** that the Applicant may from time to time apply to this Court for advice and directions in the discharge of their respective powers and duties hereunder or under the SISP.

~~[14]~~[15] **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or

elsewhere, to give effect to this Order and to assist the Applicant, as applicable, and their respective agents in carrying out the terms of this Order.

[~~15~~][16]. . . **ORDERS** the provisional execution of this Order notwithstanding appeal and without any security or provision for costs whatsoever.

[~~16~~][17]. . . **WITHOUT COSTS.**

# Exhibit "B"

**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER – AMENDMENT #1**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON READING** the affidavits of Phil Clarke sworn the 30th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and of Melissa Spearns on the 26th day of May, 2022 (the "**Spearns Affidavit**") and the Exhibits thereto, and the Monitors First, Second and Third Reports

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

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## SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such

other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

   (b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

## RESTRUCTURING

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

    (a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

    (b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

    (c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

    All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice

period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

**NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY**

14. **THIS COURT ORDERS** that until and including the 2 day of September, 2022 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which

the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

**NO INTERFERENCE WITH RIGHTS**

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

**CONTINUATION OF SERVICES**

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

**NON-DEROGATION OF RIGHTS**

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

**APPOINTMENT OF MONITOR**

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

    (d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

(e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the

"**Administration Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

## ENHANCEMENT OF MONITOR'S POWERS

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other

data storage media containing any such information ("**Records**") of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

**LIMITATION ON THE MONITOR'S LIABILITY**

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

**DIP FINANCING**

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the "**DIP Financing Agreement**") dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as

made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

    (a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

    (b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

    (c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

## SERVICE AND NOTICE

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

## GENERAL

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

Schedule "A"

Defined Terms

**"Excluded Inventory"** means inventory representing a value in the amount of USD2,500,000

**"Excluded Property"** means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

**"HSBC"** means HSBC Bank Canada; and

**"RFA"** means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.

**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER – AMENDMENT #1**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON READING** the affidavits of Phil Clarke sworn the 30th day of May, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and of Melissa Spearns on the 26th day of May, 2022 (the "**Spearns Affidavit**") and the Exhibits thereto, and the Monitors First, Second and Third Reports

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

Filed Jun 10, 20

amended ario (clean final- may 27 2022).docx

## SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such

other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

   (b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

## RESTRUCTURING

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

    (a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

    (b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

    (c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

    All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice

period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

**NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY**

14. **THIS COURT ORDERS** that until and including the 2 day of September, 2022 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which

the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

**NO INTERFERENCE WITH RIGHTS**

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

**CONTINUATION OF SERVICES**

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

**NON-DEROGATION OF RIGHTS**

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

**APPOINTMENT OF MONITOR**

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

    (d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

(e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the

"**Administration Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

**ENHANCEMENT OF MONITOR'S POWERS**

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other

data storage media containing any such information (**"Records"**) of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

**LIMITATION ON THE MONITOR'S LIABILITY**

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act,* R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

**DIP FINANCING**

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the **"DIP Financing Agreement"**) dated the 7th day of March, 2022 between, the Company, as borrower, and Bridging Finance Inc., Bridging Income Fund LP, Bridging Private Debt

**This is Exhibit "E" referred to in the affidavit of Phil Clarke sworn before me this 26 day of July, 2022**

Notary Public or Commissioner of Oaths (affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

INAMINKA MARINE LTD.
130 LeMarchant Road, Suite #301
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

November 30th 2021

**Canada Fluorspar (NL) Inc.**
**PO Box 337**
**St. Lawrence, NL**
**A0E2V0**

RQN #N0012966
Inaminka 20209

Attention: Jason Flood

Re Consulting on loading Barge

| | |
|---|---|
| 27.5 days @ C$1,500.00 per day | $41,250.00 |
| HST @15% | $6,187.50 |
| Expences as attached | $894.00 |
| **Total** | **$48,331.50** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #301
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

December 12th 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 20210

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 64.5 hours @$220.00/hour | $14,190.00 |
| A. Barclay 24 hours @$200.00/hour | $4,800.00 |
| HST @15% | $2,848.50 |
| Expences as attached | $539.17 |
| **Total** | **$22,377.67** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

December 31st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202111

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 140.0 hours @$220.00/hour | $30,800.00 |
| A. Barclay 30 hours @$200.00/hour | $6,000.00 |
| HST @15% | $5,520.00 |
| Expences as attached | $606.85 |
| **Total** | **$42,926.85** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

INAMINKA MARINE LTD.
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

January 15th. 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202201

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 65.0 hours @$220.00/hour | $14,300.00 |
| HST @15% | $2,145.00 |
| **Total** | **$16,445.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

INAMINKA MARINE LTD.
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

February 1st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202202

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 66.0 hours @$220.00/hour | $14,520.00 |
| Expences as attached | $91.00 |
| HST @15% | $2,178.00 |
| **Total** | **$16,789.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**Appendix G**

Affidavit of Phil Clarke - September 16, 2022

Court File No. T-279-22

**FEDERAL COURT**

**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.**, a body corporate

**Defendants**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

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**AFFIDAVIT OF PHIL CLARKE**

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I, Phil Clarke, CPA, CA, CIRP, LIT, of the City of Halifax, in the Province of Nova Scotia, MAKE OATH AND SAY AS FOLLOWS:

1. I am a Partner with Grant Thornton Limited ("**GTL**" or the "**Monitor**") and have personal knowledge of the matters deposed of herein.

2. Pursuant to an order dated February 21, 2022 (the "**Interim Receivership Order**"), the Supreme Court of Newfoundland and Labrador General Division appointed GTL as interim receiver of all of the current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, save and except

for the Excluded Property (as defined therein) of Canada Fluorspar Inc. and Canada Fluorspar (NL) Inc. ("**CFI**").

3. Pursuant to an initial order dated March 11, 2022, which was order was subsequently amended and restated on March 18, 2022 (the "**CCAA Order**") the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency appointed GTL the monitor for Canada Fluorspar Inc., Canada Fluorspar (NL) Inc. ("**CFI**"), and Newspar (a General Partnership) pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36. A copy of the CCAA Order filed on March 22, 2022 is attached hereto as **Exhibit "A"**.

4. Pursuant to an order on March 18, 2022 (the "**SISP Order**"), the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency approved a Sale and Investment Solicitation Process for the sale of the CFI's business, property, assets and undertakings. A copy of the SISP Order filed on March 22, 2022 is attached hereto as **Exhibit "B"**.

5. On April 20, 2022, Phase 1 of the SISP ended with the submission of non-binding Letter's of Intent. After review of the various non-binding Letter's of Intent, and consulting with CFI and the DIP lenders, the Monitor recommended proceeding with Phase 2 of the SISP. In running Phase 2 of the SISP, the Monitor received multiple bids on the assets and, after consultation with the DIP lenders, a successful bidder was selected. The success bidder was notified of its success or August 19, 2022.

6. Upon a motion by the Monitor and with the consent of the senior secured creditors and the DIP lenders, the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency extended the SISP until October 17, 2022 and the extension of the stay of proceedings under section 11 of the CCAA until October 17, 2022. Copies of the Amended and Restated Initial Order – Amendment #2 and the Order Approving a Revised Sale and Investment Solicitation Process – Revisions #2 (the "**Revised SISP Order**") are attached hereto as **Exhibit "C"** and **Exhibit "D"**.

7. All materials filed in relation to the CCAA proceedings can be found online at www.grantthornton.ca/CFI.

8. The Monitor and the successful bidder are in the process of finalizing the definitive documentation in respect of the successful bid and, pursuant to the Revised SISP Order, the deadline to file a motion, the primary purpose of which is to approve the successful bid, is September 23, 2022, and which motion will be heard by the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency on September 27, 2022. Also pursuant to the SISP Order, the deadline for closing of the successful bid is October 7, 2022 (or such earlier date as is achievable) and the outside date by which the successful bid must close is October 17, 2022.

9. As part of the hearing on September 27, 2022, the Monitor is required to update the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency on the status of any outstanding items or issues, including the within action, which could impact the anticipated closing of the transaction and increase costs to CFI and its creditors.

10. Barge H-404 (the "**Barge**"), currently under arrest in the within action, is a key asset of CFI and is included in the sale to the successful bidder. As such, it is crucial to the SISP and the closing of the sale to the successful bidder that the Barge be released from arrest no later than October 7, 2022. Failure of the Barge to be included in the sale will impact the proposed transaction to the prejudice of all parties, including the successful bidder, CFI, the DIP lenders, and CFI's creditors.

11. Prior to September 2, 2022, the Monitor had no knowledge of any claim against CFI or the Barge by Captain Richard A. Spellacy, the sole director, officer and shareholder of the Plaintiff, Inaminka Marine Services Limited, in his personal capacity. The Monitor has instructed Captain Spellacy not to conduct any services in relation to the Barge and the Monitor is not aware of any services he has provided to the Barge or CFI in relation to which he now claims wages and Captain Spellacy had never rendered an invoice to CFI or the Monitor in relation to same. The Monitor considers Captain Spellacy's claim frivolous and totally without merit and the filing of the Caveat Release by Captain Spellacy has

frustrated the Monitor's intention to post bail to have the Barge released from arrest to allow the sale to the successful bidder to proceed on or before October 7, 2022 and is a breach of the stay of proceedings put in place by the Supreme Court of Newfoundland and Labrador on February 21, 2022 pursuant to the Interim Receivership Order.

12. I make this Affidavit in good faith and in support of the request by the solicitors CFI to have the CCAA stay of proceedings recognized by the Federal Court and the Barge released from arrest pursuant to Section 50(1) of the *Federal Courts Act* and Rule 488(1) of the *Federal Court Rules* and for no other purpose.

**SWORN** before me at the City of St. John's, in the Province of Newfoundland and Labrador, on the 16th day of September, 2022.

Notary Public or Commissioner for Oaths (affix seal)

**William T. Cahill**
**Barrister & Solicitor (NL)**

**PHIL CLARKE**

**This is Exhibit "A" referred to in the affidavit of Phil Clarke sworn before me this 16th day of September, 2022.**

Notary Public or Commissioner of Oaths
(affix seal)

**William T. Cahill**
**Barrister & Solicitor (NL)**

**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION,** made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

**SERVICE**

Filed March 21, 22

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

   (b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

   (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect

of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

**RESTRUCTURING**

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

(a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

(b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

(c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "Restructuring").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants

during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

## NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including the 10th day of July, 2022 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

## NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

## NO INTERFERENCE WITH RIGHTS

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

## CONTINUATION OF SERVICES

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

## NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to

advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

## APPOINTMENT OF MONITOR

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

    (d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

    (e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to

the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

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(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the

"**Administration Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

## ENHANCEMENT OF MONITOR'S POWERS

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;



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(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other

data storage media containing any such information ("**Records**") of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

**LIMITATION ON THE MONITOR'S LIABILITY**

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

**DIP FINANCING**

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the "**DIP Financing Agreement**") dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

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(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as

made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

    (a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

    (b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

    (c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

## SERVICE AND NOTICE

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

## GENERAL

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

COURT OFFICER

Schedule "A"

Defined Terms

"**Excluded Inventory**" means inventory representing a value in the amount of USD2,500,000

"**Excluded Property**" means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

"**HSBC**" means HSBC Bank Canada; and

"**RFA**" means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.

**This is Exhibit "B" referred to in the affidavit of Phil Clarke sworn before me this 16th day of September, 2022.**

Notary Public or Commissioner of Oaths
(affix seal)

**William T. Cahill**
**Barrister & Solicitor (NL)**

2022 01G 0709
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

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

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

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## ORDER APPROVING A SALE AND INVESTMENT SOLICITATION PROCESS

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[1] **CONSIDERING** the Applicant's *Application for the Issuance of (i) an Initial Order, (ii) an Amended and Restated Initial Order, (iii) an Order approving the DIP Financing Agreement ;and (iv) an Order approving a Sale and Investment Solicitation Process* (the "**Application**"), the affidavit of Phil Clarke dated the 8th day of March, 2022 and the exhibits in support thereof;

[2] **CONSIDERING** the submissions of counsel;

[3] **CONSIDERING** the pre-filing report prepared by Grant Thornton Limited (the "**Monitor**");

[4] **CONSIDERING** the provisions of the *Companies' Creditors Arrangement Act* ("**CCAA**");

**THE COURT:**

[5] **GRANTS** the Application.

**DEFINITIONS**

[6] **DECLARES** that all capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Bidding Procedures (as defined below).

**SERVICE**

[7] **DECLARES** that sufficient prior notice of the presentation of the Application has been given by the Applicant to interested parties, and that further service thereof is hereby dispensed with.

[8] **PERMITS** the service of the present Order (this "**Order**") at any time and place and by any means whatsoever.

Filed Mar. 21/22 KA

**SISP**

[9] **APPROVES** and **RATIFIES** the Sale and Investment Solicitation Process ("**SISP**") set forth in the Procedures for the Sale and Investment Solicitation Process attached as Schedule "A" hereto (the "**Bidding Procedures**").

[10] **AUTHORIZES** the Applicant and the Company, to the extent the Company assists with the SISP, to implement the SISP and to take such steps and execute such documentation as may be necessary or incidental thereto, the whole in accordance with the Bidding Procedures.

[11] **ORDERS** that the Applicant and the Company, as well as respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of performing their duties under the SISP, except to the extent of such losses, claims, damages or liabilities resulting from gross negligence or willful misconduct of any such person or entity, as applicable, as determined by this Court.

**GENERAL**

[12] **ORDERS** that the Applicant and the Company, to the extent the Company assists with the SISP are authorized and permitted under applicable law to disclose and transfer to Potential Bidders and to their advisors personal information in the custody or control of the Company relating to the operation of the business, including human resources and payroll information, records pertaining to the Company's past and current employees, and information about any consumer, website visitor or other individual (collectively, "**Personal Information**"), but only to the extent necessary to negotiate, determine whether to proceed with, and attempt to complete a transaction in accordance with the SISP (a "**Transaction**"). Each Potential Bidder to whom any Personal Information is disclosed shall maintain and protect the Personal Information with security safeguards appropriate to the sensitivity of the Personal Information and as may otherwise be required by applicable federal or provincial privacy legislation and limit the use of such information to its evaluation of a Transaction, and if it does not complete a Transaction with the Applicant, shall return all such information to the Applicant, or in the alternative permanently destroy all such information.

[13] **ORDERS** that the Applicant may from time to time apply to this Court for advice and directions in the discharge of their respective powers and duties hereunder or under the SISP.

[14] **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or elsewhere, to give effect to this Order and to assist the Applicant, as applicable, and their respective agents in carrying out the terms of this Order.

[15] **ORDERS** the provisional execution of this Order notwithstanding appeal and without any security or provision for costs whatsoever.

[16] **WITHOUT COSTS.**

C. Foley

COURT
OFFICER

# Schedule "A"

## Procedures for the Sale and Investment Solicitation Process

On March 7, 2022, Canada Fluorspar Inc., and Canada Fluorspar (NL) Inc., by their Interim Receiver, Grant Thornton Limited, and Newspar (a General Partnership) (collectively the "**Company**" or the "**Applicant**") commenced proceedings (the "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") before the Supreme Court of Newfoundland and Labrador (in Bankruptcy and Insolvency) in the City of St. John's, in the Province of Newfoundland and Labrador (the "**Court**") pursuant to an order granted by the Court on March 11, 2022. Said order was amended and restated by the Court on March 18, 2022 (collectively, as further amended or restated from time to time, the "**Initial Order**").

Pursuant to the Initial Order, Grant Thornton Limited was appointed as monitor in the CCAA Proceedings (in such capacity, the "**Monitor**").

On March 18, 2022, the Court granted an order (the "**Bidding Procedures Order**"), authorizing the Applicant to undertake a sale and investment solicitation process ("**SISP**") for the sale of the Company's business, property, assets and undertakings (collectively, the "**Business**"). The SISP shall be conducted by the Monitor, supported by the Company as required, in the manner set forth herein.

Among other things, the Bidding Procedures Order authorizes and directs the Monitor and the Company to conduct the SISP in accordance with the bidding procedures set out herein (the "**Bidding Procedures**") governing the solicitation of offers or proposals (each a "**Bid**") for the acquisition of the Business or some portion thereof.

### Defined Terms

1. Capitalized terms used in this SISP have the meanings given thereto in Appendix A.

### Bidding Procedures

*Opportunity*

2. The SISP is intended to solicit interest in, and opportunities for: (i) one or more sales or partial sales of all, substantially all, or certain portions of the Business; and/or (ii) for an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Company or its Business. Bids considered pursuant to the SISP may include one or more of an investment, restructuring, recapitalization, refinancing or other form of reorganization of the business and affairs of the Company as a going concern or a sale (or partial sales) of all, substantially all, or certain aspects of the Business, or a combination thereof (the "**Opportunity**").

3. All interested parties are encouraged to submit bids based on any form of Opportunity that they may elect to advance pursuant to the SISP, including as a Sale Proposal or an Investment Proposal.

4. The Bidding Procedures describe the manner in which prospective bidders may gain access to due diligence materials concerning the Company and the Business, the manner in which

bidders may participate in the SISP, the requirement of and the receipt and negotiation of bids received, the ultimate selection of a Successful Bidder and the requisite approvals to be sought from the Court in connection therewith. The Monitor shall conduct the SISP in the manner set forth herein.

The Monitor, in consultation with the Company and the DIP Lenders, may at any time and from time to time, modify, amend, vary or supplement, whether material or immaterial the SISP or the Bidding Procedures, if necessary or useful in order to give effect to the substance of the SISP, the Bidding Procedures and the Bidding Procedures Order.

The Monitor shall post on the Monitor's website, as soon as practicable, any such modification, amendment, variation or supplement to the Bidding Procedures and inform the bidders impacted by such modifications.

In the event of a dispute as to the interpretation or application of the SISP or Bidding Procedures, the Court will have exclusive jurisdiction to hear and resolve such dispute.

5. No bidder may request or receive any form of bid protection as part of any bid made pursuant to the SISP.

As more particularly set out herein, a summary of the key dates pursuant to the SISP are as follows:[1]

| Event | Date |
|---|---|
| **1. Solicitation Letter**<br>Monitor to distribute Solicitation Letter, to potentially interested parties | By no later than March 20 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **2. CIM and VDR**<br>Monitor to prepare and have available for parties having executed the NDA (Potential Bidders) the CIM and VDR | By no later than March 23, 2022, at 5:00 p.m. (Newfoundland Standard Time), or at such later time as the Monitor, in consultation with the Company, deems appropriate |
| **3. Phase 1 Qualified Bidders & Bid Deadline**<br>Phase 1 Bid Deadline (for delivery of non-binding LOIs by Phase 1 Qualified Bidders in accordance with the requirement of paragraph 14 of the Bidding Procedures) | By no later than April 17, 2022, at 5:00 p.m. (Newfoundland Standard Time) |

[1] All capitalized terms not already defined are defined further below. Titles in the chart are for presentation purposes only.

| Event | Date |
|---|---|
| | |
| **4. Phase 1 Successful Bid**<br>Monitor to notify each Phase 1 Qualified Bidder in writing as to whether its bid constituted a Phase 1 Successful Bid | By no later than April 24, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **5. Phase 2 Bid Deadline & Qualified Bidders**<br>Phase 2 Bid Deadline (for delivery of definitive offers by Phase 2 Qualified Bidders in accordance with the requirement of paragraph 22 of the Bidding Procedures) | By no later than June 12, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **6. Auction**<br>Auction Commencement Date (if needed) | By no later than June 19, 2022 |
| **7. Selection of final Successful Bid**<br>Deadline for selection of final Successful Bid | By no later than June 19, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **8. Definitive Documentation**<br>Deadline for completion of definitive documentation in respect of Successful Bid | By no later than June 26, 2022 |
| **9. Approval Motion – Successful Bid**<br>Deadline for filing of Approval Motion in respect of Successful Bid | By no later than July 3, 2022 |
| **10. Closing – Successful Bid**<br>Anticipated deadline for closing of Successful Bid being the Target Closing Date | July 10, 2022 or such earlier date as is achievable |
| **11. Outside Date – Closing**<br>Outside Date by which the Successful Bid must close | July 10, 2022 |

*Solicitation of Interest: Notice of the SISP*

6. As soon as reasonably practicable after the granting of the Bidding Procedures Order:

   (a) a notice of the SISP and such other relevant information which the Company, in consultation with the Monitor and the DIP Lenders, considers appropriate shall be published in the *National Post*, the *Telegram (NL)* and *The Globe & Mail* and such other publications as may be considered appropriate;

   (b) a press release setting out the notice and such other relevant information regarding the Opportunity as may be considered appropriate, shall be issued with *Canada Newswire* designating dissemination in Canada; and

   (c) any parties that have already reached out to the Monitor expressing their interest.

7. The Monitor shall send a letter describing the Opportunity (a "**Solicitation Letter**"), outlining the SISP and inviting recipients of the Solicitation Letter to express their interest pursuant to the SISP, for distribution to potential bidders as soon as practical.

*Virtual Data Room*

8. A confidential virtual data room (the "**VDR**") in relation to the Opportunity will be made available by the Company or the Monitor to Potential Bidders that have executed the NDA (as defined below) in accordance with paragraph 9 herein. The VDR will be made available as soon as practicable. Following the completion of "**Phase 1**", but prior to the completion of "**Phase 2**", additional information may be added to the VDR to enable Phase 2 Qualified Bidders to complete any confirmatory due diligence in respect of the Company and the Opportunity. The Monitor, in consultation with the Company and the DIP Lenders, may establish or cause the Company to establish separate VDRs (including "**clean rooms**"), if the Monitor reasonably determines that doing so would further the Company's and any Potential Bidders' compliance with applicable antitrust and competition laws, or would prevent the distribution of commercially sensitive competitive information. The Monitor may also, in consultation with the Company and the DIP Lenders, limit the access of any Potential Bidder to any confidential information in the VDR where the Monitor reasonably determines that such access could negatively impact the SISP, the ability to maintain the confidentiality of the information, the Business or its value.

**PHASE 1: NON-BINDING LOIS**

*Phase 1 Qualified Bidders and Delivery of Confidential Information Memorandum*

9. In order to participate in the SISP, and prior to the distribution of any confidential information to an interested party (including access to the VDR), such interested party must deliver to the Monitor at the address specified in Appendix B hereto (including by email) a Non Disclosure Agreement (an "**NDA**") which shall enure to the benefit of any Successful Bidder that closes a transaction contemplated by the Successful Bid. Pursuant to the terms of the NDA to be signed by a potential bidder (each potential bidder who has executed an NDA with the Monitor, a "**Potential Bidder**"), each Potential Bidder will be

prohibited from communicating with any other Potential Bidder regarding the Opportunity during the term of the SISP, without the consent of the Monitor. Prior to the Monitor executing an NDA with any potential bidder, any potential bidder may be required to provide evidence, reasonably satisfactory to the Monitor, in consultation with the Company, of its financial wherewithal to complete a transaction in respect of the Opportunity (either with existing capital or with capital reasonably anticipated to be raised prior to closing) and/or to disclose details of their ownership and/or investors. For the avoidance of doubt, a party who has executed an NDA or a joinder with a Potential Bidder for the purpose of providing financing to a Potential Bidder in connection with the Opportunity (such party a "**Financing Party**") shall not be deemed a Potential Bidder for purposes of the SISP, provided that such Financing Party undertakes to inform the Monitor in the event that it elects to act as a Potential Bidder.

10. A Potential Bidder that has executed an NDA and provided any additional information required pursuant to paragraph 9, will be deemed a "**Phase 1 Qualified Bidder**" and will be promptly notified of such classification by the Monitor.

11. The Monitor with the assistance of the Company and the DIP Lenders, as required, will prepare and send to each Phase 1 Qualified Bidder a confidential information memorandum providing additional information considered relevant to the Opportunity (a "**CIM**") as soon as practicable. The Monitor, the Company, the DIP Lenders and their respective advisors make no representation or warranty as to the information contained in the CIM or otherwise made available pursuant to the SISP.

12. The Monitor shall provide any person deemed to be a Phase 1 Qualified Bidder with access to the VDR. The Monitor, the Company, the DIP Lenders and their respective advisors make no representation or warranty as to the information contained in the VDR. The VDR shall contain a template letter of intent (the "**Template LOI**") and a template purchase and sale agreement ("**Template PSA**").

13. If a Phase 1 Qualified Bidder wishes to submit a bid, it must deliver a non-binding letter of intent (an "**LOI**") (each such LOI, provided in accordance with paragraph 14 below, a "**Phase 1 Qualified Bid**"), to the Monitor at the address specified in Appendix B hereto (including by email) so as to be received by the Monitor not later than 5:00 p.m. (Newfoundland Standard Time) on April 17, 2022, or such other date or time as may be agreed by the Monitor in consultation with the Company and the DIP Lenders (the "**Phase 1 Bid Deadline**"). To the extent possible, the Phase 1 Qualified Bid should follow the format as set out in the Template LOI.

14. An LOI submitted by a Phase 1 Qualified Bidder will only be considered a "**Phase 1 Qualified Bid**" if the LOI complies at a minimum with the following:

    (a) it has been duly executed by all required parties;

    (b) it is received by the Phase 1 Bid Deadline;

    (c) it provides written evidence, satisfactory to the Monitor, in consultation with the Company and the DIP Lenders, of the ability to consummate the transaction within

the timeframe contemplated by the SISP and to satisfy any obligations or liabilities to be assumed on closing of the transaction, including, without limitation, a specific indication of the sources of capital;

(d) it identifies all proposed material conditions to closing including, without limitation, any internal, regulatory or other approvals and any form of agreement or other document required from a government body, stakeholder or other third party, and an estimate of the anticipated timeframe and any anticipated impediments for obtaining such approvals;

(e) it: (i) identifies the Qualified Phase 1 Bidder and representatives thereof who are authorized to appear and act on behalf of the Qualified Phase 1 Bidder for all purposes regarding the contemplated transaction; and (ii) fully discloses the identity of each entity or person that will be sponsoring, participating in or benefiting from the transaction contemplated by the LOI;

(f) an outline of any additional due diligence required to be conducted in order to submit a binding offer;

(g) it clearly indicates:

(i) that the Phase 1 Qualified Bidder is seeking to acquire all or substantially all of the Business whether through an asset purchase, a share purchase or a combination thereof (either one being, a "**Sale Proposal**") or some other portion of the Business (a "**Partial Sale Proposal**"); and/or

(ii) whether the Phase 1 Qualified Bidder is offering to make an investment in, restructure, recapitalize, reorganize or refinance the Company or their business (an "**Investment Proposal**");

(h) it contains such other information as may be reasonably requested by the Monitor, in consultation with the Company and the DIP Lenders;

(i) it does not provide for any break fee or expense reimbursement;

(j) in the case of a Sale Proposal, it identifies or contains the following:

(i) the purchase price or price range and key assumptions supporting the valuation and the anticipated amount of cash payable on closing of the proposed transaction;

(ii) any contemplated purchase price adjustment;

(iii) a description of the specific assets that are expected to be subject to the transaction and any assets or obligations expected to be excluded;

(iv) a description of those liabilities and obligations (including operating liabilities, obligations to employees, and reclamation obligations) which the

Phase 1 Qualified Bidder intends to assume and which such liabilities and obligations it does not intend to assume;

(v) information sufficient for the Monitor, in consultation with the Company and the DIP Lenders, to determine that the Phase 1 Qualified Bidder has sufficient ability to satisfy and perform any liabilities or obligations assumed pursuant to subparagraph (iv) above; and

(vi) any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the transaction; and

(k) in the case of an Investment Proposal, it identifies the following:

(i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment, restructuring, recapitalization, refinancing or reorganization;

(ii) the aggregate amount of the equity and/or debt investment to be made in the Company or their business;

(iii) the underlying assumptions regarding the *pro forma* capital structure;

(iv) a description of those liabilities and obligations (including operating liabilities, obligations to employees, and reclamation obligations) which the Phase 1 Qualified Bidder intends to assume and which such liabilities and obligations it does not intend to assume;

(v) information sufficient for the Monitor, in consultation with the Company, to determine that the Phase 1 Qualified Bidder has sufficient ability to satisfy and perform any liabilities or obligations assumed pursuant to subparagraph (iv) above; and

(vi) any other terms or conditions of the Investment Proposal that the Phase 1 Qualified Bidder believes are material to the transaction.

15. Notwithstanding the foregoing, the Monitor in consultation with the Company and the DIP Lenders may waive compliance with any one or more of the requirements in paragraph 14 and deem any such non-compliant LOI to be a Phase 1 Qualified Bid, provided that doing so shall not constitute a waiver by the Monitor of the requirements of paragraph 14 or an obligation on the part of the Monitor to designate any other LOI as a Phase 1 Qualified Bid. The Monitor will be under no obligation to negotiate identical terms with, or extend identical terms to, each Phase 1 Qualified Bidder;

*Assessment of Phase 1 Qualified Bids and Subsequent Process*

16. The Monitor, in consultation with the Company and the DIP Lenders, may, following the receipt of any LOI, seek clarification with respect to any of the terms or conditions of such LOI and/or request and negotiate one or more amendments to such LOI prior to

determining if the LOI should be considered a Phase 1 Qualified Bid or a Phase 1 Successful Bid (as defined below).

17. Following the Phase 1 Bid Deadline, the Monitor shall determine, in accordance with the requirements of paragraph 14 and in consultation with the Company, the LOI(s) that are selected as the most favourable Phase 1 Qualified Bid(s), which Phase 1 Qualified Bid(s) shall be deemed a "**Phase 1 Successful Bid(s)**" and which Phase 1 Qualified Bidder(s) accordingly shall be deemed a "**Phase 2 Qualified Bidder(s)**". For greater certainty, there can be more than one Phase 1 Qualified Bid that may be determined as being a Phase 1 Successful Bid, and more than one Phase 1 Qualified Bidder that may be determined as being a Phase 2 Qualified Bidder.

18. Only Phase 2 Qualified Bidders – being those that have submitted a Phase 1 Successful Bid -- shall be permitted to proceed to Phase 2 of the SISP.

19. The Monitor shall notify each Phase 1 Qualified Bidder in writing as to whether its Phase 1 Qualified Bid constituted a Phase 1 Successful Bid – such that it is a Phase 2 Qualified Bidder – within five (5) Business Days of the Phase 1 Bid Deadline, or at such later time as the Monitor deems appropriate, in consultation with the Company.

20. Without limiting the provisions governing amendment of the SISP set out in paragraph 33 below, and notwithstanding the process and timeline for Phase 1, the process to identify and designate Phase 2 Qualified Bidders and the terms upon which Phase 2 may be continued as described below, the Monitor may at any time before or after the Phase 1 Bid Deadline, determine that Phase 2 is not required and may proceed to execute a definitive agreement (which shall be subject to Court approval) with respect to a transaction contemplated in a Phase 1 Qualified Bid submitted at any time on or before the Phase 1 Bid Deadline.

## PHASE 2: FORMAL OFFERS AND REMOVAL OF CONDITIONS

### *Formal Binding Offers*

21. Any Phase 2 Qualified Bidder that wishes to make a formal offer with respect to his/her/its Sale Proposal or Investment Proposal shall submit a binding offer (a "**Binding Offer**"): (a) in the case of a Sale Proposal, in the form of the Template PSA provided in the VDR, along with a marked version showing edits to the original form of Template PSA provided in the VDR; or (b) in the case of an Investment Proposal, a plan or restructuring support agreement in form and substance satisfactory to the Monitor, in consultation with the Company and the DIP Lenders (each, such Binding Offer submitted in accordance with paragraph 22 below, a "**Phase 2 Qualified Bid**") in each case to the Monitor, at the address specified in Appendix B hereto (including by email) so as to be received by the Monitor not later than 5:00 p.m. (Newfoundland Standard Time) on June 12, 2022, or such other date or time as may be agreed by the Monitor in consultation with the Company and the DIP Lenders (as may be extended, the "**Phase 2 Bid Deadline**").

22. A Binding Offer will only be considered as a Phase 2 Qualified Bid if the Binding Offer:

(a) has been received by the Phase 2 Bid Deadline;

(b) is a Binding Offer: (i) to purchase all, substantially all, or a portion of the Business; and/or (ii) to make an investment in, restructure, recapitalize, reorganize or refinance the Company or their business, on terms and conditions reasonably acceptable to the Company and the DIP Lenders;

(c) identifies all executory contracts of the Company that the Phase 2 Qualified Bidder will assume and clearly describes, for each contract or on an aggregate basis, how all monetary defaults and non-monetary defaults will be remedied, as applicable;

(d) is not subject to any financing conditionality;

(e) is unconditional, other than upon the receipt of the Approval Order(s) (as defined below) and satisfaction of any other conditions expressly set forth in the binding offer;

(f) includes acknowledgments and representations of the Phase 2 Qualified Bidder that it: (i) has had an opportunity to conduct any and all due diligence regarding the Opportunity prior to making its Binding Offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Business in making its Binding Offer; (iii) did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Opportunity or the completeness of any information provided in connection therewith, other than as expressly set forth in the Binding Offer or other transaction document submitted with the Binding Offer; and (iv) promptly will commence any governmental or regulatory review of the proposed transaction by the applicable competition, antitrust or other applicable governmental authorities;

(g) the Binding Offer must be accompanied by a letter that confirms that the Binding Offer: (i) may be accepted by the Monitor by countersigning the Binding Offer, and (ii) is irrevocable and capable of acceptance until the earlier of (A) two business days after the date of closing of the Successful Bid; and (B) the Outside Date;

(h) does not provide for any break fee or expense reimbursement;

(i) is accompanied by a deposit in the amount of not less than 5% of the cash purchase price payable on closing or total new investment contemplated, as the case may be (the "**Deposit**"), along with acknowledgement that if the Phase 2 Qualified Bidder is selected as the Successful Bidder (as defined below), that the Deposit will be non-refundable subject to approval of the Successful Bid (as defined below) by the Court and the terms described in paragraph 32 below;

(j) contemplates and reasonably demonstrates a capacity to consummate a closing of the transaction set out therein on or before July 10 2022, or such earlier date as is practical for the parties to close the contemplated transaction, following the satisfaction or waiver of the conditions to closing (the "**Target Closing Date**") and in any event no later than July 10, 2022 (the "**Outside Date**"); and

(k) contains an agreement that the Phase 2 Qualified Bidder submitting such bid, if not chosen as the Successful Bidder, shall serve, without modification to such bid, as a Backup Bidder (as defined below), in the event the Successful Bidder fails to close.

23. The Monitor shall not purport to waive strict compliance with any one or more of the requirements specified above (for greater certainty, other than paragraph 22(c) above and paragraph 32 below and deem any such non-compliant Binding Offer to be a Phase 2 Qualified Bid.

*Selection of Successful Bid*

24. The Monitor, in consultation with the Company and the DIP Lenders, may, following the receipt of any Binding Offer, seek clarification with respect to any of the terms or conditions of such Binding Offer and/or request and negotiate one or more amendments to such Binding Offer prior to determining if the Binding Offer should be considered a Phase 2 Qualified Bid.

25. The Monitor, in consultation with the Company and the DIP Lenders, will: (a) review and evaluate each Phase 2 Qualified Bid; and (b) identify the highest or otherwise best bid (the "**Successful Bid**", and the Phase 2 Qualified Bidder making such Successful Bid, the "**Successful Bidder**") pursuant to the paragraphs below. Any Successful Bid shall be subject to approval by the Court.

26. In the event there is at least two Phase 2 Qualified Bids, the Successful Bid shall be identified through an Auction.

27. Auction: In the event that an auction (the "**Auction**") is required in accordance with the terms of this SISP, it shall be conducted in accordance with the procedures set forth in this paragraph:

(a) The Auction shall commence at a time to be designated by the Monitor, no later than June 19, 2022, and may, in the discretion of the Monitor, be held virtually due to the COVID-19 pandemic via videoconference, teleconference or such other reasonable means as the Monitor deems appropriate. The Monitor and the Company shall work in good faith with the parties entitled to attend the Auction to arrange for the Auction to be so held. The Monitor reserves the right to cancel or postpone the Auction in the consultation with the DIP Lenders.

(b) The identity of each Phase 2 Qualified Bidder participating in the Auction will be disclosed, on a confidential basis, to each other Phase 2 Qualified Bidder participating in the Auction.

(c) Except as otherwise permitted in the Monitor's discretion, only the Company, the Dip Lenders, the Monitor and the Phase 2 Qualified Bidders, and, in each case, their respective professionals shall be entitled to attend the Auction. Only a Phase 2 Qualified Bidder is eligible to participate in the Auction.

(d) Phase 2 Qualified Bidders shall appear at the Auction, or through a duly authorized representative.

(e) Except as otherwise set forth herein, the Monitor, in consultation with the Company and the DIP Lenders, may waive and/or employ and announce at the Auction additional rules, including rules to facilitate the participation of parties participating in an aggregated bid, that are reasonable under the circumstances for conducting the Auction, provided that such rules are: (i) not inconsistent with the Initial Order, the SISP, the Bidding Procedures, the DIP, the CCAA, or any order of the Court entered in connection with the CCAA Proceedings; (ii) disclosed to each Phase 2 Qualified Bidder; and (iii) designed, in the Monitor's business judgment, to result in the highest and otherwise best offer.

(f) The Monitor will arrange for the actual bidding at the Auction to be transcribed or recorded. Each Phase 2 Qualified Bidder participating in the Auction shall designate a single individual to be its spokesperson during the Auction.

(g) Each Phase 2 Qualified Bidder participating in the Auction must confirm on the record, at the commencement of the Auction and again at the conclusion of the Auction, that it has not engaged in any collusion with the Company or any other person regarding the SISP that has not been disclosed to all other Phase 2 Qualified Bidders.

(h) Prior to the Auction, the Monitor shall identify, in consultation with the Company and the DIP Lenders, the highest and best of the Phase 2 Qualified Bids received and such Phase 2 Qualified Bid shall constitute the opening bid for the purposes of the Auction (the "**Opening Bid**"). Subsequent bidding will continue in minimum increments valued at not less than $[250,000] cash in excess of the Opening Bid. For the purposes of facilitating bidding, the Monitor may ascribe a monetary value to non-cash considerations, including by way of example, to different levels of conditionality to closing. Each Phase 2 Qualified Bidder shall provide evidence of its financial wherewithal and ability to consummate the transaction at the increased purchase price, if so requested by the Monitor. Further, in the event that an Aggregated Bid qualifies to participate in the Auction, modifications to the bidding requirements may be made by the Monitor to facilitate bidding by the participants in the Aggregated Bid.

(i) All Phase 2 Qualified Bidders shall have the right to, at any time, request that the Monitor announce, subject to any potential new bids, the then-current highest and best bid and, to the extent requested by any Phase 2 Qualified Bidder, use reasonable efforts to clarify any and all questions such Phase 2 Qualified Bidder

may have regarding the Monitor's announcement of the then-current highest and best bid.

(j) Each participating Phase 2 Qualified Bidder shall be given reasonable opportunity to submit an overbid at the Auction to any then-existing overbids. The Auction shall continue until the bidding has concluded and there is one remaining Phase 2 Qualified Bidder that the Monitor, in consultation with the Company and the DIP Lenders, determine has submitted the highest and otherwise best Phase 2 Qualified Bid of the Auction. At such time and upon the conclusion of the bidding, the Auction shall be closed and the final remaining Phase 2 Qualified Bidder shall be the Successful Bidder.

(k) Upon selection of a Successful Bidder, the Monitor shall require the Successful Bidder to deliver as soon as practicable an amended and executed transaction document that reflects its final bid and any other modifications submitted and agreed to during the Auction, prior to the filing of the application material for the hearing to consider the Approval Motion (as defined below).

(l) The Monitor shall not consider any bids submitted after the conclusion of the Auction.

28. The final Successful Bid and the Backup Bid (as defined below) shall be selected by no later than June 19, 2022 and the definitive documentation in respect of the Successful Bid must be finalized and executed no later than June 26, 2022, which definitive documentation shall be conditional only upon the receipt of the Approval Order(s) and the express conditions set out therein and shall provide that the Successful Bidder shall use all reasonable efforts to close the proposed transaction by no later than the Target Closing Date, or such longer period as shall be agreed to by the Monitor in consultation with the Company, the DIP Lenders and the Successful Bidder. In any event, the Successful Bid must be closed by no later than the Outside Date, unless with the authorization of the DIP Lenders, acting reasonably.

29. Notwithstanding anything in the SISP to the contrary, if an Auction is conducted, the Phase 2 Qualified Bidder with the next highest or otherwise best Phase 2 Qualified Bid at the Auction, as determined by the Monitor will be designated as the backup bidder (the "**Backup Bidder**"). The Backup Bidder shall be required to keep its initial Phase 2 Qualified Bid (or if the Backup Bidder submitted one or more overbids at the Auction, the Backup Bidder's final overbid) (the "**Backup Bid**") open until the earlier of: (A) two business days after the date of closing of the Successful Bid; and (B) the Outside Date.

*Approval of Successful Bid*

30. The Monitor shall apply to the Court (the "**Approval Motion**") for one or more orders: (i) approving the Successful Bid and the Backup Bid (as applicable) and authorizing the taking of such steps and actions and completing such transactions as are set out therein or required thereby; and (ii) granting a vesting order and/or reverse vesting order to the extent that such relief is contemplated by the Successful Bid or the Backup Bid, as applicable, so

as to vest title to any purchased assets in the name of the Successful Bidder or the Backup Bidder (as applicable) and/or vesting unwanted liabilities out of one or more of the Company (collectively, the "**Approval Order(s)**"). The Approval Motion will be held on a date to be scheduled by the Monitor and confirmed by the Court upon application by the Monitor, who shall use their best efforts to schedule the Approval Motion on or before July 3, 2022, subject to Court availability. The Approval Motion may be adjourned or rescheduled by the Monitor without further notice, by an announcement of the adjourned date at the Approval Motion or in a notice to the service list of the CCAA Proceedings prior to the Approval Motion.

31. All Phase 2 Qualified Bids (other than the Successful Bid) shall be deemed rejected on and as of the date of the closing of the Successful Bid, with no further or continuing obligation of the Monitor to any unsuccessful Phase 2 Qualified Bidders.

*Deposits*

32. The Deposit(s):

(a) shall, upon receipt from the Phase 2 Qualified Bidder(s), be retained by the Monitor and deposited in a non-interest-bearing trust account.

(b) received from the Successful Bidder, shall:

(i) be applied to the purchase price to be paid by the applicable Successful Bidder whose Successful Bid is the subject of the Approval Order(s), upon closing of the approved transaction; and

(ii) shall otherwise be held and refundable in accordance with the terms of the definitive documentation in respect of any Successful Bid, provided that all such documentation shall provide that the Deposit shall be retained by the Monitor and forfeited by the Successful Bidder, if the Successful Bid fails to close by the Outside Date, and such failure is attributable directly to any failure or omission of the Successful Bidder to fulfil its obligations under the terms of the Successful Bid;

(c) received from the Backup Bidder, unless it is subsequently selected as the Successful Bidder, shall be fully refunded, to the Backup Bidder on or before the earlier of: (i) two (2) Business Days after the date of the closing to the Successful Bid; or (ii) July 17, 2022; and

(d) received from the Phase 2 Qualified Bidder(s) that are not the Successful Bidder or the Backup Bidder shall be fully refunded, to the Phase 2 Qualified Bidder(s) that paid the Deposit(s) as soon as practical following the selection of the Successful Bidder and in any event no later than July 17, 2022.

**Amendment**

33. The Monitor shall have the right at any time, in consultation with the Company and the DIP Lenders, to: (i) make material amendments to the SISP (including by extending the Phase 1 Bid Deadline or the Phase 2 Bid Deadline); and (ii) make non-material amendments to the SISP, in each case if, in the Monitor's reasonable judgment in consultation with the Company and/or the DIP Lenders, such material or non-material amendment will enhance the procedure for conducting the SISP or maximize the value of a transaction pursuant to the SISP. The Monitor shall advise the Service List in the CCAA Proceedings of any material amendment to the SISP. Without limiting the foregoing and notwithstanding the process and timeline for Phase 1 and the continuation of the SISP into Phase 2, the Monitor may at any time during Phase 1 or Phase 2: (i) subject to Court approval, enter into a stalking horse agreement involving a transaction with respect to some or all of the Business with a party identified through the SISP or otherwise; or (ii) subject to Court approval, enter into a definitive agreement with respect to a transaction involving some or all of the Business with a party identified through the SISP or otherwise and suspend or terminate the SISP.

**"As is, Where is"**

34. Any sale (or sales) of the Business will be on an "as is, where is" basis except for representations and warranties that are customarily provided in purchase agreements for a company subject to CCAA proceedings and any such representations and warranties provided for in the definitive documents shall not survive closing.

**Free of Any and All Claims And Interests**

35. In the event of a sale, to the extent permitted by law, all of the rights, title and interests of the Company in and to the Business to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the "**Claims and Interests**") pursuant to section 36(6) of the CCAA, such Claims and Interests to attach to the net proceeds of the sale of such Business (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof), except to the extent otherwise set forth in the relevant transaction documents with a Successful Bidder.

**Credit Bidding**

36. Any party or parties holding a valid, enforceable, and properly perfected security interest in the Business may, subject in all respects to such party's compliance with the Bidding Procedures, credit bid the amount of debt secured by such lien as part of any transaction contemplated by the Bidding Procedures; provided, however, that such transaction shall also provide for the indefeasible and irrevocable repayment in full in cash on the date of closing of any such transaction of any and all obligations: (i) owing to the DIP Lenders; (ii) owing pursuant to any charges granted by the Court in the CCAA Proceedings; and (iii) secured by a security interest in the Business that is to be acquired under such transaction that is senior to the security interest held in such Business by the party

submitting such credit bid unless the holder or indenture trustee or agent of any such senior security interest otherwise agrees. Nothing contained in this paragraph 36 is intended to, or shall, alter or amend the rights, terms or obligations under any intercreditor agreement or other form of agreement in respect of existing indebtedness of the Company.

**Confidentiality**

37. For greater certainty other than as shall be required in connection with any Auction or Approval Motion, neither the Company nor the Monitor will share: (i) the identity of any Potential Bidder, or Phase 1 Qualified Bidder; or (ii) the terms of any bid, LOI, Phase 1 Qualified Bid, Sale Proposal, Investment Proposal or Phase 2 Qualified Bid, with any other bidder without the consent of such party (including by way of email).

**Further Orders**

38. At any time during the SISP, the Monitor may apply to the Court for advice and directions with respect to any aspect of this SISP and the Bidding Procedures including, but not limited to, the continuation of the SISP or with respect to the discharge of its powers and duties hereunder.

**Additional Terms**

39. In addition to any other requirement of these Bidding Procedures:

(a) The Monitor, as applicable, shall at all times prior to the selection of a Successful Bid use commercially reasonable efforts to facilitate a competitive bidding process in the SISP including, without limitation, by actively soliciting participation by all persons who would be customarily identified as high potential bidders in a process of this kind or who may be reasonably proposed by any of the Monitor, the DIP Lenders or the Company's stakeholders as a high potential bidder.

(b) Any consent, approval or confirmation to be provided by the Company and/or the Monitor is ineffective unless provided in writing and any approval required pursuant to the terms hereof is in addition to, and not in substitution for, any other approvals required by the CCAA or as otherwise required at law in order to implement a Successful Bid. For the avoidance of doubt, a consent, approval or confirmation provided by email shall be deemed to have been provided in writing for the purposes of this paragraph.

(c) All Phase 1 Qualified Bidders and Phase 2 Qualified Bidders shall at all times be granted information, access and facilitation that is no less complete and timely than is granted by the Monitor, or their representatives, to other Phase 1 Qualified Bidders and Phase 2 Qualified Bidders pursuant to the SISP. This shall include, without limitation, reasonable access to the Company's books, records, financial information, management, advisors and business partners. The Monitor shall review all information and materials provided by the Company or its representatives to the DIP Lenders or their representatives pursuant to the DIP and, to the extent that the Monitor, in consultation with the Company, is of the view that

any such information or materials are materially relevant to a Potential Bidder or Phase 1 Qualified Bidder or Phase 2 Qualified Bidder, then such information or materials shall be promptly posted to the VDR or otherwise made available to all Potential Bidders, Phase 1 Qualified Bidders and Phase 2 Qualified Bidders. Nothing in this paragraph creates binding obligations of third parties.

(d) Nothing in this SISP shall require that a Successful Bid, Backup Bid or any other bid must be approved by the Court. The Court at all times retains the discretion to direct the clarification, termination, extension or modification of the SISP and Bidding Procedures on application of any interested party.

(e) Prior to the seeking of Court approval for any transaction or bid contemplated by this SISP, the Monitor will provide a report to the Court on the SISP process, parts of which may be filed under seal, including in respect of any and all bids received.

## APPENDIX A
## DEFINED TERMS

**"Applicant"** shall have the meaning set forth in the preamble.

**"Approval Motion"** shall have the meaning set forth in paragraph 30.

**"Approval Order(s)"** shall have the meaning set forth in paragraph 30.

**"Auction"** shall have the meaning set forth in paragraph 27.

**"Backup Bid"** shall have the meaning set forth in paragraph 29.

**"Backup Bidder"** shall have the meaning set forth in paragraph 29.

**"Bid"** shall have the meaning set forth in the preamble.

**"Bidding Procedures"** shall have the meaning set forth in the preamble.

**"Bidding Procedures Order"** shall have the meaning set forth in the preamble.

**"Binding Offer"** shall have the meaning set forth in paragraph 21.

**"Business"** shall have the meaning set forth in the preamble.

**"Business Day"** means a day on which banks are open for business in St. John's, Newfoundland and Labrador but does not include a Saturday, Sunday or statutory holiday in the Province of Newfoundland and Labrador.

**"CCAA"** shall have the meaning set forth in the preamble.

**"CCAA Proceedings"** shall have the meaning set forth in the preamble.

**"CIM"** "shall have the meaning set forth in paragraph 11.

**"Claims and Interests"** shall have the meaning set forth in paragraph 35.

**"Court"** shall have the meaning set forth in the preamble.

**"Deposit"** shall have the meaning set forth in paragraph 22(i).

**"DIP"** means the DIP Financing Agreement dated March 7, 2022 among Grant Thornton Limited, as the Monitor/Interim Receiver of the Company and the lenders party thereto from time to time providing for DIP financing.

**"DIP Lenders"** means, collectively, Bridging Finance Inc. and/or an affiliate to be named, and Her Majesty in Right of Newfoundland and Labrador, as represented by the Minister of Industry, Energy and Technology, each in its capacity as lender under the DIP.

**"Financing Party"** shall have the meaning set forth in paragraph 9.

**"Initial Order"** shall have the meaning set forth in the preamble.

**"Investment Proposal"** shall have the meaning set forth in paragraph 14(g)(ii).

**"LOI"** shall have the meaning set forth in paragraph 13.

**"Monitor"** shall have the meaning set forth in the preamble.

**"NDA"** shall have the meaning set forth in paragraph 9.

**"Opening Bid"** shall have the meaning set forth in paragraph 27(h)27(h).

**"Opportunity"** shall have the meaning set forth in paragraph 2.

**"Outside Date"** shall have the meaning set forth in paragraph 22(j).

**"Partial Sale Proposal"** shall have the meaning set forth in paragraph 14(g)(i).

**"Phase 1"** shall have the meaning set forth in paragraph 8.

**"Phase 1 Bid Deadline"** shall have the meaning set forth in paragraph 13.

**"Phase 1 Qualified Bid"** shall have the meaning set forth in paragraph 13.

**"Phase 1 Qualified Bidder"** shall have the meaning set forth in paragraph 10.

**"Phase 1 Successful Bid"** shall have the meaning set forth in paragraph 17.

**"Phase 2"** shall have the meaning set forth in paragraph 8.

**"Phase 2 Bid Deadline"** shall have the meaning set forth in paragraph 21.

**"Phase 2 Qualified Bid"** shall have the meaning set forth in paragraph 21.

**"Phase 2 Qualified Bidder"** shall have the meaning set forth in paragraph 17.

**"Potential Bidder"** shall have the meaning set forth in paragraph 9.

**"Sale Proposal"** shall have the meaning set forth in paragraph 14(g)(i).

**"SISP"** shall have the meaning set forth in the preamble.

**"Successful Bid"** shall have the meaning set forth in paragraph 25.

**"Successful Bidder"** shall have the meaning set forth in paragraph 25.

**"Target Closing Date"** shall have the meaning set forth in paragraph 22(j).

**"Solicitation Letter"** shall have the meaning set forth in paragraph 7.

**"Template LOI"** shall have the meaning set forth in paragraph 12.

**"Template PSA"** shall have the meaning set forth in paragraph 12.

**"VDR"** shall have the meaning set forth in paragraph 8.

## APPENDIX B

**TO the Company:**

**Canada Fluorspar Inc., Canada Fluorspar (NL) Inc, and Newspar (a General Partnership)**

with a copy to:

**Cox & Palmer**

**Attention:** **Darren O'Keefe and Allison Philpott**
Email: dokeefe@coxandpalmer.com and aphilpott@coxandpalmer.com

**TO THE MONITOR:**

**Grant Thornton Limited**

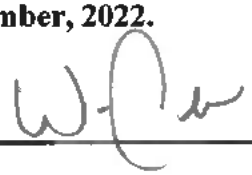
**Attention:** **Phil Clarke and Sean MacNeil**
Email: phil.clarke@ca.gt.com and sean.macneil@ca.gt.com

with a copy to:

**McInnes Cooper**

**Attention:** **Meghan King and Geoff Spencer**
Email: meghan.king@mcinnescooper.com and geoffrey.spencer@mcinnescooper.com

**This is Exhibit "C" referred to in the affidavit of Phil Clarke sworn before me this 16th day of September, 2022.**



Notary Public or Commissioner of Oaths
(affix seal)

**William T. Cahill**
**Barrister & Solicitor (NL)**

**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER – AMENDMENT #2**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON READING** the affidavits of Phil Clarke sworn the 30th day of May, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and of Melissa Spearns sworn on the 26th day of May, 2022 (the "**Spearns Affidavit**") and the Exhibits thereto, and the Monitors First Second and Third Reports;

**ON READING** the affidavit of Phil Clarke sworn the 24th day of August, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and the Monitor's Fourth Report;

amended ar.o (clean• august 24 2022)

Filed Aug 30/22 JK

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

**SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

**APPLICATION**

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

**PLAN OF ARRANGEMENT**

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

**POSSESSION OF PROPERTY AND OPERATIONS**

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such

other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

   (b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

**RESTRUCTURING**

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

    (a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

    (b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

    (c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

    All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

**NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY**

14. **THIS COURT ORDERS** that until and including the 17th day of October, 2022 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA,

(iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

**NO INTERFERENCE WITH RIGHTS**

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

**CONTINUATION OF SERVICES**

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

**NON-DEROGATION OF RIGHTS**

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this

Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

**APPOINTMENT OF MONITOR**

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Company's receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

(d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

(e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to

the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the bénefit of and are hereby granted a charge (the

"**Administration Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

**ENHANCEMENT OF MONITOR'S POWERS**

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other

data storage media containing any such information (**"Records"**) of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

**LIMITATION ON THE MONITOR'S LIABILITY**

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

**DIP FINANCING**

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the **"DIP Financing Agreement"**) dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as

made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

    (a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

    (b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

    (c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

**SERVICE AND NOTICE**

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

**GENERAL**

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

COURT OFFICER

Schedule "A"

Defined Terms

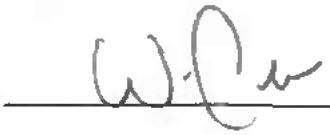
"**Excluded Inventory**" means inventory representing a value in the amount of USD2,500,000

"**Excluded Property**" means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

"**HSBC**" means HSBC Bank Canada; and

"**RFA**" means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.

**This is Exhibit "D" referred to in the affidavit of Phil Clarke sworn before me this 16th day of September, 2022.**



Notary Public or Commissioner of Oaths
(affix seal)

**William T. Cahill**
**Barrister & Solicitor (NL)**

**2022 01G 0709**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**IN BANKRUPTCY AND INSOLVENCY**

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

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

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**ORDER APPROVING A REVISED SALE AND INVESTMENT SOLICITATION PROCESS – Revision #2**

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[1] **CONSIDERING** the Applicant's *Application for the issuance of (i) an Initial Order, (ii) an Amended and Restated Initial Order, (iii) an Order approving the DIP Financing Agreement; and (iv) an Order approving a Sale and Investment Solicitation Process* (the "**Application**"), the affidavit of Phil Clarke dated the 8th day of March, 2022 and the exhibits in support thereof;

[2] **CONSIDERING** the submissions of counsel;

[3] **CONSIDERING** the pre-filing report prepared by Grant Thornton Limited (the "**Monitor**");

[4] **CONSIDERING** the further materials filed with this Court since March 8th, 2022, including the First, Second and Third Reports of the Monitor, and the affidavit of Phil Clarke dated the 30th day of May, 2022 and Melissa Spearns dated May 26th, 2022 and the exhibits thereto;

[5] **CONSIDERING** the further materials filed since May 31st, 2022 including the Fourth Report of the Monitor, and the affidavit of Phil Clarke dated the 24th of August, 2022 and the exhibits thereto;

[6] **CONSIDERING** the provisions of the *Companies' Creditors Arrangement Act* ("**CCAA**");

**THE COURT:**

[7] **CONFIRMS ITS GRANT** of the original Order dated March 18th, 2022 and its subsequent Order dated June 10th, 2022, in connection with the Application (defined above), with the modifications blacklined herein being approved and deemed effective as of the date of the Order to which this revised Order is attached as **Exhibit "A"**

**DEFINITIONS**

Filed Aug 30/22 JK

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[8] **DECLARES** that all capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Bidding Procedures (as defined below).

**SERVICE**

[9] **DECLARES** that sufficient prior notice of the presentation of the Application has been given by the Applicant to interested parties, and that further service thereof is hereby dispensed with.

[10] **PERMITS** the service of the present Order (this "**Order**") at any time and place and by any means whatsoever.

**SISP**

[11] **APPROVES** and **RATIFIES** the Revised Sale and Investment Solicitation Process ("**SISP**") set forth in the Procedures for the Sale and Investment Solicitation Process attached as Schedule "A" hereto (the "**Bidding Procedures**").

[12] **AUTHORIZES** the Applicant and the Company, to the extent the Company assists with the SISP, to implement the SISP and to take such steps and execute such documentation as may be necessary or incidental thereto, the whole in accordance with the Bidding Procedures.

[13] **ORDERS** that the Applicant and the Company, as well as respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of performing their duties under the SISP, except to the extent of such losses, claims, damages or liabilities resulting from gross negligence or willful misconduct of any such person or entity, as applicable, as determined by this Court.

**GENERAL**

[14] **ORDERS** that the Applicant and the Company, to the extent the Company assists with the SISP are authorized and permitted under applicable law to disclose and transfer to Potential Bidders and to their advisors personal information in the custody or control of the Company relating to the operation of the business, including human resources and payroll information, records pertaining to the Company's past and current employees, and information about any consumer, website visitor or other individual (collectively, "**Personal Information**"), but only to the extent necessary to negotiate, determine whether to proceed with, and attempt to complete a transaction in accordance with the SISP (a "**Transaction**"). Each Potential Bidder to whom any Personal Information is disclosed shall maintain and protect the Personal Information with security safeguards appropriate to the sensitivity of the Personal Information and as may otherwise be required by applicable federal or provincial privacy legislation and limit the use of such information to its evaluation of a Transaction, and if it does not complete a Transaction with the Applicant, shall return all such information to the Applicant, or in the alternative permanently destroy all such information.

[15] **ORDERS** that the Applicant may from time to time apply to this Court for advice and directions in the discharge of their respective powers and duties hereunder or under the SISP.

[16] **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or elsewhere, to give effect to this Order and to assist the Applicant, as applicable, and their respective agents in carrying out the terms of this Order.

[17] **ORDERS** the provisional execution of this Order notwithstanding appeal and without any security or provision for costs whatsoever.

[18] **WITHOUT COSTS.**

**COURT OFFICER**

# Exhibit "A"

## Procedures for the Sale and Investment Solicitation Process

On March 7, 2022, Canada Fluorspar Inc., and Canada Fluorspar (NL) Inc., by their Interim Receiver, Grant Thornton Limited, and Newspar (a General Partnership) (collectively the "**Company**" or the "**Applicant**") commenced proceedings (the "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") before the Supreme Court of Newfoundland and Labrador (in Bankruptcy and Insolvency) in the City of St. John's, in the Province of Newfoundland and Labrador (the "**Court**") pursuant to an order granted by the Court on March 18, 2022. Said order was amended and restated by the Court on March 18, 2022 (collectively, as further amended or restated from time to time, the "**Initial Order**").

Pursuant to the Initial Order, Grant Thornton Limited was appointed as monitor in the CCAA Proceedings (in such capacity, the "**Monitor**").

On March 18, 2022, the Court granted an order (the "**Bidding Procedures Order**"), authorizing the Applicant to undertake a sale and investment solicitation process ("**SISP**") for the sale of the Company's business, property, assets and undertakings (collectively, the "**Business**"). The SISP shall be conducted by the Monitor, supported by the Company as required, in the manner set forth herein.

Among other things, the Bidding Procedures Order authorizes and directs the Monitor and the Company to conduct the SISP in accordance with the bidding procedures set out herein (the "**Bidding Procedures**") governing the solicitation of offers or proposals (each a "**Bid**") for the acquisition of the Business or some portion thereof.

### Defined Terms

1. Capitalized terms used in this SISP have the meanings given thereto in Appendix A.

### Bidding Procedures

*Opportunity*

2. The SISP is intended to solicit interest in, and opportunities for: (i) one or more sales or partial sales of all, substantially all, or certain portions of the Business; and/or (ii) for an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Company or its Business. Bids considered pursuant to the SISP may include one or more of an investment, restructuring, recapitalization, refinancing or other form of reorganization of the business and affairs of the Company as a going concern or a sale (or partial sales) of all, substantially all, or certain aspects of the Business, or a combination thereof (the "**Opportunity**").

3. All interested parties are encouraged to submit bids based on any form of Opportunity that they may elect to advance pursuant to the SISP, including as a Sale Proposal or an Investment Proposal.

4. The Bidding Procedures describe the manner in which prospective bidders may gain access to due diligence materials concerning the Company and the Business, the manner in which

bidders may participate in the SISP, the requirement of and the receipt and negotiation of bids received, the ultimate selection of a Successful Bidder and the requisite approvals to be sought from the Court in connection therewith. The Monitor shall conduct the SISP in the manner set forth herein.

The Monitor, in consultation with the Company and the DIP Lenders, may at any time and from time to time, modify, amend, vary or supplement, whether material or immaterial the SISP or the Bidding Procedures, if necessary or useful in order to give effect to the substance of the SISP, the Bidding Procedures and the Bidding Procedures Order.

The Monitor shall post on the Monitor's website, as soon as practicable, any such modification, amendment, variation or supplement to the Bidding Procedures and inform the bidders impacted by such modifications.

In the event of a dispute as to the interpretation or application of the SISP or Bidding Procedures, the Court will have exclusive jurisdiction to hear and resolve such dispute.

5. No bidder may request or receive any form of bid protection as part of any bid made pursuant to the SISP.

As more particularly set out herein, a summary of the key dates pursuant to the SISP are as follows:[1]

| **Event** | **Date** |
|---|---|
| **1. Solicitation Letter**<br>Monitor to distribute Solicitation Letter, to potentially interested parties | By no later than March 20 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **2. CIM and VDR**<br>Monitor to prepare and have available for parties having executed the NDA (Potential Bidders) the CIM and VDR | By no later than March 23, 2022, at 5:00 p.m. (Newfoundland Standard Time), or at such later time as the Monitor, in consultation with the Company, deems appropriate |
| **3. Phase 1 Qualified Bidders & Bid Deadline**<br>Phase 1 Bid Deadline (for delivery of non-binding LOIs by Phase 1 Qualified Bidders in accordance with the requirement of paragraph 14 of the Bidding Procedures) | By no later than April 17, 2022, at 5:00 p.m. (Newfoundland Standard Time) |

[1] All capitalized terms not already defined are defined further below. Titles in the chart are for presentation purposes only.

| Event | Date |
|---|---|
| | |
| **4. Phase 1 Successful Bid**<br>Monitor to notify each Phase 1 Qualified Bidder in writing as to whether its bid constituted a Phase 1 Successful Bid | By no later than April 24, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **5. Phase 2 Bid Deadline & Qualified Bidders**<br>Phase 2 Bid Deadline (for delivery of definitive offers by Phase 2 Qualified Bidders in accordance with the requirement of paragraph 22 of the Bidding Procedures) | By no later than July 22, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **6. Auction**<br>Auction Commencement Date (if needed) | By no later than July 29, 2022 |
| **7. Selection of final Successful Bid**<br>Deadline for selection of final Successful Bid | By no later than August 5, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **8. Definitive Documentation**<br>Deadline for completion of definitive documentation in respect of Successful Bid | By no later than September 14, 2022 |
| **9. Approval Motion – Successful Bid**<br>Deadline for filing of Approval Motion in respect of Successful Bid | By no later than September 23, 2022 |
| **10. Closing – Successful Bid**<br>Anticipated deadline for closing of Successful Bid being the Target Closing Date | October 7, 2022 or such earlier date as is achievable |
| **11. Outside Date – Closing**<br>Outside Date by which the Successful Bid must close | October 17, 2022 |

*Solicitation of Interest: Notice of the SISP*

6. As soon as reasonably practicable after the granting of the Bidding Procedures Order:

   (a) a notice of the SISP and such other relevant information which the Company, in consultation with the Monitor and the DIP Lenders, considers appropriate shall be published in the *National Post*, the *Telegram (NL)* and *The Globe & Mail* and such other publications as may be considered appropriate;

   (b) a press release setting out the notice and such other relevant information regarding the Opportunity as may be considered appropriate, shall be issued with *Canada Newswire* designating dissemination in Canada; and

   (c) any parties that have already reached out to the Monitor expressing their interest.

7. The Monitor shall send a letter describing the Opportunity (a "**Solicitation Letter**"), outlining the SISP and inviting recipients of the Solicitation Letter to express their interest pursuant to the SISP, for distribution to potential bidders as soon as practical.

*Virtual Data Room*

8. A confidential virtual data room (the "**VDR**") in relation to the Opportunity will be made available by the Company or the Monitor to Potential Bidders that have executed the NDA (as defined below) in accordance with paragraph 9 herein. The VDR will be made available as soon as practicable. Following the completion of "**Phase 1**", but prior to the completion of "**Phase 2**", additional information may be added to the VDR to enable Phase 2 Qualified Bidders to complete any confirmatory due diligence in respect of the Company and the Opportunity. The Monitor, in consultation with the Company and the DIP Lenders, may establish or cause the Company to establish separate VDRs (including "**clean rooms**"), if the Monitor reasonably determines that doing so would further the Company's and any Potential Bidders' compliance with applicable antitrust and competition laws, or would prevent the distribution of commercially sensitive competitive information. The Monitor may also, in consultation with the Company and the DIP Lenders, limit the access of any Potential Bidder to any confidential information in the VDR where the Monitor reasonably determines that such access could negatively impact the SISP, the ability to maintain the confidentiality of the information, the Business or its value.

**PHASE 1: NON-BINDING LOIS**

*Phase 1 Qualified Bidders and Delivery of Confidential Information Memorandum*

9. In order to participate in the SISP, and prior to the distribution of any confidential information to an interested party (including access to the VDR), such interested party must deliver to the Monitor at the address specified in Appendix B hereto (including by email) a Non Disclosure Agreement (an "**NDA**") which shall enure to the benefit of any Successful Bidder that closes a transaction contemplated by the Successful Bid. Pursuant to the terms of the NDA to be signed by a potential bidder (each potential bidder who has executed an NDA with the Monitor, a "**Potential Bidder**"), each Potential Bidder will be

prohibited from communicating with any other Potential Bidder regarding the Opportunity during the term of the SISP, without the consent of the Monitor. Prior to the Monitor executing an NDA with any potential bidder, any potential bidder may be required to provide evidence, reasonably satisfactory to the Monitor, in consultation with the Company, of its financial wherewithal to complete a transaction in respect of the Opportunity (either with existing capital or with capital reasonably anticipated to be raised prior to closing) and/or to disclose details of their ownership and/or investors. For the avoidance of doubt, a party who has executed an NDA or a joinder with a Potential Bidder for the purpose of providing financing to a Potential Bidder in connection with the Opportunity (such party a "**Financing Party**") shall not be deemed a Potential Bidder for purposes of the SISP, provided that such Financing Party undertakes to inform the Monitor in the event that it elects to act as a Potential Bidder.

10. A Potential Bidder that has executed an NDA and provided any additional information required pursuant to paragraph 9, will be deemed a "**Phase 1 Qualified Bidder**" and will be promptly notified of such classification by the Monitor.

11. The Monitor with the assistance of the Company and the DIP Lenders, as required, will prepare and send to each Phase 1 Qualified Bidder a confidential information memorandum providing additional information considered relevant to the Opportunity (a "**CIM**") as soon as practicable. The Monitor, the Company, the DIP Lenders and their respective advisors make no representation or warranty as to the information contained in the CIM or otherwise made available pursuant to the SISP.

12. The Monitor shall provide any person deemed to be a Phase 1 Qualified Bidder with access to the VDR. The Monitor, the Company, the DIP Lenders and their respective advisors make no representation or warranty as to the information contained in the VDR. The VDR shall contain a template letter of intent (the "**Template LOI**") and a template purchase and sale agreement ("**Template PSA**").

13. If a Phase 1 Qualified Bidder wishes to submit a bid, it must deliver a non-binding letter of intent (an "**LOI**") (each such LOI, provided in accordance with paragraph 14 below, a "**Phase 1 Qualified Bid**"), to the Monitor at the address specified in Appendix B hereto (including by email) so as to be received by the Monitor not later than 5:00 p.m. (Newfoundland Standard Time) on April 17, 2022, or such other date or time as may be agreed by the Monitor in consultation with the Company and the DIP Lenders (the "**Phase 1 Bid Deadline**"). To the extent possible, the Phase 1 Qualified Bid should follow the format as set out in the Template LOI.

14. An LOI submitted by a Phase 1 Qualified Bidder will only be considered a "**Phase 1 Qualified Bid**" if the LOI complies at a minimum with the following:

    (a) it has been duly executed by all required parties;

    (b) it is received by the Phase 1 Bid Deadline;

    (c) it provides written evidence, satisfactory to the Monitor, in consultation with the Company and the DIP Lenders, of the ability to consummate the transaction within

the timeframe contemplated by the SISP and to satisfy any obligations or liabilities to be assumed on closing of the transaction, including, without limitation, a specific indication of the sources of capital;

(d) it identifies all proposed material conditions to closing including, without limitation, any internal, regulatory or other approvals and any form of agreement or other document required from a government body, stakeholder or other third party, and an estimate of the anticipated timeframe and any anticipated impediments for obtaining such approvals;

(e) it: (i) identifies the Qualified Phase 1 Bidder and representatives thereof who are authorized to appear and act on behalf of the Qualified Phase 1 Bidder for all purposes regarding the contemplated transaction; and (ii) fully discloses the identity of each entity or person that will be sponsoring, participating in or benefiting from the transaction contemplated by the LOI;

(f) an outline of any additional due diligence required to be conducted in order to submit a binding offer;

(g) it clearly indicates:

(i) that the Phase 1 Qualified Bidder is seeking to acquire all or substantially all of the Business whether through an asset purchase, a share purchase or a combination thereof (either one being, a "**Sale Proposal**") or some other portion of the Business (a "**Partial Sale Proposal**"); and/or

(ii) whether the Phase 1 Qualified Bidder is offering to make an investment in, restructure, recapitalize, reorganize or refinance the Company or their business (an "**Investment Proposal**");

(h) it contains such other information as may be reasonably requested by the Monitor, in consultation with the Company and the DIP Lenders;

(i) it does not provide for any break fee or expense reimbursement;

(j) in the case of a Sale Proposal, it identifies or contains the following:

(i) the purchase price or price range and key assumptions supporting the valuation and the anticipated amount of cash payable on closing of the proposed transaction;

(ii) any contemplated purchase price adjustment;

(iii) a description of the specific assets that are expected to be subject to the transaction and any assets or obligations expected to be excluded;

(iv) a description of those liabilities and obligations (including operating liabilities, obligations to employees, and reclamation obligations) which the

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Phase 1 Qualified Bidder intends to assume and which such liabilities and obligations it does not intend to assume;

(v) information sufficient for the Monitor, in consultation with the Company and the DIP Lenders, to determine that the Phase 1 Qualified Bidder has sufficient ability to satisfy and perform any liabilities or obligations assumed pursuant to subparagraph (iv) above; and

(vi) any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the transaction; and

(k) in the case of an Investment Proposal, it identifies the following:

(i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment, restructuring, recapitalization, refinancing or reorganization;

(ii) the aggregate amount of the equity and/or debt investment to be made in the Company or their business;

(iii) the underlying assumptions regarding the *pro forma* capital structure;

(iv) a description of those liabilities and obligations (including operating liabilities, obligations to employees, and reclamation obligations) which the Phase 1 Qualified Bidder intends to assume and which such liabilities and obligations it does not intend to assume;

(v) information sufficient for the Monitor, in consultation with the Company, to determine that the Phase 1 Qualified Bidder has sufficient ability to satisfy and perform any liabilities or obligations assumed pursuant to subparagraph (iv) above; and

(vi) any other terms or conditions of the Investment Proposal that the Phase 1 Qualified Bidder believes are material to the transaction.

15. Notwithstanding the foregoing, the Monitor in consultation with the Company and the DIP Lenders may waive compliance with any one or more of the requirements in paragraph 14 and deem any such non-compliant LOI to be a Phase 1 Qualified Bid, provided that doing so shall not constitute a waiver by the Monitor of the requirements of paragraph 14 or an obligation on the part of the Monitor to designate any other LOI as a Phase 1 Qualified Bid. The Monitor will be under no obligation to negotiate identical terms with, or extend identical terms to, each Phase 1 Qualified Bidder;

***Assessment of Phase 1 Qualified Bids and Subsequent Process***

16. The Monitor, in consultation with the Company and the DIP Lenders, may, following the receipt of any LOI, seek clarification with respect to any of the terms or conditions of such LOI and/or request and negotiate one or more amendments to such LOI prior to

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determining if the LOI should be considered a Phase 1 Qualified Bid or a Phase 1 Successful Bid (as defined below).

17. Following the Phase 1 Bid Deadline, the Monitor shall determine, in accordance with the requirements of paragraph 14 and in consultation with the Company, the LOI(s) that are selected as the most favourable Phase 1 Qualified Bid(s), which Phase 1 Qualified Bid(s) shall be deemed a "**Phase 1 Successful Bid(s)**" and which Phase 1 Qualified Bidder(s) accordingly shall be deemed a "**Phase 2 Qualified Bidder(s)**". For greater certainty, there can be more than one Phase 1 Qualified Bid that may be determined as being a Phase 1 Successful Bid, and more than one Phase 1 Qualified Bidder that may be determined as being a Phase 2 Qualified Bidder.

18. Only Phase 2 Qualified Bidders – being those that have submitted a Phase 1 Successful Bid – shall be permitted to proceed to Phase 2 of the SISP.

19. The Monitor shall notify each Phase 1 Qualified Bidder in writing as to whether its Phase 1 Qualified Bid constituted a Phase 1 Successful Bid – such that it is a Phase 2 Qualified Bidder – within five (5) Business Days of the Phase 1 Bid Deadline, or at such later time as the Monitor deems appropriate, in consultation with the Company.

20. Without limiting the provisions governing amendment of the SISP set out in paragraph 33 below, and notwithstanding the process and timeline for Phase 1, the process to identify and designate Phase 2 Qualified Bidders and the terms upon which Phase 2 may be continued as described below, the Monitor may at any time before or after the Phase 1 Bid Deadline, determine that Phase 2 is not required and may proceed to execute a definitive agreement (which shall be subject to Court approval) with respect to a transaction contemplated in a Phase 1 Qualified Bid submitted at any time on or before the Phase 1 Bid Deadline.

## PHASE 2: FORMAL OFFERS AND REMOVAL OF CONDITIONS

### *Formal Binding Offers*

21. Any Phase 2 Qualified Bidder that wishes to make a formal offer with respect to his/her/its Sale Proposal or Investment Proposal shall submit a binding offer (a "**Binding Offer**"): (a) in the case of a Sale Proposal, in the form of the Template PSA provided in the VDR, along with a marked version showing edits to the original form of Template PSA provided in the VDR; or (b) in the case of an Investment Proposal, a plan or restructuring support agreement in form and substance satisfactory to the Monitor, in consultation with the Company and the DIP Lenders (each, such Binding Offer submitted in accordance with paragraph 22 below, a "**Phase 2 Qualified Bid**") in each case to the Monitor, at the address specified in Appendix B hereto (including by email) so as to be received by the Monitor not later than 5:00 p.m. (Newfoundland Standard Time) on July 22, 2022, or such other date or time as may be agreed by the Monitor in consultation with the Company and the DIP Lenders (as may be extended, the "**Phase 2 Bid Deadline**").

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22. A Binding Offer will only be considered as a Phase 2 Qualified Bid if the Binding Offer:

(a) has been received by the Phase 2 Bid Deadline;

(b) is a Binding Offer: (i) to purchase all, substantially all, or a portion of the Business; and/or (ii) to make an investment in, restructure, recapitalize, reorganize or refinance the Company or their business, on terms and conditions reasonably acceptable to the Company and the DIP Lenders;

(c) identifies all executory contracts of the Company that the Phase 2 Qualified Bidder will assume and clearly describes, for each contract or on an aggregate basis, how all monetary defaults and non-monetary defaults will be remedied, as applicable;

(d) is not subject to any financing conditionality;

(e) is unconditional, other than upon the receipt of the Approval Order(s) (as defined below) and satisfaction of any other conditions expressly set forth in the binding offer;

(f) includes acknowledgments and representations of the Phase 2 Qualified Bidder that it: (i) has had an opportunity to conduct any and all due diligence regarding the Opportunity prior to making its Binding Offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Business in making its Binding Offer; (iii) did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Opportunity or the completeness of any information provided in connection therewith, other than as expressly set forth in the Binding Offer or other transaction document submitted with the Binding Offer; and (iv) promptly will commence any governmental or regulatory review of the proposed transaction by the applicable competition, antitrust or other applicable governmental authorities;

(g) the Binding Offer must be accompanied by a letter that confirms that the Binding Offer: (i) may be accepted by the Monitor by countersigning the Binding Offer, and (ii) is irrevocable and capable of acceptance until the earlier of (A) two business days after the date of closing of the Successful Bid; and (B) the Outside Date;

(h) does not provide for any break fee or expense reimbursement;

(i) is accompanied by a deposit in the amount of not less than 5% of the cash purchase price payable on closing or total new investment contemplated, as the case may be (the "**Deposit**"), along with acknowledgement that if the Phase 2 Qualified Bidder is selected as the Successful Bidder (as defined below), that the Deposit will be non-refundable subject to approval of the Successful Bid (as defined below) by the Court and the terms described in paragraph 32 below;

(j) contemplates and reasonably demonstrates a capacity to consummate a closing of the transaction set out therein on or before October 7, 2022, or such earlier date as is practical for the parties to close the contemplated transaction, following the satisfaction or waiver of the conditions to closing (the "**Target Closing Date**") and in any event no later than October 17, 2022 (the "**Outside Date**"); and

(k) contains an agreement that the Phase 2 Qualified Bidder submitting such bid, if not chosen as the Successful Bidder, shall serve, without modification to such bid, as a Backup Bidder (as defined below), in the event the Successful Bidder fails to close.

23. The Monitor shall not purport to waive strict compliance with any one or more of the requirements specified above (for greater certainty, other than paragraph 22(c) above and paragraph 32 below and deem any such non-compliant Binding Offer to be a Phase 2 Qualified Bid.

***Selection of Successful Bid***

24. The Monitor, in consultation with the Company and the DIP Lenders, may, following the receipt of any Binding Offer, seek clarification with respect to any of the terms or conditions of such Binding Offer and/or request and negotiate one or more amendments to such Binding Offer prior to determining if the Binding Offer should be considered a Phase 2 Qualified Bid.

25. The Monitor, in consultation with the Company and the DIP Lenders, will: (a) review and evaluate each Phase 2 Qualified Bid; and (b) identify the highest or otherwise best bid (the "**Successful Bid**", and the Phase 2 Qualified Bidder making such Successful Bid, the "**Successful Bidder**") pursuant to the paragraphs below. Any Successful Bid shall be subject to approval by the Court.

26. In the event there is at least two Phase 2 Qualified Bids, the Successful Bid shall be identified through an Auction.

27. Auction: In the event that an auction (the "**Auction**") is required in accordance with the terms of this SISP, it shall be conducted in accordance with the procedures set forth in this paragraph:

(a) The Auction shall commence at a time to be designated by the Monitor, no later than July 29, 2022, and may, in the discretion of the Monitor, be held virtually due to the COVID-19 pandemic via videoconference, teleconference or such other reasonable means as the Monitor deems appropriate. The Monitor and the Company shall work in good faith with the parties entitled to attend the Auction to arrange for the Auction to be so held. The Monitor reserves the right to cancel or postpone the Auction in the consultation with the DIP Lenders.

(b) The identity of each Phase 2 Qualified Bidder participating in the Auction will be disclosed, on a confidential basis, to each other Phase 2 Qualified Bidder participating in the Auction.

(c) Except as otherwise permitted in the Monitor's discretion, only the Company, the Dip Lenders, the Monitor and the Phase 2 Qualified Bidders, and, in each case, their respective professionals shall be entitled to attend the Auction. Only a Phase 2 Qualified Bidder is eligible to participate in the Auction.

(d) Phase 2 Qualified Bidders shall appear at the Auction, or through a duly authorized representative.

(e) Except as otherwise set forth herein, the Monitor, in consultation with the Company and the DIP Lenders, may waive and/or employ and announce at the Auction additional rules, including rules to facilitate the participation of parties participating in an aggregated bid, that are reasonable under the circumstances for conducting the Auction, provided that such rules are: (i) not inconsistent with the Initial Order, the SISP, the Bidding Procedures, the DIP, the CCAA, or any order of the Court entered in connection with the CCAA Proceedings; (ii) disclosed to each Phase 2 Qualified Bidder; and (iii) designed, in the Monitor's business judgment, to result in the highest and otherwise best offer.

(f) The Monitor will arrange for the actual bidding at the Auction to be transcribed or recorded. Each Phase 2 Qualified Bidder participating in the Auction shall designate a single individual to be its spokesperson during the Auction.

(g) Each Phase 2 Qualified Bidder participating in the Auction must confirm on the record, at the commencement of the Auction and again at the conclusion of the Auction, that it has not engaged in any collusion with the Company or any other person regarding the SISP that has not been disclosed to all other Phase 2 Qualified Bidders.

(h) Prior to the Auction, the Monitor shall identify, in consultation with the Company and the DIP Lenders, the highest and best of the Phase 2 Qualified Bids received and such Phase 2 Qualified Bid shall constitute the opening bid for the purposes of the Auction (the "**Opening Bid**"). Subsequent bidding will continue in minimum increments valued at not less than **$[250,000]** cash in excess of the Opening Bid. For the purposes of facilitating bidding, the Monitor may ascribe a monetary value to non-cash considerations, including by way of example, to different levels of conditionality to closing. Each Phase 2 Qualified Bidder shall provide evidence of its financial wherewithal and ability to consummate the transaction at the increased purchase price, if so requested by the Monitor. Further, in the event that an Aggregated Bid qualifies to participate in the Auction, modifications to the bidding requirements may be made by the Monitor to facilitate bidding by the participants in the Aggregated Bid.

(i) All Phase 2 Qualified Bidders shall have the right to, at any time, request that the Monitor announce, subject to any potential new bids, the then-current highest and best bid and, to the extent requested by any Phase 2 Qualified Bidder, use reasonable efforts to clarify any and all questions such Phase 2 Qualified Bidder

a

may have regarding the Monitor's announcement of the then-current highest and best bid.

(j) Each participating Phase 2 Qualified Bidder shall be given reasonable opportunity to submit an overbid at the Auction to any then-existing overbids. The Auction shall continue until the bidding has concluded and there is one remaining Phase 2 Qualified Bidder that the Monitor, in consultation with the Company and the DIP Lenders, determine has submitted the highest and otherwise best Phase 2 Qualified Bid of the Auction. At such time and upon the conclusion of the bidding, the Auction shall be closed and the final remaining Phase 2 Qualified Bidder shall be the Successful Bidder.

(k) Upon selection of a Successful Bidder, the Monitor shall require the Successful Bidder to deliver as soon as practicable an amended and executed transaction document that reflects its final bid and any other modifications submitted and agreed to during the Auction, prior to the filing of the application material for the hearing to consider the Approval Motion (as defined below).

(l) The Monitor shall not consider any bids submitted after the conclusion of the Auction.

28. The final Successful Bid and the Backup Bid (as defined below) shall be selected by no later than August 5, 2022 and the definitive documentation in respect of the Successful Bid must be finalized and executed no later than September 14, 2022, which definitive documentation shall be conditional only upon the receipt of the Approval Order(s) and the express conditions set out therein and shall provide that the Successful Bidder shall use all reasonable efforts to close the proposed transaction by no later than the Target Closing Date, or such longer period as shall be agreed to by the Monitor in consultation with the Company, the DIP Lenders and the Successful Bidder. In any event, the Successful Bid must be closed by no later than the Outside Date, unless with the authorization of the DIP Lenders, acting reasonably.

29. Notwithstanding anything in the SISP to the contrary, if an Auction is conducted, the Phase 2 Qualified Bidder with the next highest or otherwise best Phase 2 Qualified Bid at the Auction, as determined by the Monitor will be designated as the backup bidder (the "**Backup Bidder**"). The Backup Bidder shall be required to keep its initial Phase 2 Qualified Bid (or if the Backup Bidder submitted one or more overbids at the Auction, the Backup Bidder's final overbid) (the "**Backup Bid**") open until the earlier of: (A) two business days after the date of closing of the Successful Bid; and (B) the Outside Date.

***Approval of Successful Bid***

30. The Monitor shall apply to the Court (the "**Approval Motion**") for one or more orders: (i) approving the Successful Bid and the Backup Bid (as applicable) and authorizing the taking of such steps and actions and completing such transactions as are set out therein or required thereby; and (ii) granting a vesting order and/or reverse vesting order to the extent that such relief is contemplated by the Successful Bid or the Backup Bid, as applicable, so

as to vest title to any purchased assets in the name of the Successful Bidder or the Backup Bidder (as applicable) and/or vesting unwanted liabilities out of one or more of the Company (collectively, the "**Approval Order(s)**"). The Approval Motion will be held on a date to be scheduled by the Monitor and confirmed by the Court upon application by the Monitor, who shall use their best efforts to schedule the Approval Motion on or before September 23, 2022, subject to Court availability. The Approval Motion may be adjourned or rescheduled by the Monitor without further notice, by an announcement of the adjourned date at the Approval Motion or in a notice to the service list of the CCAA Proceedings prior to the Approval Motion.

31. All Phase 2 Qualified Bids (other than the Successful Bid) shall be deemed rejected on and as of the date of the closing of the Successful Bid, with no further or continuing obligation of the Monitor to any unsuccessful Phase 2 Qualified Bidders.

***Deposits***

32. The Deposit(s):

(a) shall, upon receipt from the Phase 2 Qualified Bidder(s), be retained by the Monitor and deposited in a non-interest-bearing trust account.

(b) received from the Successful Bidder, shall:

(i) be applied to the purchase price to be paid by the applicable Successful Bidder whose Successful Bid is the subject of the Approval Order(s), upon closing of the approved transaction; and

(ii) shall otherwise be held and refundable in accordance with the terms of the definitive documentation in respect of any Successful Bid, provided that all such documentation shall provide that the Deposit shall be retained by the Monitor and forfeited by the Successful Bidder, if the Successful Bid fails to close by the Outside Date, and such failure is attributable directly to any failure or omission of the Successful Bidder to fulfil its obligations under the terms of the Successful Bid;

(c) received from the Backup Bidder, unless it is subsequently selected as the Successful Bidder, shall be fully refunded, to the Backup Bidder on or before the earlier of: (i) two (2) Business Days after the date of the closing to the Successful Bid; or (ii) October 17, 2022; and

(d) received from the Phase 2 Qualified Bidder(s) that are not the Successful Bidder or the Backup Bidder shall be fully refunded, to the Phase 2 Qualified Bidder(s) that paid the Deposit(s) as soon as practical following the selection of the Successful Bidder and in any event no later than October 17, 2022.

**Amendment**

33. The Monitor shall have the right at any time, in consultation with the Company and the DIP Lenders, to: (i) make material amendments to the SISP (including by extending the Phase 1 Bid Deadline or the Phase 2 Bid Deadline); and (ii) make non-material amendments to the SISP, in each case if, in the Monitor's reasonable judgment in consultation with the Company and/or the DIP Lenders, such material or non-material amendment will enhance the procedure for conducting the SISP or maximize the value of a transaction pursuant to the SISP. The Monitor shall advise the Service List in the CCAA Proceedings of any material amendment to the SISP. Without limiting the foregoing and notwithstanding the process and timeline for Phase 1 and the continuation of the SISP into Phase 2, the Monitor may at any time during Phase 1 or Phase 2: (i) subject to Court approval, enter into a stalking horse agreement involving a transaction with respect to some or all of the Business with a party identified through the SISP or otherwise; or (ii) subject to Court approval, enter into a definitive agreement with respect to a transaction involving some or all of the Business with a party identified through the SISP or otherwise and suspend or terminate the SISP.

**"As is, Where is"**

34. Any sale (or sales) of the Business will be on an "**as is, where is**" basis except for representations and warranties that are customarily provided in purchase agreements for a company subject to CCAA proceedings and any such representations and warranties provided for in the definitive documents shall not survive closing.

**Free of Any and All Claims And Interests**

35. In the event of a sale, to the extent permitted by law, all of the rights, title and interests of the Company in and to the Business to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the "**Claims and Interests**") pursuant to section 36(6) of the CCAA, such Claims and Interests to attach to the net proceeds of the sale of such Business (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof), except to the extent otherwise set forth in the relevant transaction documents with a Successful Bidder.

**Credit Bidding**

36. Any party or parties holding a valid, enforceable, and properly perfected security interest in the Business may, subject in all respects to such party's compliance with the Bidding Procedures, credit bid the amount of debt secured by such lien as part of any transaction contemplated by the Bidding Procedures; provided, however, that such transaction shall also provide for the indefeasible and irrevocable repayment in full in cash on the date of closing of any such transaction of any and all obligations: (i) owing to the DIP Lenders; (ii) owing pursuant to any charges granted by the Court in the CCAA Proceedings; and (iii) secured by a security interest in the Business that is to be acquired under such transaction that is senior to the security interest held in such Business by the party

submitting such credit bid unless the holder or indenture trustee or agent of any such senior security interest otherwise agrees. Nothing contained in this paragraph 36 is intended to, or shall, alter or amend the rights, terms or obligations under any intercreditor agreement or other form of agreement in respect of existing indebtedness of the Company.

**Confidentiality**

37. For greater certainty other than as shall be required in connection with any Auction or Approval Motion, neither the Company nor the Monitor will share: (i) the identity of any Potential Bidder, or Phase 1 Qualified Bidder; or (ii) the terms of any bid, LOI, Phase 1 Qualified Bid, Sale Proposal, Investment Proposal or Phase 2 Qualified Bid, with any other bidder without the consent of such party (including by way of email).

**Further Orders**

38. At any time during the SISP, the Monitor may apply to the Court for advice and directions with respect to any aspect of this SISP and the Bidding Procedures including, but not limited to, the continuation of the SISP or with respect to the discharge of its powers and duties hereunder.

**Additional Terms**

39. In addition to any other requirement of these Bidding Procedures:

    (a) The Monitor, as applicable, shall at all times prior to the selection of a Successful Bid use commercially reasonable efforts to facilitate a competitive bidding process in the SISP including, without limitation, by actively soliciting participation by all persons who would be customarily identified as high potential bidders in a process of this kind or who may be reasonably proposed by any of the Monitor, the DIP Lenders or the Company's stakeholders as a high potential bidder.

    (b) Any consent, approval or confirmation to be provided by the Company and/or the Monitor is ineffective unless provided in writing and any approval required pursuant to the terms hereof is in addition to, and not in substitution for, any other approvals required by the CCAA or as otherwise required at law in order to implement a Successful Bid. For the avoidance of doubt, a consent, approval or confirmation provided by email shall be deemed to have been provided in writing for the purposes of this paragraph.

    (c) All Phase 1 Qualified Bidders and Phase 2 Qualified Bidders shall at all times be granted information, access and facilitation that is no less complete and timely than is granted by the Monitor, or their representatives, to other Phase 1 Qualified Bidders and Phase 2 Qualified Bidders pursuant to the SISP. This shall include, without limitation, reasonable access to the Company's books, records, financial information, management, advisors and business partners. The Monitor shall review all information and materials provided by the Company or its representatives to the DIP Lenders or their representatives pursuant to the DIP and, to the extent that the Monitor, in consultation with the Company, is of the view that

any such information or materials are materially relevant to a Potential Bidder or Phase 1 Qualified Bidder or Phase 2 Qualified Bidder, then such information or materials shall be promptly posted to the VDR or otherwise made available to all Potential Bidders, Phase 1 Qualified Bidders and Phase 2 Qualified Bidders. Nothing in this paragraph creates binding obligations of third parties.

(d) Nothing in this SISP shall require that a Successful Bid, Backup Bid or any other bid must be approved by the Court. The Court at all times retains the discretion to direct the clarification, termination, extension or modification of the SISP and Bidding Procedures on application of any interested party.

(e) Prior to the seeking of Court approval for any transaction or bid contemplated by this SISP, the Monitor will provide a report to the Court on the SISP process, parts of which may be filed under seal, including in respect of any and all bids received.

## APPENDIX A
## DEFINED TERMS

"**Applicant**" shall have the meaning set forth in the preamble.

"**Approval Motion**" shall have the meaning set forth in paragraph 30.

"**Approval Order(s)**" shall have the meaning set forth in paragraph 30.

"**Auction**" shall have the meaning set forth in paragraph 27.

"**Backup Bid**" shall have the meaning set forth in paragraph 29.

"**Backup Bidder**" shall have the meaning set forth in paragraph 29.

"**Bid**" shall have the meaning set forth in the preamble.

"**Bidding Procedures**" shall have the meaning set forth in the preamble.

"**Bidding Procedures Order**" shall have the meaning set forth in the preamble.

"**Binding Offer**" shall have the meaning set forth in paragraph 21.

"**Business**" shall have the meaning set forth in the preamble.

"**Business Day**" means a day on which banks are open for business in St. John's, Newfoundland and Labrador but does not include a Saturday, Sunday or statutory holiday in the Province of Newfoundland and Labrador.

"**CCAA**" shall have the meaning set forth in the preamble.

"**CCAA Proceedings**" shall have the meaning set forth in the preamble.

"**CIM**" "shall have the meaning set forth in paragraph 11.

"**Claims and Interests**" shall have the meaning set forth in paragraph 35.

"**Court**" shall have the meaning set forth in the preamble.

"**Deposit**" shall have the meaning set forth in paragraph 22(i).

"**DIP**" means the DIP Financing Agreement dated March 11, 2022 among Grant Thornton Limited, as the Monitor/Interim Receiver of the Company and the lenders party thereto from time to time providing for DIP financing.

"**DIP Lenders**" means, collectively, Bridging Finance Inc. and/or an affiliate to be named, and Her Majesty in Right of Newfoundland and Labrador, as represented by the Minister of Industry, Energy and Technology, each in its capacity as lender under the DIP.

"**Financing Party**" shall have the meaning set forth in paragraph 9.

"**Initial Order**" shall have the meaning set forth in the preamble.

"**Investment Proposal**" shall have the meaning set forth in paragraph 14(g)(ii).

"**LOI**" shall have the meaning set forth in paragraph 13.

"**Monitor**" shall have the meaning set forth in the preamble.

"**NDA**" shall have the meaning set forth in paragraph 9.

"**Opening Bid**" shall have the meaning set forth in paragraph 27(h)27(h).

"**Opportunity**" shall have the meaning set forth in paragraph 2.

"**Outside Date**" shall have the meaning set forth in paragraph 22(j).

"**Partial Sale Proposal**" shall have the meaning set forth in paragraph 14(g)(i).

"**Phase 1**" shall have the meaning set forth in paragraph 8.

"**Phase 1 Bid Deadline**" shall have the meaning set forth in paragraph 13.

"**Phase 1 Qualified Bid**" shall have the meaning set forth in paragraph 13.

"**Phase 1 Qualified Bidder**" shall have the meaning set forth in paragraph 10.

"**Phase 1 Successful Bid**" shall have the meaning set forth in paragraph 17.

"**Phase 2**" shall have the meaning set forth in paragraph 8.

"**Phase 2 Bid Deadline**" shall have the meaning set forth in paragraph 21.

"**Phase 2 Qualified Bid**" shall have the meaning set forth in paragraph 21.

"**Phase 2 Qualified Bidder**" shall have the meaning set forth in paragraph 17.

"**Potential Bidder**" shall have the meaning set forth in paragraph 9.

"**Sale Proposal**" shall have the meaning set forth in paragraph 14(g)(i).

"**SISP**" shall have the meaning set forth in the preamble.

"**Successful Bid**" shall have the meaning set forth in paragraph 25.

"**Successful Bidder**" shall have the meaning set forth in paragraph 25.

"**Target Closing Date**" shall have the meaning set forth in paragraph 22(j).

**"Solicitation Letter"** shall have the meaning set forth in paragraph 7.

**"Template LOI"** shall have the meaning set forth in paragraph 12.

**"Template PSA"** shall have the meaning set forth in paragraph 12.

**"VDR"** shall have the meaning set forth in paragraph 8.

## APPENDIX B

**TO the Company:**

**Canada Fluorspar Inc., Canada Fluorspar (NL) Inc. and Newspar (a General Partnership)**

with a copy to:

**O'Keefe and Company**

**Attention:** **Darren O'Keefe**
Email: darren@okeefeandcompany.com

**TO THE MONITOR:**

**Grant Thornton Limited**

**Attention:** **Phil Clarke and Jason Kanji**
Email: phil.clarke@ca.gt.com and jason.kanji@ca.gt.com

with a copy to:

**McInnes Cooper**

**Attention:** **Meghan King and Geoff Spencer**
Email: meghan.king@mcinnescooper.com and geoffrey.spencer@mcinnescooper.com

**Appendix H**

Affidavit of Richard A. Spellacy - September 26, 2022

e-document
FEDERAL COURT
COUR FÉDÉRALE
FILED
DÉPOSÉ
26-SEP-2022
Jasmine Lajoie
Ottawa, ONT
15

**Court File No. 279-22**

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC. ("CFI")**, a body corporate

**Defendant**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL INTERESTED IN THE SHIP "BARGE H-404" (the "Barge") (the "Action")**

**Defendant**
*(In Rem)*

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**AFFIDAVIT**
**OF**
**RICHARD A. SPELLACY MOTION**

---

I, Richard A. Spellacy, of the City of St. John's, in the Province of Newfoundland and Labrador, being duly sworn, do depose and say that:

1. I am the sole shareholder, officer and director of the Plaintiff, Inaminka Marine Services Limited ("IMS") in the within matter and, as such, I am aware of the matters relating to the claim of IMS against the Defendants and the arrest of the ship being CFI Pontoon 1, "BARGE H-404" (the "Barge").

2. I give this Affidavit in response to the Motion of Defendants for a stay of the within action.

3. IMS, through me, provides consultation services to the marine industry in various areas, such as, marine transportation; operation of vessels, including rigs, barges and tug boats, in general; advice on operations and safe movement of rigs and barges; advice on the use of tugs in the movement of rigs and barges; consultation and oversight in the construction, conversation and/or modification of ships (including barges). IMS is well respected in the marine industry and its services are sought after worldwide.

4. The Defendant, Canada Fluorspar (NL) Inc. ("CFNLI"), operated a fluorspar mine near the Town of St. Lawrence, NL. I understand that for some of the time, it exported and marketed fluorspar from its terminal near the mine, which is known as Blue Beach.

5. Based upon my communications with CFNLI, I understand that CFNLI is the owner of the Barge, which is registered in Panama.

6. I understand through my communications with CFNLI that it obtained the Barge to use at Blue Beach Terminal (the "Terminal"), which is at the site of its mine, to facilitate the loading of fluorspar on cargo ships at its loading pier at the Terminal. I have examined the Terminal, the pier, and the Barge itself, and I am familiar with the same. I, therefore, know that without the use of the Barge, it was impossible to load the cargo ships at the Terminal, particularly during inclement weather. CFNLI would often have to engage trucks to transport the fluorspar from the Terminal to awaiting cargo ships at a marine terminal in Marystown, NL. I was advised during my communications with CFNLI that trucking fluorspar from St. Lawrence to Marystown was a great expense to CFNLI and this expense could be eliminated if the Barge could be utilized at all times at the Terminal. The Barge in its then current state could not be moored at the Terminal to safely load the cargo ships during any kind of inclement weather.

7. Further, the Terminal was located on the south coast of the Island of Newfoundland and was open to the North Atlantic with no shelter from inclement weather. Docking the Barge at the Terminal during inclement weather, with high winds and seas, exposed the Barge to the risk of instability and damage. To move, the Barge from the Terminal to a protected location from the weather before the damaging winds and seas arrived could only be done by tugs. Moving the Barge by hiring tugs also increased CFNLI's expenses at the Terminal.

8. In or about late summer or early fall of 2021, I was consulted by Leo Power, a director of CFNLI, to engage IMS to assess the marine situation at Blue Beach and try and advise the management of CFNLI on how to deal with the problems associated with the use of the Barge at the Blue Beach Terminal. I was subsequently asked by Patrick Gannon et al to participate in a conference call took place on the afternoon of October 27, 2021 among the Vancouver Based Management team of CFI; Jason Flood of CFNLI in St. Lawrence; and Patrick Gannon of CFI in Montana. Subsequent to this conference call, IMS was approached by Bill Dobbs on behalf of the senior management of CFNLI seeking a solution to enable it to utilize the Barge at the Terminal to facilitate the loading of cargo ships there, regardless of the weather conditions. Mr. Flood explained that CFNLI wanted to eliminate the use of tugs to move the Barge to safety and eliminate the use of trucks to transport the fluorspar elsewhere for loading on the cargo ships. To accomplish this, CFNLI needed a set of storm moorings that would allow the Barge to move on and off the Blue Beach Terminal without the use of tugs and result in the Barge being safely moored on a set of storm moorings during periods of inclement weather.

9. On or about October 27, 2021 IMS was retained by CFNLI for the following, and other, services: to provide consultation to CFNLI on how the Barge could be protected from inclement weather by moving it safely away from the dock at the Terminal (the "loading piers") to safety and without using tugs; to design a system and/or process which would enable CFNLI to move the Barge on and off the loading piers, as needed; to design a set of storm moorings, equipped with storm anchors, where the Barge would be moored safely during inclement weather; to enable CFNLI to safely move the Barge on and off the storm moorings, as needed, and return the Barge safely to the loading piers after the inclement weather had passed; to complete sketches/drawings for each component of this system, including for the loading piers, storm moorings, storm anchors, and the necessary modifications to the Barge to accommodate the loading piers and storm moorings; to budget the cost for completing the foregoing and timeline and budget for the construction of this system; to source all contractors to manufacture and install the various components for the loading piers, storm moorings, storm anchors, and the modification to the Barge, itself, to facilitate its movement between the loading piers and storm moorings and to secure the Barge safely to the loading piers and the storm moorings, as needed (the "Services").

10. I designed the system and can state that the Services provided by IMS would have made it possible for CFNLI to use the Barge at the Terminal, eliminating the need to hire tugs to move the Barge from the Terminal to a location protected from the inclement weather and avoid transport of the fluorspar from the Terminal to Marystown by truck to load the fluorspar on awaiting cargo ships. In turn, the Services would have made it possible for CFNLI to use the Terminal to load cargo ships there, thereby making the overall operation of the fluorspar mine by CFNLI more commercially efficient, effective, and, in turn, profitable.

11. The Services were necessary to allow the safe and effective utilization of the Barge by CFNLI to operate the fluorspar mine and its business of marketing, selling and transporting its product around the world to its buyers.

12. The Services were completed and presented in final form to CFNLI by IMS on or about January 20, 2022 with the final budget, drawings, operating proposals, and timelines completed by IMS on January 30, 2022.

13. Upon retaining IMS for the Services, CFNLI required IMS to complete a vendor registration form (the "VR Form"), which we completed on or about October 28, 2021. In the VR Form, IMS stated that its terms for the Services were 30 days of issuing its invoices (net 30 days) and the contract amount for the Services was $143,000.00 plus tax. CFNLI issued to IMS two purchase orders to start the Services.

14. IMS issued invoices to CFNLI dated November 30, 2021, December 12, 2021, December 31, 2021, January 15, 2022 and February 1, 2022, respectively, which I prepared. The aggregate amount of the invoices are $146,870.02, including HST. CFNLI failed to pay the amount owing to IMS for the Services completed and IMS, therefore, commenced its action and caused the Barge to be arrested.

15. IMS's Statement of Claim was issued on February 16, 2022 against CFNLI and against the owners and all others interested in the ship, being the Barge. I gave an Affidavit Lead Warrant dated February 16, 2022 to support the issuance of a Warrant to Arrest the Barge. I understand from IMS' lawyer, Deborah L. J. Hutchings, K.C., that the Arrest of the Barge by Sherrif's Officers was effected on February 18, 2022 and service of the Statement of Claim was effected upon the Defendants on the same date. No defence has been filed in the within action.

16. Personally, I earn my living through the work of IMS. The principle sum owing by CFNLI of $143,000.00 plus taxes to IMS is a significant receivable for IMS and has caused my personal income to decrease significantly. This, in turn, has had a negative impact upon my ability to meet the cost of living in Newfoundland and Labrador which has increased exponentially over the last 18 months.

17. All facts deposed herein I believe to be true, except where stated otherwise. I give this Affidavit knowing that it is a criminal offense to make a false statement.

**SWORN** before me at the City of St. John's, in the Province of Newfoundland and Labrador, this 26th day of September, 2022, before me:

Commissioner for Oaths / Barrister / Notary Public

RICHARD A. SPELLACY

## Appendix I

Affidavit of Phil Clarke - September 27, 2022

e-document T-279-22-ID 35
FILED / DÉPOSÉ
FEDERAL COURT
COUR FÉDÉRALE
September 27, 2022
27 septembre 2022
Jonathan Macena
STJ 18

Court File No. T-279-22

**FEDERAL COURT**

**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.**, a body corporate

**Defendants**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

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**AFFIDAVIT OF PHIL CLARKE**

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I, Phil Clarke, CPA, CA, CIRP, LIT, of the City of Halifax, in the Province of Nova Scotia, MAKE OATH AND SAY AS FOLLOWS:

1. I am a Senior Vice President with Grant Thornton Limited ("**GTL**" or the "**Monitor**") and have personal knowledge of the matters deposed of herein. The within Affidavit is filed in response to the Affidavit of Richard A. Spellacy sworn September 26, 2022.

2. With respect to the scope of the consultation services provided by Inaminka Marine Services Limited ("**IMSL**") to Canada Fluorspar (NL) Inc. ("**CFI**"), while there were drawings prepared by IMSL and options presented to CFI for utilization of Barge H-404 (the "**Barge**") at CFI's marine terminal, such drawings were high-level and were not of

such a nature that CFI could utilize same. Further, to the best of my knowledge, information and belief: (i) while a high-level budget was prepared, CFI did not decide on any one option presented by IMSL and IMSL were not directed to undertake any further services either prior to or after February 21, 2022, being the date of the interim receivership order against CFI; (ii) no contractors were sourced by IMSL; (iii) nothing was manufactured by IMSL for the Barge or CFI's marine terminal; and (iv) no physical work was undertaken by IMSL in relation to the Barge or CFI's marine terminal.

3. For greater certainty, no goods, materials or services were supplied by IMSL to the Barge which could be characterized as necessary for its operation or maintenance and both the Barge and CFI's marine terminal remain operational in the same manner as prior to any consulting services provided by IMSL.

4. I make this Affidavit in good faith and in support of the request by the solicitors CFI to have the CCAA stay of proceedings recognized by the Federal Court and the Barge released from arrest pursuant to Section 50(1) of the *Federal Courts Act* and Rule 488(1) of the *Federal Court Rules* and for no other purpose.

**SWORN** before me at the City of St. John's, in the Province of Newfoundland and Labrador, on the 27th day of September, 2022.

Notary Public or Commissioner for Oaths (affix seal)

William T. Cahill
Barrister & Solicitor (NL)

PHIL CLARKE

## Appendix J

Order and Reasons - October 5, 2022

Federal Court Cour fédérale

**Date: 20221005**

**Docket: T-279-22**

**Citation: 2022 FC 1375**

**Ottawa, Ontario, October 5, 2022**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.,**
**a body corporate**

**Plaintiff**

**and**

**CANADA FLUORSPAR (NL) INC., a body corporate**

**Defendants**
**(*In Personam*)**

**and**

**THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
***(In Rem)***

**<u>ORDER AND REASONS</u>**

## I. **Overview**

[1] This motion arises in the context of the within action by the Plaintiff, Inaminka Marine Services Limited [IMS], *in personam* against Canada Fluorspar (NL) Inc. [CFI] and *in rem* against the Ship "Barge H-404" [the Barge]. In the action, IMS claims amounts owing for services alleged to have been provided to these Defendants. The Barge is under arrest in this action, and the Plaintiff's principal, Captain Richard Spellacy, has filed a Caveat against its release.

[2] In this motion, CFI invokes section 50(1) of the *Federal Courts Act*, RSC 1985, c F-7 [Act] to seek a stay of IMS's action and, under Rule 488 of the *Federal Courts Rules*, SOR/98-106 [Rules], seeks release of the Barge from arrest. The motion arises in the context of proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA] in the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency [the Bankruptcy Court] arising out of the insolvency of CFI, in which the Bankruptcy Court has issued a stay of proceedings against CFI. In the alternative, CFI moves to strike the *in rem* portion of IMS's action pursuant to Rule 221, on the basis that IMS's claims do not fall within the scope of section 22(2)(m) of the Act, and release the Barge from arrest pursuant to Rule 488.

[3] As explained in greater detail below, the motion for a stay is granted and the Barge is released from arrest, because CFI has satisfied the Court that, taking into account applicable jurisprudence and the particular circumstances of this matter, the Bankruptcy Court is a more

appropriate forum for adjudication of the Plaintiff's claim. It is therefore unnecessary for the Court to adjudicate CMI's motion for alternative relief.

## II. **Background**

[4] The *in personam* Defendant, CFI, is a corporation incorporated in Newfoundland and Labrador [NL]. It operates a fluorspar mine in St. Lawrence, NL. CFI is the owner of the Barge and employs the Barge to support the loading of cargo ships at the marine terminal at the site of its mine. While there was no evidence before the Court on this point, I understand the parties to agree that the Barge is a foreign vessel, registered in Panama.

[5] The Plaintiff, IMS, is also a corporation incorporated in NL. In this action, it claims for consultation and design services, related to a method and facilities for moving the Barge on and off the loading piers at CFI's marine terminal in response to inclement weather, the cost of which services it says remains owing by CFI.

[6] IMS commenced this action on February 16, 2022 and obtained a Warrant for the arrest of the Barge, which was executed that same day. The Barge was arrested where it was berthed at the Marbase (the former Marystown Shipyard) in Marystown, NL, and currently remains at the Marbase under arrest.

[7] Pursuant to an order dated February 22, 2022 [Interim Receivership Order], the Supreme Court of Newfoundland and Labrador General Division [SCNL] appointed Grant Thornton Limited [GT or Interim Receiver or Monitor] Interim Receiver of all of the property of CFI and

another company, Canada Fluorspar Inc. The Interim Receivership Order identifies such property [Property] to include all current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, except for the Excluded Property (as defined in the Interim Receivership Order). The Barge does not form part of the Excluded Property.

[8] The Interim Receivership Order provides that no proceedings shall be commenced or continued against or in respect of CFI, Canada Fluorspar Inc., or the Property without the consent of GT or leave of the SCNL. It also stays any proceedings currently underway against CFI, Canada Fluorspar Inc., or the Property at the time of the Interim Receivership Order, pending a further order of the SCNL.

[9] The Interim Receivership Order states that the SCNL requests the aid and recognition of any court having jurisdiction either within Canada or abroad to give effect to the order and assist GT, as Interim Receiver, in carrying out the order. It further requests that all other courts make orders and provide assistance to GT as may be necessary or desirable to give effect to the Interim Receivership Order.

[10] Subsequently, pursuant to an initial order dated March 11, 2022, which was amended and restated on March 18, 2022 [CCAA Order], the Bankruptcy Court appointed GT the Monitor for CFI, Canada Fluorspar Inc., and Newspar (a General Partnership), pursuant to the CCAA. To avoid confusion, I note that the Bankruptcy Court, which issued the CCAA Order, is the same

provincial superior court that issued the Interim Receivership Order, although styled differently for purposes of the CCAA proceeding.

[11] The CCAA Order provides that CFI remains in possession and control of its current and future assets, undertakings and property. It also stayed all proceedings against CFI or its property until July 10, 2022 [Stay Period]. Through a series of extensions, the Bankruptcy Court extended the Stay Period, which is currently effective until October 17, 2022. The CCAA Order further provides that either CFI or GT has the ability to apply to any court for the recognition of the CCAA Order and for assistance in carrying out the terms of the order.

[12] By order dated March 18, 2022, as subsequently revised [SISP Order], the Bankruptcy Court approved a Sale and Investment Solicitation Process [SISP] with respect to the assets of CFI. In the SISP Order, the Bankruptcy Court requests the aid in recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or elsewhere, to give effect to the SISP Order and to assist the applicants for the SISP Order (which include CFI acting through GT) and their respective agents in carrying out the terms of the SISP Order.

[13] On August 3, 2022, CFI filed its Notice of Motion in support of the motion now before the Court, seeking the following relief:

A. a stay of IMS's action against it and the Barge, pursuant to section 50(1) of the Act, and release of the Barge from arrest pursuant to Rule 488;

B. in the alternative, that this Court strike the *in rem* portion of IMS's action, pursuant to Rule 221, on the basis that IMS's claims do not fall within the scope of section 22(2)(m) of the Act, and release of the Barge from arrest pursuant to Rule 488;

C. in the further alternative, an extension of time for CFI to file its defence to IMS's action.

[14] On September 2, 2022, Captain Richard Spellacy, IMS's sole shareholder, officer and director, filed a Caveat against the release of the Barge from arrest. I understand from counsel's submissions that the Caveat was filed in support of a claim for master's wages.

[15] CFI subsequently served and filed its full motion record on or about September 20, 2022, and IMS filed its responding materials on September 26, 2022. The parties argued this motion on September 28, 2022. I understand from the parties that a motion to approve a proposed sale of CFI's assets under the SISP had been scheduled to be heard by the Bankruptcy Court on September 27, 2022, the day before the hearing of this motion. CFI's counsel advised at the outset of the hearing of the present motion that the motion before the Bankruptcy Court was being rescheduled and that a new hearing date had not yet been set. However, counsel confirmed that the approval to be sought from the Bankruptcy Court at that motion was in support of the closing of the proposed sale by October 7, 2022, or October 17, 2022 as an outside date.

## III. **Issues**

[16] This motion raises the following two principal issues for the Court's determination:

A. Whether the Court should exercise its discretion pursuant to section 50(1) of the Act to stay the within action commenced by IMS and, as a consequence, release the Barge from arrest; or

B. In the alternative, whether IMS's action should be struck pursuant to Rule 221, because the services alleged to be provided to CFI by IMS fall outside the scope of section 22(2)(m) of the Act and, as such, do not fall within the *in rem* jurisdiction of the Federal Court.

## IV. **Analysis**

### A. *Whether the Court should exercise its discretion pursuant to section 50(1) of the Act to stay the within action commenced by IMS and, as a consequence, release the Barge from arrest*

#### (1) General Principles

[17] In addressing this issue, it is helpful first to review general principles and supporting jurisprudence governing a motion of this nature in the context of an insolvency proceeding underway in a provincial superior court. In formulating the following explanation, I am borrowing liberally from my decision in *RMI Marine Limited v Scotia Tide (Ship)*, 2019 FC 114 [*RMI Marine*], which canvassed many of the same principles.

[18] Section 50 of the Act grants this Court the authority to stay a proceeding in any cause or matter on the ground that the claim is proceeding in another court or jurisdiction or where it is in the interests of justice to do so. The party seeking a stay is required to clearly establish the existence of a more appropriate forum (*Holt Cargo Systems Inc v ABC Containerline NV (Trustee of)*, 2001 SCC 90 [*Holt*] at para 89).

[19] As discussed in *RMI Marine*, the jurisprudential framework applicable to a motion of this sort was discussed in *Holt* and the companion decision in *Antwerp Bulkcarriers, NV (Re)*, 2001 SCC 91 [*Antwerp*]. *Holt* and *Antwerp* were decisions that arose in the context of the bankruptcy of a Belgian container line, which resulted in the arrest of one of its vessels, the "Brussel", at the Port of Halifax through an *in rem* action in the Federal Court.

[20] Following the arrest of the "Brussel", the shipowner was declared bankrupt by the Belgian bankruptcy court, and the trustees in bankruptcy obtained from the Superior Court of Québec an order recognizing the judgment of the Belgian court. The trustees subsequently obtained an order that the proceeds of sale of the vessel or the vessel itself be provided to the trustees for distribution through the Belgian bankruptcy [the Québec Superior Court Order]. This order was contrary to the ongoing procedural framework developed in the Federal Court for sale of the vessel and distribution of its proceeds. Relying in part on the Québec Superior Court Order, the trustees applied to the Federal Court for a stay of its proceedings and to have the proceeds of sale paid out to them. Justice MacKay of the Federal Court ruled against the trustees [the Federal Court Order].

[21] Both the Québec Superior Court Order and the Federal Court Order were appealed, and the Supreme Court of Canada ultimately considered the resulting appellate decisions.

[22] In Antwerp, which considered the appeal from the Québec Superior Court Order, the Supreme Court concluded (at paragraphs 37 and 40) that the Federal Court's maritime jurisdiction, once properly engaged by the commencement of the in rem action and the arrest of the ship, was not lost as a result of the subsequent bankruptcy of the shipowner. The Supreme Court also explained (at paragraphs 37 and 45 to 47) that the bankruptcy court had no power to deal with the vessel, which had already been captured by a competent order of the Federal Court. In essence, the Supreme Court found (at paragraphs 48 to 53) that the bankruptcy court's issuance of what amounted to an anti-suit injunction improperly attempted to restrict the Federal Court's ability to exercise its jurisdiction. The Supreme Court noted (at paragraphs 54 to 55) that it was open to the Federal Court judge to enter a stay if he considered it appropriate to do so, or to decline to accede to the request of the trustees as he did, and that the circumstances would have been the same had the bankruptcy occurred in Canada rather than in Belgium.

[23] In *Holt*, the Supreme Court considered the appeal from the Federal Court Order. The Supreme Court held (at paragraphs 41 to 44) that, pursuant to the applicable Canadian conflict of laws principles, the plaintiff, which had arrested the vessel in the Federal Court, was entitled to have its maritime lien status, conferred under the law of the United States where the plaintiff provided services to the vessel, recognized in the Federal Court proceeding.

[24] Consistent with the decision in Antwerp, the Supreme Court noted in *Holt* (at paragraphs 60 to 66) that the Federal Court did not lose jurisdiction as a result of orders issued by the Superior Court of Québec sitting in bankruptcy. The Supreme Court then considered whether the Federal Court should nevertheless have deferred to the Belgian bankruptcy court on the basis of international comity, concluding (at paragraphs 85 to 87) that international coordination was an important, but not necessarily a controlling, factor. The Federal Court was required to be mindful of the difficulties presented by international bankruptcies, including the desirability of minimizing the multiplicity of proceedings and potentially inconsistent decisions, as well as the need to do justice to the particular litigants before it. No single consideration was to be elevated to a controlling position in the exercise of the Federal Court's discretion whether to stay its own proceedings.

[25] Finally, in considering (at paragraphs 80 to 98) whether the Federal Court erred in the exercise of its discretion to deny the trustees' motion for a stay of proceedings, the Supreme Court noted that the principles on which the discretion should be exercised in this type of matter were authoritatively settled in Amchem Products Inc v British Columbia (Workers' Compensation Board), [1993] 1 SCR 897. That case explained that the relevant question was whether there was a more appropriate jurisdiction based on the relevant factors and that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff (pages 920 to 921). After noting the public policy considerations applicable in the context of an international bankruptcy, the Supreme Court described as follows (at paragraph 91 of *Holt*) the factors to be considered in making the discretionary decision:

> 91. The "natural forum" is the one to which the action has the most real and substantial connection (*Amchem*, at pp. 916 and

> 935). Relevant circumstances include not only issues of public policy (as in this case) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigating in one forum or the other, and the discouragement of forum shopping. In short, within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.

[26] The Supreme Court concluded that the Federal Court had considered the relevant factors in arriving at its decision. Justice MacKay had acknowledged the importance of comity and international coordination in a proper case, but he placed primary emphasis on the fact that he was dealing with an in rem action by secured creditors against the vessel which, at the time of the bankruptcy, the Federal Court had already arrested and, at the time of the interventions of the Canadian bankruptcy court, he had already ordered appraised and sold. The Supreme Court rejected the trustees' argument that the plaintiff was forum shopping by arresting the vessel in Canada and acknowledged that Justice MacKay had appropriately given weight to the juridical advantage afforded to the plaintiff in Canada through recognition of the secured status of its maritime lien.

[27] While there are factors that distinguish the "Brussel" litigation from the circumstances in the case at hand, *Holt* and Antwerp nevertheless provide in significant measure the framework that governs the exercise of discretion in considering CFI's motion for a stay under section 50 of the *Act*.

[28] *One obvious factual difference* is that the bankruptcy in the present case arises in a domestic context, not an international one. As noted in *RMI Marine*, this Court must nonetheless consider the effect of an order of a provincial superior court issued in the context of an

insolvency, which is an important, but not necessarily a controlling, factor (para 39). In that respect, guidance can also be taken from the decision in *Always Travel Inc v Air Canada*, 2003 FCT 707 [*Always Travel*], which also arose in the context of a CCAA proceeding in a provincial superior court.

[29] *Always Travel* involved a proposed class action in the Federal Court against a number of airlines, including Air Canada. At that time, Air Canada was the subject of an order from the Ontario Superior Court of Justice under the CCAA, which protected it against legal proceedings in the context of an intended restructuring. On that basis, Air Canada moved to have the Federal Court stay its proceedings.

[30] Much like the present case, the order of the Ontario Superior Court of Justice in *Always Travel* stayed all proceedings against Air Canada and expressly requested the aid and recognition of any Canadian court in carrying out the terms of the order (at para 8). Justice Hugessen of the Federal Court granted a stay of proceedings for three months, or until such earlier time as the stay by the Ontario Superior Court of Justice was lifted. In addressing the role of the Federal Court in considering a CCAA order from a provincial superior court, Justice Hugessen relied in part on the decisions in *Holt* and Antwerp in providing (at paragraphs 10 to 12) the following explanation:

> 10. Superior courts do not order each other about or make orders interfering with each other's process. Rather, it is essential that they should cooperate. Conflicts between courts, or other bodies having ultimate judicial power, may well have serious results, including perhaps even loss of liberty. In Canada, superior courts do not compete with one another. They accord to one another "full faith and credit," as was said in *Morguard Investments Ltd. v. De Savoye*, and repeated in the Brussel decisions. Justice Farley's order specifically requests that this Court, in comity, and more than that, in recognition of the fact that both courts are engaged in a single legal system in the

> administration of Canadian justice, should lend its aid to the order of the Ontario Superior Court of Justice staying proceedings.
>
> 11. It has been said to me this morning that I should not grant a stay order based on Justice Farley's orders first because I have no evidence before me and second because there has been no attempt to justify a stay in the terms of the classic three part test originally enunciated by the Supreme Court in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, and subsequently in *RJR MacDonald Inc. v. Canada (Attorney General)*. To that I say that this is not an ordinary stay and that a stay granted in comity does not need to meet the requirements of that test and does not need evidence; it is my view that the proper attitude of respectful cooperation which this Court should have and does have to judgments of the Ontario Superior Court of Justice will require that, as a matter of course, in virtually every case where an order is given by a provincial superior court in the exercise of its CCAA jurisdiction, and that order requests this Court's aid, this Court will give such aid on proper application being made.
>
> 12. That is not the end of the matter. If a party to proceedings in this Court thinks that a stay should not be granted in comity and in aid of a provincial superior court order, it is at liberty to oppose the stay or, if the stay is granted, apply to this Court to have it lifted. The plaintiffs would thus have been free to bring evidence today and make representations to me that for some reasons or other these proceedings ought not to be stayed, but matters did not develop in that way. Let me be quite clear. The burden is on a person seeking in this Court to avoid the consequences of this Court acting in aid of a provincial superior court exercising its jurisdiction under the CCAA. The burden is on that person to show this Court that it should not act in aid. Nothing that I say or do today forecloses the plaintiffs from making an application if they so wish. I say that simply because in the way in which these proceedings developed, it was agreed between counsel and the Court that we should deal with this matter today strictly on issues of law, matters of fact being left to another day, if necessary.

[31] I pause to note that the body of jurisprudence explained above is also canvassed in CFI's written representations in support of this motion, and IMS explained in its own written representations that it takes no issue with CFI's explanation of the basis upon which the Federal Court has determined when it is appropriate to impose a stay. However, at the hearing of this

motion, disagreement developed between counsel as to the significance of the above passage from *Always Travel*. CFI's counsel relies on this passage in support of a submission that, in responding to the motion, IMS bears the burden of proving that the Federal Court should not issue the requested stay in aid of the Bankruptcy Court. IMS disputes this position, arguing that, as the moving party, CFI must bear the burden.

[32] As found in *RMI Marine* (at para 42), I regard *Always Travel* as describing the proper attitude of respectful cooperation between courts, an attitude that is consistent with the guidance of the Supreme Court in *Holt* and *Antwerp* as to the importance of comity and cooperation. However, Always Travel should not be interpreted as detracting from the discretion to be exercised by the Federal Court in considering a motion to stay its proceedings or from the requirement to consider the other guidance and factors identified in *Holt*.

[33] As such, I accept IMS's position that CMI, as the moving party seeking a stay of a Federal Court proceeding, bears the burden to clearly establish the existence of a more appropriate forum (see *RMI Marine* at para 86, *Holt* at para 89). However, given the importance of comity and cooperation between courts, I also accept the reasoning in *Always Travel* that, particularly in a circumstance where a provincial superior court has expressly requested the aid of other courts in carrying out the terms of its order, it will typically be difficult for a responding party to resist such a request in the absence of compelling arguments in relation to the factors identified in *Holt*.

(2) Application of Principles

[34] Against that jurisprudential backdrop, I turn to consideration of the parties' arguments as to how the relevant principles should be applied in the case at hand.

[35] First, I note that this is clearly a case where a provincial superior court has issued requests for aid and recognition of its orders, as reflected in the orders canvassed earlier in these Reasons and, in particular, the SISP Order that governs the sale process in support of which CFI is seeking the stay. This is an important factor, complemented by public policy considerations associated with the purpose of the CCAA (see *RMI Marine* at para 86). As CFI submits, the CCAA is broad remedial legislation designed to facilitate a restructuring of debtor corporations in the interest of the company, its creditors and the public (see, *e.g., Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 18).

[36] CFI argues that the SISP, which is being supervised by the Bankruptcy Court, represents a means of achieving an orderly sale of CFI's assets for the general benefit of creditors and stakeholders. CFI submits that such a process cannot proceed efficiently or effectively in separate courts with multiple creditor actions and duplicative motions. I accept the merit of these submissions and afford them weight as relevant public policy considerations.

[37] On the other side of the ledger, IMS argues that it will be prejudiced if it is not permitted to pursue its claim to judgment and satisfaction through sale of the vessel under the Federal Court's *in rem* processes. In support of this position, IMS submits that, in addition to having rights *in rem* under section 22(2)(m) of the Act, it benefits from a maritime lien under section 139(2) of the *Marine Liability Act*, SC 2001, c 6 [MLA], which affords such status to claims that

arise in respect of goods, materials or services supplied to a foreign vessel (within the meaning of section 2 of the *Canada Shipping Act, 2001*, SC 2001, c 26). As previously noted, I understand that it is not disputed that the barge is not registered in Canada and is therefore a foreign vessel for purposes of section 139(2).

[38] IMS takes the position that it requires access to the Federal Court's jurisdiction and processes in order to benefit from the priority afforded by the maritime lien it claims. It also relies on the Federal Court's jurisdiction to use equitable principles of Canadian maritime law to elevate to the equivalent of maritime lien status a claim that may not otherwise benefit from a maritime lien. IMS refers to the explanation of these equitable principles in *Nanaimo Harbour Link Corp v Abakhan & Associates Inc*, 2007 BCSC 109 [*Nanaimo*], in which the Supreme Court of British Columbia [BCSC] considered an application by maritime claimants for an order under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA] that the statutory stay of proceedings conferred by the BIA did not apply to the claimants' Federal Court proceedings. The claimants asserted that their claims benefited from secured status as maritime liens or were entitled to equivalent status pursuant to equitable principles and that the Federal Court had jurisdiction to apply said principles.

[39] *Nanaimo* referred to these equitable principles at paragraphs 21 and 22, explaining that certain of the maritime claimants asserted that they were entitled to elevated status in the Federal Court proceedings as a result of their supply of labour and materials to the ship. The claimants argued that the value of the ship was resultantly enhanced such that it would be inequitable for the mortgagee to be enriched by that enhanced value without credit to the suppliers. Ultimately,

the BCSC granted the claimants' application, concluding that they should have the opportunity to seek maritime lien or equivalent status and that the ranking of priorities and the proof of maritime claims were matters for the Federal Court to determine pursuant to the principles of Canadian maritime law (at para 53).

[40] In the case at hand, IMS similarly argues that the services it provided to the Barge served to enhance its value and that this enhanced value will be realized in any sale of the Barge. As such, in the event it is not successful in arguing entitlement to maritime lien status under section 139(2) of the MLA, it will be seeking equivalent status through an equitable adjustment of priorities in accordance with Canadian maritime law principles.

[41] CFI disputes IMS's claimed entitlement to maritime lien status. Indeed, as it argued under the alternative issue presented in its motion, CFI takes the position that IMS does not qualify as an *in rem* necessaries claimant under section 22(2)(m) of the Act. However, the Court need not reach a conclusion on any of those disputes for the purposes of the present issue, which is whether to grant the requested stay. Importantly, CFI acknowledges that IMS has the right to assert its claim (including its claim for maritime lien or equivalent priority status) in the CCAA proceeding against the proceeds of sale that will result from the SISP. CFI also acknowledges that, as a superior court with inherent jurisdiction and concurrent jurisdiction over Canadian maritime law, the Bankruptcy Court would be in a position to adjudicate IMS's claims and associated arguments for priority.

[42] IMS argues that, as the Federal Court has experience with the adjudication of maritime claims and the application of the principles of maritime law it wishes to invoke, it should not be deprived of the opportunity to pursue its claim in this Court. I also understand it to express doubt as to its ability to invoke these maritime law principles in the CCAA proceeding before the Bankruptcy Court. However, IMS has provided no authority or compelling argument in support of this concern. I find no basis to conclude that the Bankruptcy Court lacks the jurisdiction to adjudicate IMS's claims or that the substantive principles of Canadian maritime law or the Bankruptcy Court's application of those principles would differ from what IMS would encounter before the Federal Court.

[43] There is no question that, if the requested stay were to deprive IMS of a juridical advantage that would be available to it in the Federal Court but not in the Bankruptcy Court, that would be a significant factor militating against granting the stay. Such a consideration was a significant factor underlying the reasoning in *Holt* (at paras 46-50). As explained earlier in these Reasons, the plaintiff in *Holt* enjoyed a juridical advantage before the Federal Court that would be in jeopardy if the Federal Court proceedings were stayed in deference to the Belgian bankruptcy court, because Belgian law would not recognize the plaintiff's maritime lien status under US law. In contrast, in the case at hand, there is no evident juridical advantage to IMS in the Federal Court that would not also be available before the Bankruptcy Court.

[44] Before leaving these arguments by IMS, I should also note that the outcome in *Nanaimo* turned significantly on the fact that the provincial superior court proceeding in that case was being conducted under the BIA. As the BCSC observed at paragraph 10, section 136(1) of the

BIA excludes secured creditors from the statute's scheme of distribution of the assets of a bankrupt party. Relying on that provision and its application in *Holt*, the BCSC assessed the applicant's claims for maritime lien or comparable status as secured claims entitled to be adjudicated outside the bankruptcy (*Nanaimo* at paras 10-19, 53). However, as CFI submits, *Nanaimo* is distinguishable from the case at hand, which involves a proceeding not under the BIA, but under the CCAA. Presumably because the objective of the CCAA is to facilitate the restructuring of insolvent companies rather than distributing their assets, the CCAA does not contain a provision comparable to section 136 of the BIA.

[45] I have also considered other arguments advanced by IMS in opposition to the requested stay. These include a submission that CFI comes to the Court without "clean hands" and therefore should not be afforded the relief it seeks. While IMS has not identified any authority supporting its position, I accept that there is potential for a lack of clean hands to be relevant to the Court's willingness to grant the sort of discretionary remedy represented by a stay under section 50(1) of the Act.

[46] In support of this argument, IMS takes issue with the fact that CFI did not file a Statement of Defence to IMS's Federal Court action, in the over seven months since the action was commenced, and then brought what IMS characterizes as a last minute stay motion, with little notice to IMS, in order to support the impending sale of CFI's assets. IMS also argues that, prior to late August 2022, the Monitor and CFI had not included IMS's counsel on the service list for motions in the CCAA proceeding. IMS submits that these circumstances have caused it

prejudice, including incurring legal costs to respond to this motion and irreparable harm that it will suffer if the Barge is released from arrest.

[47] On the subject of the stage to which this proceeding has progressed and the fact CFI has not filed a Defence, CFI relies on the stay of all other proceedings imposed by the provincial superior court orders. Of course, in accordance with the reasoning in *Always Travel*, CFI requires the discretionary order now sought from the Federal Court to implement that stay in the present proceeding. However, in these circumstances, I find no basis to conclude that its failure to file a Defence in this proceeding represents any sort of misconduct.

[48] Indeed, CFI argues that the fact this proceeding has not advanced beyond service of the Statement of Claim and arrest of the Barge militates in favour of granting the stay. This position is consistent with the reasoning in *Holt*, in which Justice MacKay's decision not to stay the Federal Court proceeding turned in part on the fact that proceeding has already advanced to issuance of an order for appraisement and sale of the "Brussel".

[49] Turning to the timing of the present motion, CMI filed its Notice of Motion on August 2, 2022. While it did not serve and file the remainder of its motion materials until Tuesday, September 20, 2022, the timing for the filing of IMS's responding materials on Monday, September 26, 2022 and the hearing of the motion on Wednesday, September 28, 2022, was set by the Court at a case management conference on September 22, 2022, following consultation with counsel. IMS has not advanced a compelling argument that the timing of this motion is

untoward or that it had inadequate time to prepare to respond. In my view, IMS has not established that CFI's approach to this litigation represents a lack of clean hand.

[50] Finally, returning to considerations of public policy, IMS submits that granting the requested stay could cause a loss of confidence on the part of the maritime industry that relies upon the Federal Court's *in rem* jurisdiction and processes. In my view, this argument must be considered in the context of the above analysis of IMS's arguments surrounding the loss of juridical advantage it alleges it would experience as result of the stay. As I have found no basis for a conclusion that IMS would be unable to assert its claims and priority arguments before the Bankruptcy Court through the CCAA process, I place little weight on IMS's public policy argument.

(3) Conclusion on Stay Motion

[51] Based on the above analysis, I am satisfied that CFI has clearly established that the CCAA proceeding before the Bankruptcy Court represents a more appropriate forum than the present proceeding for adjudication of claims against the Barge. I will therefore issue a stay of the present proceeding.

[52] At the hearing of this motion, CMI's counsel explained that it is anticipated that the stay in the CCAA proceeding, which currently expires on October 17, 2022, will be extended potentially to a date in February 2023 to afford time for completion of remaining processes under the CCAA. There is no evidence before the Court on an extension of the CCAA stay or its likely duration. However, I accept the logic of CMI's submission that, under the present circumstances,

the duration of the Federal Court stay should be concurrent with that under the CCAA. My Order will so provide. However, it will also reserve the Plaintiff's right to apply to have the stay of its action lifted at an earlier time in the event of any material change in circumstances.

(4) Release of the Barge from Arrest

[53] It flows from the decision to stay the Plaintiff's action, and the reasoning underlying that decision, that the Barge should be released from arrest to facilitate its sale along with other assets of CFI through the CCAA proceeding. I note IMS's position that, if the Court were to grant CFI's motion, it should order that CFI post bail for the release of the Barge from arrest. However, the reasoning explained above, underlying the decision to grant the stay, turns significantly on IMS's ability to assert its claim against the proceeds of sale of the Barge achieved through the CCAA process. As CFI has satisfied the Court that a stay is warranted, I do not consider it appropriate to also impose a requirement to post bail to achieve release of the Barge from arrest.

[54] Before leaving the subject of the Barge's release, I will briefly address the significance of the Caveat filed by Captain Spellacy. During the hearing of this motion, disagreement developed between counsel surrounding the scope of the motion in relation to the Caveat. IMS's counsel objected to submissions by CFI's counsel related to the Caveat, taking the position that CFI's Notice of Motion was silent on the subject of the Caveat. CFI responded to the objection by pointing out that the Caveat was filed only on September 2, 2022, a month after the Notice of Motion was filed, but that CFI's subsequent written representations in support of the motion spoke to the Caveat and requested relief in relation thereto.

[55] Further exploration of the parties' positions on the objection clarified that IMS's concern was with the possibility that CFI was seeking to strike or dismiss the Caveat, through arguments akin to those advanced in relation to IMS's action under the second, alternative, issue in this motion. While the evidence upon which IMS relies in this motion was provided in an affidavit sworn by its principal, Captain Spellacy, IMS's counsel explained that this evidence did not speak to Captain Spellacy's personal claim in support of which the Caveat had been filed. Indeed, the Court has very little information related to that claim, other than that it has been described as seeking master's wages.

[56] However, IMS's counsel advised that she accepted that, as a matter of law, if the Court decided to stay IMS's action, then that stay would apply to any caveats filed in the action. CFI's counsel in turn clarified that it was not his intention to advance arguments, akin to those under the alternative issue, to strike the Caveat. Rather, CFI's arguments in relation to the Caveat are advanced solely under the first issue. CFI takes the position that the principles and analyses that support its motion for a stay of the Plaintiff's claim apply equally to the Caveat.

[57] As such, the parties appear to agree that a decision to stay the action includes application of that stay to the Caveat filed therein. The Caveat therefore does not represent an impediment to the Court ordering the Barge released from arrest. Regardless of such agreement, I cannot identify any basis to conclude that the Court's analysis, underlying its finding that the Bankruptcy Court is a preferable forum for adjudication of IMS's claim, would not also apply to the claim underlying the Caveat.

[58] Finally, I note that at the hearing I explored with CMI's counsel the concern raised by IMS's counsel that, once the Barge is released from arrest, it is not precluded from departing the jurisdiction. While the SISP Order contemplates the closing of the sale of CFI's assets, including the Barge, by early to mid October, the sale has not yet been approved. However, I accept CFI's submission that GT is pursuing the sale of the business as a going concern and that, as the parties agree, the Barge is a key asset in the operation of the business. I am satisfied that this is not a case where there is an obvious risk of the Barge fleeing the jurisdiction.

B. *In the alternative, whether IMS's action should be struck pursuant to Rule 221, because the services alleged to be provided to CFI by IMS fall outside the scope of section 22(2)(m) of the Act and, as such, do not fall within the in rem jurisdiction of the Federal Court*

[59] Given my decision to grant the stay requested under the first issue in this motion, and as the second issue is advanced in the alternative, the Court will not adjudicate the second issue.

## V. **Costs**

[60] The parties agree that cost should flow to the successful party in this motion. At the hearing, the Court afforded counsel the opportunity to attempt to agree on a lump sum costs figure. While no agreement resulted, CFI's counsel proposed a figure of $3500.00, and IMS's counsel did not make substantive submissions opposing this figure. As CFI's counsel notes, in the somewhat similar motion in *RMI Marine*, I awarded the successful party costs in the all-inclusive amount of $3500.00. I consider that amount appropriate in the case at hand, and my Order will so provide.

**ORDER IN T-279-22**

**THIS COURT ORDERS that:**

1. The Plaintiff's action is stayed, effective until October 17, 2022, or any later date to which the stay issued by the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency may be extended.

2. The Plaintiff shall have leave to apply to have the stay of its action lifted at an earlier time in the event of any material change in circumstances.

3. The Plaintiff shall pay the Defendant, Canada Fluorspar (NL) Inc., costs of this motion in the all-inclusive amount of $3500.00.

"Richard F. Southcott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-279-22 |
| **STYLE OF CAUSE:** | INAMINKA MARINE SERVICES LIMITED., v CANADA FLUORSPAR (NL) INC., and THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404" |
| **PLACE OF HEARING:** | HEARD VIA VIDEOCONFERENCE |
| **DATE OF HEARING:** | SEPTEMBER 28, 2022 |
| **ORDER AND REASONS:** | SOUTHCOTT J. |
| **DATED:** | OCTOBER 5, 2022 |

**APPEARANCES:**

| | |
|---|---|
| Deborah L.J. Hutchings | FOR THE PLAINTIFF |
| William T. Cahill & Allison Philpott | FOR THE DEFENDANTS |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| MacNab Fagan & Murphy<br>St. John's, Newfoundland | FOR THE PLAINTIFF |
| Cox & Palmer<br>St. John's, Newfoundland | FOR THE DEFENDANTS |

## Appendix K

Corrected Order and Reasons - October 5, 2022

Federal Court Cour fédérale

**Date: 20221005**

**Docket: T-279-22**

**Citation: 2022 FC 1375**

**Ottawa, Ontario, October 5, 2022**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.,**
**a body corporate**

**Plaintiff**

**and**

**CANADA FLUORSPAR (NL) INC., a body corporate**

**Defendants**
**(*In Personam*)**

**and**

**THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
***(In Rem)***

**<u>CORRECTED</u> ORDER AND REASONS**

**<u>(Corrected October 7, 2022, under Rule 397(2), to include the release from arrest omitted from the Order)</u>**

## I. **Overview**

[1] This motion arises in the context of the within action by the Plaintiff, Inaminka Marine Services Limited [IMS], *in personam* against Canada Fluorspar (NL) Inc. [CFI] and *in rem* against the Ship "Barge H-404" [the Barge]. In the action, IMS claims amounts owing for services alleged to have been provided to these Defendants. The Barge is under arrest in this action, and the Plaintiff's principal, Captain Richard Spellacy, has filed a Caveat against its release.

[2] In this motion, CFI invokes section 50(1) of the *Federal Courts Act*, RSC 1985, c F-7 [Act] to seek a stay of IMS's action and, under Rule 488 of the *Federal Courts Rules*, SOR/98-106 [Rules], seeks release of the Barge from arrest. The motion arises in the context of proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA] in the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency [the Bankruptcy Court] arising out of the insolvency of CFI, in which the Bankruptcy Court has issued a stay of proceedings against CFI. In the alternative, CFI moves to strike the *in rem* portion of IMS's action pursuant to Rule 221, on the basis that IMS's claims do not fall within the scope of section 22(2)(m) of the Act, and release the Barge from arrest pursuant to Rule 488.

[3] As explained in greater detail below, the motion for a stay is granted and the Barge is released from arrest, because CFI has satisfied the Court that, taking into account applicable jurisprudence and the particular circumstances of this matter, the Bankruptcy Court is a more

appropriate forum for adjudication of the Plaintiff's claim. It is therefore unnecessary for the Court to adjudicate CMI's motion for alternative relief.

## II. **Background**

[4] The *in personam* Defendant, CFI, is a corporation incorporated in Newfoundland and Labrador [NL]. It operates a fluorspar mine in St. Lawrence, NL. CFI is the owner of the Barge and employs the Barge to support the loading of cargo ships at the marine terminal at the site of its mine. While there was no evidence before the Court on this point, I understand the parties to agree that the Barge is a foreign vessel, registered in Panama.

[5] The Plaintiff, IMS, is also a corporation incorporated in NL. In this action, it claims for consultation and design services, related to a method and facilities for moving the Barge on and off the loading piers at CFI's marine terminal in response to inclement weather, the cost of which services it says remains owing by CFI.

[6] IMS commenced this action on February 16, 2022 and obtained a Warrant for the arrest of the Barge, which was executed that same day. The Barge was arrested where it was berthed at the Marbase (the former Marystown Shipyard) in Marystown, NL, and currently remains at the Marbase under arrest.

[7] Pursuant to an order dated February 22, 2022 [Interim Receivership Order], the Supreme Court of Newfoundland and Labrador General Division [SCNL] appointed Grant Thornton Limited [GT or Interim Receiver or Monitor] Interim Receiver of all of the property of CFI and

another company, Canada Fluorspar Inc. The Interim Receivership Order identifies such property [Property] to include all current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, except for the Excluded Property (as defined in the Interim Receivership Order). The Barge does not form part of the Excluded Property.

[8] The Interim Receivership Order provides that no proceedings shall be commenced or continued against or in respect of CFI, Canada Fluorspar Inc., or the Property without the consent of GT or leave of the SCNL. It also stays any proceedings currently underway against CFI, Canada Fluorspar Inc., or the Property at the time of the Interim Receivership Order, pending a further order of the SCNL.

[9] The Interim Receivership Order states that the SCNL requests the aid and recognition of any court having jurisdiction either within Canada or abroad to give effect to the order and assist GT, as Interim Receiver, in carrying out the order. It further requests that all other courts make orders and provide assistance to GT as may be necessary or desirable to give effect to the Interim Receivership Order.

[10] Subsequently, pursuant to an initial order dated March 11, 2022, which was amended and restated on March 18, 2022 [CCAA Order], the Bankruptcy Court appointed GT the Monitor for CFI, Canada Fluorspar Inc., and Newspar (a General Partnership), pursuant to the CCAA. To avoid confusion, I note that the Bankruptcy Court, which issued the CCAA Order, is the same

provincial superior court that issued the Interim Receivership Order, although styled differently for purposes of the CCAA proceeding.

[11] The CCAA Order provides that CFI remains in possession and control of its current and future assets, undertakings and property. It also stayed all proceedings against CFI or its property until July 10, 2022 [Stay Period]. Through a series of extensions, the Bankruptcy Court extended the Stay Period, which is currently effective until October 17, 2022. The CCAA Order further provides that either CFI or GT has the ability to apply to any court for the recognition of the CCAA Order and for assistance in carrying out the terms of the order.

[12] By order dated March 18, 2022, as subsequently revised [SISP Order], the Bankruptcy Court approved a Sale and Investment Solicitation Process [SISP] with respect to the assets of CFI. In the SISP Order, the Bankruptcy Court requests the aid in recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or elsewhere, to give effect to the SISP Order and to assist the applicants for the SISP Order (which include CFI acting through GT) and their respective agents in carrying out the terms of the SISP Order.

[13] On August 3, 2022, CFI filed its Notice of Motion in support of the motion now before the Court, seeking the following relief:

A. a stay of IMS's action against it and the Barge, pursuant to section 50(1) of the Act, and release of the Barge from arrest pursuant to Rule 488;

B. in the alternative, that this Court strike the *in rem* portion of IMS's action, pursuant to Rule 221, on the basis that IMS's claims do not fall within the scope of section 22(2)(m) of the Act, and release of the Barge from arrest pursuant to Rule 488;

C. in the further alternative, an extension of time for CFI to file its defence to IMS's action.

[14] On September 2, 2022, Captain Richard Spellacy, IMS's sole shareholder, officer and director, filed a Caveat against the release of the Barge from arrest. I understand from counsel's submissions that the Caveat was filed in support of a claim for master's wages.

[15] CFI subsequently served and filed its full motion record on or about September 20, 2022, and IMS filed its responding materials on September 26, 2022. The parties argued this motion on September 28, 2022. I understand from the parties that a motion to approve a proposed sale of CFI's assets under the SISP had been scheduled to be heard by the Bankruptcy Court on September 27, 2022, the day before the hearing of this motion. CFI's counsel advised at the outset of the hearing of the present motion that the motion before the Bankruptcy Court was being rescheduled and that a new hearing date had not yet been set. However, counsel confirmed that the approval to be sought from the Bankruptcy Court at that motion was in support of the closing of the proposed sale by October 7, 2022, or October 17, 2022 as an outside date.

## III. **Issues**

[16] This motion raises the following two principal issues for the Court's determination:

A. Whether the Court should exercise its discretion pursuant to section 50(1) of the Act to stay the within action commenced by IMS and, as a consequence, release the Barge from arrest; or

B. In the alternative, whether IMS's action should be struck pursuant to Rule 221, because the services alleged to be provided to CFI by IMS fall outside the scope of section 22(2)(m) of the Act and, as such, do not fall within the *in rem* jurisdiction of the Federal Court.

## IV. **Analysis**

### A. *Whether the Court should exercise its discretion pursuant to section 50(1) of the Act to stay the within action commenced by IMS and, as a consequence, release the Barge from arrest*

#### (1) General Principles

[17] In addressing this issue, it is helpful first to review general principles and supporting jurisprudence governing a motion of this nature in the context of an insolvency proceeding underway in a provincial superior court. In formulating the following explanation, I am borrowing liberally from my decision in *RMI Marine Limited v Scotia Tide (Ship)*, 2019 FC 114 [*RMI Marine*], which canvassed many of the same principles.

[18] Section 50 of the Act grants this Court the authority to stay a proceeding in any cause or matter on the ground that the claim is proceeding in another court or jurisdiction or where it is in the interests of justice to do so. The party seeking a stay is required to clearly establish the existence of a more appropriate forum (*Holt Cargo Systems Inc v ABC Containerline NV (Trustee of)*, 2001 SCC 90 [*Holt*] at para 89).

[19] As discussed in *RMI Marine*, the jurisprudential framework applicable to a motion of this sort was discussed in *Holt* and the companion decision in *Antwerp Bulkcarriers, NV (Re)*, 2001 SCC 91 [*Antwerp*]. *Holt* and *Antwerp* were decisions that arose in the context of the bankruptcy of a Belgian container line, which resulted in the arrest of one of its vessels, the "Brussel", at the Port of Halifax through an *in rem* action in the Federal Court.

[20] Following the arrest of the "Brussel", the shipowner was declared bankrupt by the Belgian bankruptcy court, and the trustees in bankruptcy obtained from the Superior Court of Québec an order recognizing the judgment of the Belgian court. The trustees subsequently obtained an order that the proceeds of sale of the vessel or the vessel itself be provided to the trustees for distribution through the Belgian bankruptcy [the Québec Superior Court Order]. This order was contrary to the ongoing procedural framework developed in the Federal Court for sale of the vessel and distribution of its proceeds. Relying in part on the Québec Superior Court Order, the trustees applied to the Federal Court for a stay of its proceedings and to have the proceeds of sale paid out to them. Justice MacKay of the Federal Court ruled against the trustees [the Federal Court Order].

[21] Both the Québec Superior Court Order and the Federal Court Order were appealed, and the Supreme Court of Canada ultimately considered the resulting appellate decisions.

[22] In Antwerp, which considered the appeal from the Québec Superior Court Order, the Supreme Court concluded (at paragraphs 37 and 40) that the Federal Court's maritime jurisdiction, once properly engaged by the commencement of the in rem action and the arrest of the ship, was not lost as a result of the subsequent bankruptcy of the shipowner. The Supreme Court also explained (at paragraphs 37 and 45 to 47) that the bankruptcy court had no power to deal with the vessel, which had already been captured by a competent order of the Federal Court. In essence, the Supreme Court found (at paragraphs 48 to 53) that the bankruptcy court's issuance of what amounted to an anti-suit injunction improperly attempted to restrict the Federal Court's ability to exercise its jurisdiction. The Supreme Court noted (at paragraphs 54 to 55) that it was open to the Federal Court judge to enter a stay if he considered it appropriate to do so, or to decline to accede to the request of the trustees as he did, and that the circumstances would have been the same had the bankruptcy occurred in Canada rather than in Belgium.

[23] In *Holt*, the Supreme Court considered the appeal from the Federal Court Order. The Supreme Court held (at paragraphs 41 to 44) that, pursuant to the applicable Canadian conflict of laws principles, the plaintiff, which had arrested the vessel in the Federal Court, was entitled to have its maritime lien status, conferred under the law of the United States where the plaintiff provided services to the vessel, recognized in the Federal Court proceeding.

[24] Consistent with the decision in Antwerp, the Supreme Court noted in *Holt* (at paragraphs 60 to 66) that the Federal Court did not lose jurisdiction as a result of orders issued by the Superior Court of Québec sitting in bankruptcy. The Supreme Court then considered whether the Federal Court should nevertheless have deferred to the Belgian bankruptcy court on the basis of international comity, concluding (at paragraphs 85 to 87) that international coordination was an important, but not necessarily a controlling, factor. The Federal Court was required to be mindful of the difficulties presented by international bankruptcies, including the desirability of minimizing the multiplicity of proceedings and potentially inconsistent decisions, as well as the need to do justice to the particular litigants before it. No single consideration was to be elevated to a controlling position in the exercise of the Federal Court's discretion whether to stay its own proceedings.

[25] Finally, in considering (at paragraphs 80 to 98) whether the Federal Court erred in the exercise of its discretion to deny the trustees' motion for a stay of proceedings, the Supreme Court noted that the principles on which the discretion should be exercised in this type of matter were authoritatively settled in Amchem Products Inc v British Columbia (Workers' Compensation Board), [1993] 1 SCR 897. That case explained that the relevant question was whether there was a more appropriate jurisdiction based on the relevant factors and that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff (pages 920 to 921). After noting the public policy considerations applicable in the context of an international bankruptcy, the Supreme Court described as follows (at paragraph 91 of *Holt*) the factors to be considered in making the discretionary decision:

> 91. The "natural forum" is the one to which the action has the most real and substantial connection (*Amchem*, at pp. 916 and

> 935). Relevant circumstances include not only issues of public policy (as in this case) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigating in one forum or the other, and the discouragement of forum shopping. In short, within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.

[26] The Supreme Court concluded that the Federal Court had considered the relevant factors in arriving at its decision. Justice MacKay had acknowledged the importance of comity and international coordination in a proper case, but he placed primary emphasis on the fact that he was dealing with an in rem action by secured creditors against the vessel which, at the time of the bankruptcy, the Federal Court had already arrested and, at the time of the interventions of the Canadian bankruptcy court, he had already ordered appraised and sold. The Supreme Court rejected the trustees' argument that the plaintiff was forum shopping by arresting the vessel in Canada and acknowledged that Justice MacKay had appropriately given weight to the juridical advantage afforded to the plaintiff in Canada through recognition of the secured status of its maritime lien.

[27] While there are factors that distinguish the "Brussel" litigation from the circumstances in the case at hand, *Holt* and Antwerp nevertheless provide in significant measure the framework that governs the exercise of discretion in considering CFI's motion for a stay under section 50 of the *Act*.

[28] *One obvious factual difference* is that the bankruptcy in the present case arises in a domestic context, not an international one. As noted in *RMI Marine*, this Court must nonetheless consider the effect of an order of a provincial superior court issued in the context of an

insolvency, which is an important, but not necessarily a controlling, factor (para 39). In that respect, guidance can also be taken from the decision in *Always Travel Inc v Air Canada*, 2003 FCT 707 [*Always Travel*], which also arose in the context of a CCAA proceeding in a provincial superior court.

[29] *Always Travel* involved a proposed class action in the Federal Court against a number of airlines, including Air Canada. At that time, Air Canada was the subject of an order from the Ontario Superior Court of Justice under the CCAA, which protected it against legal proceedings in the context of an intended restructuring. On that basis, Air Canada moved to have the Federal Court stay its proceedings.

[30] Much like the present case, the order of the Ontario Superior Court of Justice in *Always Travel* stayed all proceedings against Air Canada and expressly requested the aid and recognition of any Canadian court in carrying out the terms of the order (at para 8). Justice Hugessen of the Federal Court granted a stay of proceedings for three months, or until such earlier time as the stay by the Ontario Superior Court of Justice was lifted. In addressing the role of the Federal Court in considering a CCAA order from a provincial superior court, Justice Hugessen relied in part on the decisions in *Holt* and Antwerp in providing (at paragraphs 10 to 12) the following explanation:

> 10. Superior courts do not order each other about or make orders interfering with each other's process. Rather, it is essential that they should cooperate. Conflicts between courts, or other bodies having ultimate judicial power, may well have serious results, including perhaps even loss of liberty. In Canada, superior courts do not compete with one another. They accord to one another "full faith and credit," as was said in *Morguard Investments Ltd. v. De Savoye*, and repeated in the Brussel decisions. Justice Farley's order specifically requests that this Court, in comity, and more than that, in recognition of the fact that both courts are engaged in a single legal system in the

> administration of Canadian justice, should lend its aid to the order of the Ontario Superior Court of Justice staying proceedings.
>
> 11. It has been said to me this morning that I should not grant a stay order based on Justice Farley's orders first because I have no evidence before me and second because there has been no attempt to justify a stay in the terms of the classic three part test originally enunciated by the Supreme Court in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, and subsequently in *RJR MacDonald Inc. v. Canada (Attorney General)*. To that I say that this is not an ordinary stay and that a stay granted in comity does not need to meet the requirements of that test and does not need evidence; it is my view that the proper attitude of respectful cooperation which this Court should have and does have to judgments of the Ontario Superior Court of Justice will require that, as a matter of course, in virtually every case where an order is given by a provincial superior court in the exercise of its CCAA jurisdiction, and that order requests this Court's aid, this Court will give such aid on proper application being made.
>
> 12. That is not the end of the matter. If a party to proceedings in this Court thinks that a stay should not be granted in comity and in aid of a provincial superior court order, it is at liberty to oppose the stay or, if the stay is granted, apply to this Court to have it lifted. The plaintiffs would thus have been free to bring evidence today and make representations to me that for some reasons or other these proceedings ought not to be stayed, but matters did not develop in that way. Let me be quite clear. The burden is on a person seeking in this Court to avoid the consequences of this Court acting in aid of a provincial superior court exercising its jurisdiction under the CCAA. The burden is on that person to show this Court that it should not act in aid. Nothing that I say or do today forecloses the plaintiffs from making an application if they so wish. I say that simply because in the way in which these proceedings developed, it was agreed between counsel and the Court that we should deal with this matter today strictly on issues of law, matters of fact being left to another day, if necessary.

[31] I pause to note that the body of jurisprudence explained above is also canvassed in CFI's written representations in support of this motion, and IMS explained in its own written representations that it takes no issue with CFI's explanation of the basis upon which the Federal Court has determined when it is appropriate to impose a stay. However, at the hearing of this

motion, disagreement developed between counsel as to the significance of the above passage from *Always Travel*. CFI's counsel relies on this passage in support of a submission that, in responding to the motion, IMS bears the burden of proving that the Federal Court should not issue the requested stay in aid of the Bankruptcy Court. IMS disputes this position, arguing that, as the moving party, CFI must bear the burden.

[32] As found in *RMI Marine* (at para 42), I regard *Always Travel* as describing the proper attitude of respectful cooperation between courts, an attitude that is consistent with the guidance of the Supreme Court in *Holt* and *Antwerp* as to the importance of comity and cooperation. However, Always Travel should not be interpreted as detracting from the discretion to be exercised by the Federal Court in considering a motion to stay its proceedings or from the requirement to consider the other guidance and factors identified in *Holt*.

[33] As such, I accept IMS's position that CMI, as the moving party seeking a stay of a Federal Court proceeding, bears the burden to clearly establish the existence of a more appropriate forum (see *RMI Marine* at para 86, *Holt* at para 89). However, given the importance of comity and cooperation between courts, I also accept the reasoning in *Always Travel* that, particularly in a circumstance where a provincial superior court has expressly requested the aid of other courts in carrying out the terms of its order, it will typically be difficult for a responding party to resist such a request in the absence of compelling arguments in relation to the factors identified in *Holt*.

(2) Application of Principles

[34] Against that jurisprudential backdrop, I turn to consideration of the parties' arguments as to how the relevant principles should be applied in the case at hand.

[35] First, I note that this is clearly a case where a provincial superior court has issued requests for aid and recognition of its orders, as reflected in the orders canvassed earlier in these Reasons and, in particular, the SISP Order that governs the sale process in support of which CFI is seeking the stay. This is an important factor, complemented by public policy considerations associated with the purpose of the CCAA (see *RMI Marine* at para 86). As CFI submits, the CCAA is broad remedial legislation designed to facilitate a restructuring of debtor corporations in the interest of the company, its creditors and the public (see, *e.g., Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 18).

[36] CFI argues that the SISP, which is being supervised by the Bankruptcy Court, represents a means of achieving an orderly sale of CFI's assets for the general benefit of creditors and stakeholders. CFI submits that such a process cannot proceed efficiently or effectively in separate courts with multiple creditor actions and duplicative motions. I accept the merit of these submissions and afford them weight as relevant public policy considerations.

[37] On the other side of the ledger, IMS argues that it will be prejudiced if it is not permitted to pursue its claim to judgment and satisfaction through sale of the vessel under the Federal Court's *in rem* processes. In support of this position, IMS submits that, in addition to having rights *in rem* under section 22(2)(m) of the Act, it benefits from a maritime lien under section 139(2) of the *Marine Liability Act*, SC 2001, c 6 [MLA], which affords such status to claims that

arise in respect of goods, materials or services supplied to a foreign vessel (within the meaning of section 2 of the *Canada Shipping Act, 2001*, SC 2001, c 26). As previously noted, I understand that it is not disputed that the barge is not registered in Canada and is therefore a foreign vessel for purposes of section 139(2).

[38] IMS takes the position that it requires access to the Federal Court's jurisdiction and processes in order to benefit from the priority afforded by the maritime lien it claims. It also relies on the Federal Court's jurisdiction to use equitable principles of Canadian maritime law to elevate to the equivalent of maritime lien status a claim that may not otherwise benefit from a maritime lien. IMS refers to the explanation of these equitable principles in *Nanaimo Harbour Link Corp v Abakhan & Associates Inc*, 2007 BCSC 109 [*Nanaimo*], in which the Supreme Court of British Columbia [BCSC] considered an application by maritime claimants for an order under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA] that the statutory stay of proceedings conferred by the BIA did not apply to the claimants' Federal Court proceedings. The claimants asserted that their claims benefited from secured status as maritime liens or were entitled to equivalent status pursuant to equitable principles and that the Federal Court had jurisdiction to apply said principles.

[39] *Nanaimo* referred to these equitable principles at paragraphs 21 and 22, explaining that certain of the maritime claimants asserted that they were entitled to elevated status in the Federal Court proceedings as a result of their supply of labour and materials to the ship. The claimants argued that the value of the ship was resultantly enhanced such that it would be inequitable for the mortgagee to be enriched by that enhanced value without credit to the suppliers. Ultimately,

the BCSC granted the claimants' application, concluding that they should have the opportunity to seek maritime lien or equivalent status and that the ranking of priorities and the proof of maritime claims were matters for the Federal Court to determine pursuant to the principles of Canadian maritime law (at para 53).

[40] In the case at hand, IMS similarly argues that the services it provided to the Barge served to enhance its value and that this enhanced value will be realized in any sale of the Barge. As such, in the event it is not successful in arguing entitlement to maritime lien status under section 139(2) of the MLA, it will be seeking equivalent status through an equitable adjustment of priorities in accordance with Canadian maritime law principles.

[41] CFI disputes IMS's claimed entitlement to maritime lien status. Indeed, as it argued under the alternative issue presented in its motion, CFI takes the position that IMS does not qualify as an *in rem* necessaries claimant under section 22(2)(m) of the Act. However, the Court need not reach a conclusion on any of those disputes for the purposes of the present issue, which is whether to grant the requested stay. Importantly, CFI acknowledges that IMS has the right to assert its claim (including its claim for maritime lien or equivalent priority status) in the CCAA proceeding against the proceeds of sale that will result from the SISP. CFI also acknowledges that, as a superior court with inherent jurisdiction and concurrent jurisdiction over Canadian maritime law, the Bankruptcy Court would be in a position to adjudicate IMS's claims and associated arguments for priority.

[42] IMS argues that, as the Federal Court has experience with the adjudication of maritime claims and the application of the principles of maritime law it wishes to invoke, it should not be deprived of the opportunity to pursue its claim in this Court. I also understand it to express doubt as to its ability to invoke these maritime law principles in the CCAA proceeding before the Bankruptcy Court. However, IMS has provided no authority or compelling argument in support of this concern. I find no basis to conclude that the Bankruptcy Court lacks the jurisdiction to adjudicate IMS's claims or that the substantive principles of Canadian maritime law or the Bankruptcy Court's application of those principles would differ from what IMS would encounter before the Federal Court.

[43] There is no question that, if the requested stay were to deprive IMS of a juridical advantage that would be available to it in the Federal Court but not in the Bankruptcy Court, that would be a significant factor militating against granting the stay. Such a consideration was a significant factor underlying the reasoning in *Holt* (at paras 46-50). As explained earlier in these Reasons, the plaintiff in *Holt* enjoyed a juridical advantage before the Federal Court that would be in jeopardy if the Federal Court proceedings were stayed in deference to the Belgian bankruptcy court, because Belgian law would not recognize the plaintiff's maritime lien status under US law. In contrast, in the case at hand, there is no evident juridical advantage to IMS in the Federal Court that would not also be available before the Bankruptcy Court.

[44] Before leaving these arguments by IMS, I should also note that the outcome in *Nanaimo* turned significantly on the fact that the provincial superior court proceeding in that case was being conducted under the BIA. As the BCSC observed at paragraph 10, section 136(1) of the

BIA excludes secured creditors from the statute's scheme of distribution of the assets of a bankrupt party. Relying on that provision and its application in *Holt*, the BCSC assessed the applicant's claims for maritime lien or comparable status as secured claims entitled to be adjudicated outside the bankruptcy (*Nanaimo* at paras 10-19, 53). However, as CFI submits, *Nanaimo* is distinguishable from the case at hand, which involves a proceeding not under the BIA, but under the CCAA. Presumably because the objective of the CCAA is to facilitate the restructuring of insolvent companies rather than distributing their assets, the CCAA does not contain a provision comparable to section 136 of the BIA.

[45] I have also considered other arguments advanced by IMS in opposition to the requested stay. These include a submission that CFI comes to the Court without "clean hands" and therefore should not be afforded the relief it seeks. While IMS has not identified any authority supporting its position, I accept that there is potential for a lack of clean hands to be relevant to the Court's willingness to grant the sort of discretionary remedy represented by a stay under section 50(1) of the Act.

[46] In support of this argument, IMS takes issue with the fact that CFI did not file a Statement of Defence to IMS's Federal Court action, in the over seven months since the action was commenced, and then brought what IMS characterizes as a last minute stay motion, with little notice to IMS, in order to support the impending sale of CFI's assets. IMS also argues that, prior to late August 2022, the Monitor and CFI had not included IMS's counsel on the service list for motions in the CCAA proceeding. IMS submits that these circumstances have caused it

prejudice, including incurring legal costs to respond to this motion and irreparable harm that it will suffer if the Barge is released from arrest.

[47] On the subject of the stage to which this proceeding has progressed and the fact CFI has not filed a Defence, CFI relies on the stay of all other proceedings imposed by the provincial superior court orders. Of course, in accordance with the reasoning in *Always Travel*, CFI requires the discretionary order now sought from the Federal Court to implement that stay in the present proceeding. However, in these circumstances, I find no basis to conclude that its failure to file a Defence in this proceeding represents any sort of misconduct.

[48] Indeed, CFI argues that the fact this proceeding has not advanced beyond service of the Statement of Claim and arrest of the Barge militates in favour of granting the stay. This position is consistent with the reasoning in *Holt*, in which Justice MacKay's decision not to stay the Federal Court proceeding turned in part on the fact that proceeding has already advanced to issuance of an order for appraisement and sale of the "Brussel".

[49] Turning to the timing of the present motion, CMI filed its Notice of Motion on August 2, 2022. While it did not serve and file the remainder of its motion materials until Tuesday, September 20, 2022, the timing for the filing of IMS's responding materials on Monday, September 26, 2022 and the hearing of the motion on Wednesday, September 28, 2022, was set by the Court at a case management conference on September 22, 2022, following consultation with counsel. IMS has not advanced a compelling argument that the timing of this motion is

untoward or that it had inadequate time to prepare to respond. In my view, IMS has not established that CFI's approach to this litigation represents a lack of clean hand.

[50] Finally, returning to considerations of public policy, IMS submits that granting the requested stay could cause a loss of confidence on the part of the maritime industry that relies upon the Federal Court's *in rem* jurisdiction and processes. In my view, this argument must be considered in the context of the above analysis of IMS's arguments surrounding the loss of juridical advantage it alleges it would experience as result of the stay. As I have found no basis for a conclusion that IMS would be unable to assert its claims and priority arguments before the Bankruptcy Court through the CCAA process, I place little weight on IMS's public policy argument.

(3) Conclusion on Stay Motion

[51] Based on the above analysis, I am satisfied that CFI has clearly established that the CCAA proceeding before the Bankruptcy Court represents a more appropriate forum than the present proceeding for adjudication of claims against the Barge. I will therefore issue a stay of the present proceeding.

[52] At the hearing of this motion, CMI's counsel explained that it is anticipated that the stay in the CCAA proceeding, which currently expires on October 17, 2022, will be extended potentially to a date in February 2023 to afford time for completion of remaining processes under the CCAA. There is no evidence before the Court on an extension of the CCAA stay or its likely duration. However, I accept the logic of CMI's submission that, under the present circumstances,

the duration of the Federal Court stay should be concurrent with that under the CCAA. My Order will so provide. However, it will also reserve the Plaintiff's right to apply to have the stay of its action lifted at an earlier time in the event of any material change in circumstances.

(4) Release of the Barge from Arrest

[53] It flows from the decision to stay the Plaintiff's action, and the reasoning underlying that decision, that the Barge should be released from arrest to facilitate its sale along with other assets of CFI through the CCAA proceeding. I note IMS's position that, if the Court were to grant CFI's motion, it should order that CFI post bail for the release of the Barge from arrest. However, the reasoning explained above, underlying the decision to grant the stay, turns significantly on IMS's ability to assert its claim against the proceeds of sale of the Barge achieved through the CCAA process. As CFI has satisfied the Court that a stay is warranted, I do not consider it appropriate to also impose a requirement to post bail to achieve release of the Barge from arrest.

[54] Before leaving the subject of the Barge's release, I will briefly address the significance of the Caveat filed by Captain Spellacy. During the hearing of this motion, disagreement developed between counsel surrounding the scope of the motion in relation to the Caveat. IMS's counsel objected to submissions by CFI's counsel related to the Caveat, taking the position that CFI's Notice of Motion was silent on the subject of the Caveat. CFI responded to the objection by pointing out that the Caveat was filed only on September 2, 2022, a month after the Notice of Motion was filed, but that CFI's subsequent written representations in support of the motion spoke to the Caveat and requested relief in relation thereto.

[55] Further exploration of the parties' positions on the objection clarified that IMS's concern was with the possibility that CFI was seeking to strike or dismiss the Caveat, through arguments akin to those advanced in relation to IMS's action under the second, alternative, issue in this motion. While the evidence upon which IMS relies in this motion was provided in an affidavit sworn by its principal, Captain Spellacy, IMS's counsel explained that this evidence did not speak to Captain Spellacy's personal claim in support of which the Caveat had been filed. Indeed, the Court has very little information related to that claim, other than that it has been described as seeking master's wages.

[56] However, IMS's counsel advised that she accepted that, as a matter of law, if the Court decided to stay IMS's action, then that stay would apply to any caveats filed in the action. CFI's counsel in turn clarified that it was not his intention to advance arguments, akin to those under the alternative issue, to strike the Caveat. Rather, CFI's arguments in relation to the Caveat are advanced solely under the first issue. CFI takes the position that the principles and analyses that support its motion for a stay of the Plaintiff's claim apply equally to the Caveat.

[57] As such, the parties appear to agree that a decision to stay the action includes application of that stay to the Caveat filed therein. The Caveat therefore does not represent an impediment to the Court ordering the Barge released from arrest. Regardless of such agreement, I cannot identify any basis to conclude that the Court's analysis, underlying its finding that the Bankruptcy Court is a preferable forum for adjudication of IMS's claim, would not also apply to the claim underlying the Caveat.

[58] Finally, I note that at the hearing I explored with CMI's counsel the concern raised by IMS's counsel that, once the Barge is released from arrest, it is not precluded from departing the jurisdiction. While the SISP Order contemplates the closing of the sale of CFI's assets, including the Barge, by early to mid October, the sale has not yet been approved. However, I accept CFI's submission that GT is pursuing the sale of the business as a going concern and that, as the parties agree, the Barge is a key asset in the operation of the business. I am satisfied that this is not a case where there is an obvious risk of the Barge fleeing the jurisdiction.

B. *In the alternative, whether IMS's action should be struck pursuant to Rule 221, because the services alleged to be provided to CFI by IMS fall outside the scope of section 22(2)(m) of the Act and, as such, do not fall within the in rem jurisdiction of the Federal Court*

[59] Given my decision to grant the stay requested under the first issue in this motion, and as the second issue is advanced in the alternative, the Court will not adjudicate the second issue.

## V. **Costs**

[60] The parties agree that cost should flow to the successful party in this motion. At the hearing, the Court afforded counsel the opportunity to attempt to agree on a lump sum costs figure. While no agreement resulted, CFI's counsel proposed a figure of $3500.00, and IMS's counsel did not make substantive submissions opposing this figure. As CFI's counsel notes, in the somewhat similar motion in *RMI Marine*, I awarded the successful party costs in the all-inclusive amount of $3500.00. I consider that amount appropriate in the case at hand, and my Order will so provide.

**<u>CORRECTED</u> ORDER IN T-279-22**

**THIS COURT ORDERS that:**

1. The Plaintiff's action is stayed, effective until October 17, 2022, or any later date to which the stay issued by the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency may be extended.

2. The Plaintiff shall have leave to apply to have the stay of its action lifted at an earlier time in the event of any material change in circumstances.

3. <u>The Defendant Ship is released from arrest.</u>

4. The Plaintiff shall pay the Defendant, Canada Fluorspar (NL) Inc., costs of this motion in the all-inclusive amount of $3500.00.

"Richard F. Southcott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-279-22 |
| **STYLE OF CAUSE:** | INAMINKA MARINE SERVICES LIMITED., v CANADA FLUORSPAR (NL) INC., and THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404" |
| **PLACE OF HEARING:** | HEARD VIA VIDEOCONFERENCE |
| **DATE OF HEARING:** | SEPTEMBER 28, 2022 |
| **ORDER AND REASONS:** | SOUTHCOTT J. |
| **DATED:** | OCTOBER 5, 2022 |

**APPEARANCES:**

| | |
|---|---|
| Deborah L.J. Hutchings | FOR THE PLAINTIFF |
| William T. Cahill & Allison Philpott | FOR THE DEFENDANTS |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| MacNab Fagan & Murphy<br>St. John's, Newfoundland | FOR THE PLAINTIFF |
| Cox & Palmer<br>St. John's, Newfoundland | FOR THE DEFENDANTS |

**Appendix L**

Affidavit of Richard A. Spellacy – October 24, 2022

e-document T-279-22-ID 48

FILED / DÉPOSÉ
FEDERAL COURT
COUR FÉDÉRALE
February 15, 2023
15 février 2023
Tanya Smith
STJ 22

# TAB 2 – AFFIDAVIT OF RICHARD A. SPELLACY DATED OCTOBER 24, 2022

**Court File No. T-279-22**

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED**

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC. ("CFI")**

**Defendants**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL INTERESTED IN THE SHIP "BARGE H-404"**

**Defendants**
*(In Rem)*

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**AFFIDAVIT**
**OF**
**RICHARD A. SPELLACY**

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I, Richard A. Spellacy, of the City of St. John's, in the Province of Newfoundland and Labrador, being duly sworn, do depose and say that:

1. I am the sole shareholder, officer and director of the Plaintiff Inaminka Marine Services Limited ("**IMS**") in the within matter and, as such, I am aware of the matters relating to the claim of IMS against the Defendants and the arrest of the ship being CFI Pontoon 1, "BARGE H-404" (the "**Barge**").

2. I have read the within Motion of IMS seeking an order to lift the stay of its action, reinstatement of the arrest of the Barge, and leave to bring a Motion before this Court for

the sale of the Barge pursuant to the Federal Court Rules and I give this Affidavit in support of IMS's Motion.

3. I further state that matters herein disposed to are true, except where I have stated to be based upon information and belief.

4. IMS, through me, provides consultation services to the marine industry in various areas, such as, marine transportation; operation of vessels, including rigs, barges and tug boats, in general; advice on operations and safe movement of rigs and barges; advice on the use of tugs in the movement of rigs and barges; consultation and oversight in the construction, conversion and/or modification of ships (including barges). IMS is well respected in the marine industry and its services are sought after worldwide.

5. The Defendant Canada Fluorspar (NL) Inc. ("**CFI**") operated a fluorspar mine near the Town of St. Lawrence, NL. I understand that for some of the time, it exported and marketed fluorspar from its terminal near the mine, which is known as Blue Beach.

6. Based upon my communications with CFI, I understand that it is the owner of the Barge which is registered in Panama. Attached hereto as Exhibit "A" is a copy of the proof of Registration of the Barge in Panama.

7. I understand through my communications with CFI that it obtained the Barge to use at Blue Beach Terminal (the "**Terminal**"), which is at the site of its mine, to facilitate the loading of fluorspar on cargo ships at its loading pier at the Terminal. I have examined the Terminal, the pier, and the Barge itself, and I am familiar with the same. I, therefore, know that without the use of the Barge, it was impossible to load the cargo ships at the loading pier at the Terminal, particularly during inclement weather. The Barge was purchased by CFI for the express purpose of providing an interface at the Blue Beach Terminal, as shown in the photographs attached to my Affidavit. CFI would often have to engage trucks to transport the fluorspar from the Terminal to awaiting cargo ships at a marine terminal in Marystown, NL. I was advised during my communications with CFI that trucking fluorspar from St. Lawrence to Marystown was a great expense to CFI and this expense could be eliminated if the Barge could be utilized at all times at the Terminal. The Barge in its then current state could not be moored at the Terminal to safely load the cargo ships during any kind of inclement weather. Attached hereto as Exhibit "B" are

photographs which I took of the Barge while moored up to the Terminal and they show the gaps or spacing between the Barge and loading pier which prevented CFI from utilizing the Barge as the Terminal.

8. Further, the Terminal was located on the south coast of the Island of Newfoundland and was open to the North Atlantic with no shelter from inclement weather. Docking the Barge at the Terminal during inclement weather, with high winds and seas, exposed the Barge to the risk of instability and damage. A report showing the damage to the starboard side of the Barge during such weather is attached hereto as Exhibit "L". To move the Barge from the Terminal to a protected location from the weather before the damaging winds and seas arrived could only be done by tugs. Moving the Barge by hiring tugs also increased CFI's expenses at the Terminal.

9. In or about late summer or early fall of 2021, I was consulted by Leo Power, a director of CFI, to engage IMS to assess the marine situation at Blue Beach and to advise the management of CFI on how to deal with and resolve the problems associated with the use of the Barge at the Blue Beach Terminal. I was subsequently asked by Patrick Gannon and others to participate in a conference call that took place on the afternoon of October 27, 2021 among the Vancouver Based Management team of CFI; Jason Flood of CFI in St. Lawrence; and Patrick Gannon of CFI in Montana. Subsequent to this conference call, IMS was approached by Bill Dobbs on behalf of the senior management of CFI seeking a solution to enable it to utilize the Barge at the Terminal to facilitate the loading of cargo ships there, regardless of the weather conditions. Mr. Flood explained that CFI wanted to eliminate the use of tugs to move the Barge to safety and eliminate the use of trucks to transport the fluorspar elsewhere for loading on the cargo ships. To accomplish this, I determined that CFI needed a set of storm moorings that would allow the Barge to move on and off the Blue Beach Terminal without the use of tugs and result in the Barge being safely moored on a set of storm moorings during periods of inclement weather.

10. On or about October 27, 2021 IMS was retained by CFI for the following, and other, services: to provide consultation to CFI on how the Barge could be protected from inclement weather by moving it safely away from the dock at the Terminal (the "**loading piers**") to safety and without using tugs; to design a system and/or process which would enable CFI to move the Barge on and off the loading piers, as needed; to design a set of storm moorings, equipped with storm anchors, where the Barge would be moored safely

during inclement weather; to enable CFI to safely move the Barge on and off the storm moorings, as needed, and return the Barge safely to the loading piers after the inclement weather had passed; to complete sketches/drawings for each component of this system, including for the loading piers, storm moorings, storm anchors, and the necessary modifications to the Barge to accommodate the loading piers and storm moorings; to budget the cost for completing the foregoing and timeline and budget for the construction of this system; to source all contractors to manufacture, fabricate, and install the various components for the loading piers, storm moorings, storm anchors, and the modification to the Barge, itself, to facilitate its movement between the loading piers and storm moorings and to secure the Barge safely to the loading piers and the storm moorings, as needed (the "**Services**").

11. I designed the system and can state that the Services provided by IMS would have made it possible for CFI to use the Barge at the Terminal, eliminating the need to hire tugs to move the Barge from the Terminal to a location protected from the inclement weather and avoid transport of the fluorspar from the Terminal to Marystown by truck to load the fluorspar on awaiting cargo ships. In turn, the Services would have made it possible for CFI to use the Terminal to load cargo ships there, thereby making the overall operation of the fluorspar mine by CFI more commercially efficient, effective, and, in turn, profitable.

12. The Services were necessary to allow the safe and effective utilization of the Barge by CFI to operate the fluorspar mine and its business of marketing, selling and transporting its product around the world to its buyers.

13. The Services were completed and presented in final form to CFI by IMS on or about January 20, 2022 with the final budget, drawings, operating proposals, and timelines completed by IMS on January 30, 2022.

14. Upon retaining IMS for the Services, CFI required IMS to complete a vendor registration form (the "**VR Form**"), which we completed on or about October 28, 2021. In the VR Form, IMS stated that its terms for the Services were 30 days of issuing its invoices (net 30 days) and the contract amount for the Services was $143,000.00 plus tax. CFI issued to IMS two purchase orders to start the Services. Attached hereto as Exhibit "C" to this my

Affidavit is a true copy of the VR Form. Attached hereto as Exhibit "D" is a true copy of the purchase orders issued to IMS from CFI.

15. IMS issued invoices to CFI dated November 30, 2021, December 12, 2021, December 31, 2021, January 15, 2022 and February 1, 2022, respectively, which I prepared. The aggregate amount of the invoices are $146,870.02, including HST. CFI failed to pay the amount owing to IMS for the Services completed and IMS, therefore, commenced its action and caused the Barge to be arrested. Attached hereto as Exhibit "E" are true copies of invoices issued by IMS to CFI for the Services.

16. IMS's Statement of Claim was issued on February 16, 2022 against CFI and against the owners and all others interested in the ship, being the Barge. I gave an Affidavit Lead Warrant dated February 16, 2022 to support the issuance of a Warrant to Arrest the Barge. I understand from IMS' lawyer, Deborah L. J. Hutchings, KC, that the Arrest of the Barge by Sherrif's Officers was effected on February 18, 2022 and service of the Statement of Claim was effected upon the Defendants on the same date. To the date hereof no defence has been filed in the within action. Attached hereto as Exhibited "F" are the Sheriff's documents which I understand confirms the arrest of the Barge and service of the Statement of Claim.

17. Personally, I earn my living through the work of IMS. The principle sum owing by CFI of $143,000.00 plus taxes to IMS is a significant receivable for IMS and has caused my personal income to decrease significantly. This, in turn, has had a negative impact upon my ability to meet the cost of living in Newfoundland and Labrador which has increased exponentially over the last 18 months or so. I am nearly 80 years of age, and I am still reliant upon my earnings of IMS to support myself personally.

18. Without any prior knowledge of IMS or me, and I am advised by solicitor Deborah L. H. Hutchings, KC, and do verily believe, that by an Order Appointing Interim Receiver dated February 21, 2022 of the Supreme Court of Newfoundland and Labrador ("**SCNL**"), Grant Thornton Limited ("**GTL**"), namely Phil Clarke of GTL, was appointed Interim Receiver (the "**Interim Receiver**") of CFI pursuant to the Bankruptcy and Insolvency Act ("**BIA**").

19. I am advised by Deborah L.J. Hutchings KC, and do verily believe, that by application of the Interim Receiver, SCNL granted an initial order dated March 11, 2022, pursuant to the

Companies Creditors Arrangement Act ("**CCAA**") that the Interim Receiver be appointed Monitor over CFI (the "**Monitor**").

20. On August 2, 2022, CFI, under the direction of the Monitor, filed a Motion to impose a stay of the Action and sought the release of the Barge from arrest and, in turn, the release of a Caveat filed by me with the Court on September 2, 2022 for my claim for unpaid master's wages while I was acting as master of the Barge (the "**CFI Motion**").

21. By my Affidavit of September 2, 2022, which I attached to my Proof of Claim, I set out the basis and calculation of my claim for Master's Wages with the Monitor. Attached hereto as Exhibit "H" to this my Affidavit is a true copy of my Proof of Claim and Affidavit attached thereto.

22. The CFI Motion was supported by an Affidavit of Phil Clarke in his capacity of Monitor. The Monitor stated it had a purchaser for the assets of CFI ("**Successful Bidder**") and that since the Barge was a "key" component of the sale, the Monitor required that the Action be stayed and, in turn, the arrest of the Barge be released. This, effectively, would release my Caveat.

23. I attach hereto as Exhibit "G", a true copy of Phil Clarke's Affidavit which was filed in support of the CFI Motion. This Affidavit provides background into the BIA and CCAA proceedings.

24. CFI stated that the CFI Motion was urgent as the Monitor had successfully negotiated a sale of CFI's assets, which included the Barge, and without the stay upon the Action and release of the Barge from arrest, the sale would likely not be completed. The closing of the sale was imminent and all parties concerned, including creditors, were awaiting the outcome of the CFI Motion. Therefore, the hearing of the CFI Motion was urgent.

25. The CFI Motion was heard on an urgent basis on September 28, 2022 before the Honourable Mr. Justice Richard Southcott ("**Justice Southcott**"), who reserved his decision but later rendered it in writing on October 5, 2022 (the "**Decision**"). Attached hereto as Exhibit "I" is a true copy of the Decision.

26. In the Decision of Justice Southcott the Action was stayed, thereby releasing the arrest of the Barge and, in turn, releasing my Caveat; however, Justice Southcott also ordered that IMS "shall have leave to apply to have the stay of its action lifted at an earlier time in the event of any material change in the circumstances."

27. Further, it was stated to the Court in support of the CFI Motion that while the stay under the CCAA proceedings will expire October 17, 2022, the Monitor will be seeking an extension potentially to a date in February 2023. This was the first time that IMS and I had heard of such an extension date. Counsel for CFI stated that this extension period was to be used to wind up the process under the CCAA and allow creditors, such as IMS, time to argue their respective claims before the CCAA Monitor.

28. As noted above, the Decision was filed October 5, 2022. On October 6, 2022, the firm of McInnes Cooper, acting for GTL, the Court-Appointed Monitor for CFI and Canadian Fluorspar Inc. (the "**Companies**") with SCNL, served upon the creditors, which included IMS, through its counsel the following:

1. Original Notice of Motion dated October 5, 2022 for Approval of the Sale;
2. Reverse Vesting Order;
3. Supporting Affidavit of Phil Clarke (Monitor) dated October 6, 2022;
4. Order to Enhance the Powers of the Monitor;
5. Amended ARIO ("Amended and Restated Interim Order") – Amendment #3; and
6. Memorandum of Fact and Law dated October 5, 2022
   (the "**Monitor's Application**").

The Monitor's Application was scheduled to be heard at 10:00 a.m. on October 12, 2022. A true copy of the Monitor's Application is attached hereto as Exhibit "J".

29. Also filed with the Monitor's Application, but not until October 7, 2022, was the "Fifth Report of Grant Thornton Limited, in its capacity as Monitor" dated October 6, 2022. A true copy of this Fifth Report is attached hereto as Exhibit "K".

30. Upon review of the Monitor's Application, it is obvious that there was a significant change in the information of the status of the sale, and the circumstances of and manner in which

the sale of the assets was to be completed than was previously communicated by the Monitor and communicated by CFI's counsel during the CFI Motion before Justice Southcott. This change in information and circumstances were not made known to IMS prior to receipt of the Monitor's Application on October 6, 2022.

31. At paragraphs 16, 17, 18 and 29 of his Affidavit given on October 6, 2022 in support of the Monitor's Application, the Monitor, Phil Clarke of GTL, states as follows:

> "16. A plan of arrangement would require the support of CFI's senior secured creditors who are already taking a substantial loss on their security and who would be better off exercising their security to culminate a sale of CFI than supporting a plan that would divert funds away from their security. The Monitor understands that the additional time and cost would negatively impact the Successful Bidder's proposed timelines to restart operations and therefore create additional risk.
> 17. The reverse vesting structure will enable the Proposed Transaction to be completed efficiently and expeditiously minimizing risks, costs and delays of having to transfer Permits and Licenses.
> 18. The purchase price of the proposed transaction is not sufficient to repay the secured creditors, therefore the majority of creditors, whose claims will be included in the Excluded Liabilities in the Proposed Transaction, will receive no recovery. There is no apparent prejudice to these creditors as there would be no recovery for them had the transaction been structured as a traditional asset sale...
> 29. The Revised Cashflow shows that the Monitor has sufficient cash to allow for the extension without an increase to the DIP, or any additional borrowing. The revised Cashflow is attached as Exhibit "C"."

32. It is clear from Phil Clarke's Affidavit that not only are the secured creditors taking a substantial loss under the CCAA proceedings, but they will have little to no recovery under the new transactions as described in his affidavit (the "**New Transactions**") and the unsecured creditors will receive nothing.

33. In the late afternoon of October 11, 2022, the day preceding the hearing of the Monitor's Application, I understand from Deborah L. J. Hutchings, KC, and do verily believe, that she received by way of email a copy of a letter of same date from the Monitor addressed

to PricewaterhouseCoopers Inc. and to the Government of Newfoundland and Labrador. In the letter the Monitor advised that he would not be seeking approval of the New Transactions the following day as the Successful Bidder had failed to pay the required "top up of the deposit" in the amount of $1,400,000.00 which was to be deposited with the Monitor prior to the October 12, 2022 hearing. Further, the letter states that "CFI's cashflow attached to the Monitors 5th Report as Appendix BB covering the period of September 19, 2022, through to February 26, 2023 contemplated that the Successful Bidder…having paid to the Monitor an additional $1,400,000.00…the Monitor's view is that material adverse change has occurred in respect of the CFI's Proposed Transaction and therefore the go forward cashflows are based on the assumption the Proposed Transaction will close no later than November 30, 2022".

34. I have reviewed the chart attached to Phil Clarke's Affidavit which I attach as a true copy to this my Affidavit as Exhibit "L". The Cashflow chart shows, as sets out in Phil Clarke's Affidavit of October 6, 2022, there is a shortfall of cash flow by an approximate amount of $1,400,000, being the further funds, which was expected to be deposited by the Successful Bidder before the hearing of October 12, 2022.

35. I am advised by Deborah L. J. Hutchings, KC, and do verily believe, that on October 12, 2022, after repeating the circumstances leading to the failure of the New Transactions, counsel for the Monitor, Geoff Spencer of McInnes Cooper, advised the court that <u>there is sufficient liquidity</u> to get the operation of the mine through to February 28, 2023. I am familiar with the Barge and I am aware through my own knowledge of the marketplace for the Barge that the Monitor could sell the Barge and can make up the shortfall of $1,400,000 from its sale.

36. Since the Monitor's Application, I have been in contact with a third party who was previously interested in purchasing the Barge, who advised me that he was contacted by telephone during the week of October 12, 2022 by a Gordon Buffett of Sydney, Nova Scotia, holding himself out as a ship's broker and who was preparing the Barge for sale. This Gordon Buffett, so I am advised, was wondering if the third party was still interested in purchasing the Barge. I obtained the telephone number for the said Gordon Buffett from the third party and on Friday, October 21, 2022, I called and spoke with a person who identified himself as Gordon Buffett who confirmed to me that he was preparing the

Barge for sale; however the person from whom he was taking instruction asked him to discontinue preparing the Barge for sale.

37. On the basis of the forgoing and in recognition of IMS's claim against CFI and the Barge, I support IMS's position that there has been a material change in the circumstances for this Honourable Court to exercise its jurisdiction over IMS's claim and to lift the stay of its Action, to reinstate the arrest of the Barge, and to give IMS leave to make a motion to this Court relating to the sale of the Barge under the arrest and sale provisions in the *Federal Courts Rules.*

38. All facts deposed herein I believe to be true, except where I have stated otherwise. I give this Affidavit knowing that it is a criminal offense to make a false statement.

**SWORN** before me at the City of St. John's, in the Province of Newfoundland and Labrador, this 24th day of October, 2022, before me:

Commissioner for Oaths / Barrister / Notary Public

**RICHARD A. SPELLACY**

# Exhibit "A"

REPÚBLICA DE PANAMÁ | REPUBLIC OF PANAMA
AUTORIDAD MARÍTIMA DE PANAMÁ | PANAMA MARITIME AUTHORITY

PANAMA MARITIME AUTHORITY

DIRECTORATE GENERAL OF MERCHANT MARINE / DIRECCION GENERAL DE MARINA MERCANTE
INTERNATIONAL SERVICE / SERVICIO INTERNACIONAL

| IMO NUMBER<br>Número OMI | REGISTRATION No<br>Número Oficial | CALL SIGN<br>Distintivo de Llamada |
|---|---|---|
| ********** | 19557-91-I | S/R |

Issued under Law No. 57 dated August 6th, 2008 / Expedido bajo Ley No. 57 de 6 de agosto de 2008

## NAVIGATION STATUTORY REGISTRY / PATENTE REGLAMENTARIA DE NAVEGACION

### Vessel's Information / Información de la Nave

| Name of Vessel / Nombre del Buque | Type Vessel / tipo de Buque |
|---|---|
| CFI PONTOON 1 | BARCAZA |

Registered Owner / Propietario
CANADA FLUORSPAR NL INC

| Resident Agent / Agente Residente | Radio Accounting Authority / Autoridad de Cuentas de Radio |
|---|---|
| ALEMAN, CORDERO, GALINDO & LEE | SIN RADIO |

| Previous Name / Nombre Anterior | Previous Flag / Nacionalidad a la que Renuncia |
|---|---|
| 40 | INGLATERRA |

| Built in / Construido en | Builders / Constructores | Hull Material / Material del casco | Keel Laid / Puesta de Quilla | Construction Date / Año de Construcción |
|---|---|---|---|---|
| SUNDERLAND, INGLATERRA | AUSTIN & PICKERSGILL, LTD. | ACERO | 1986 | 1987 |

| Lenght / Eslora | Breadth / Manga | Depth / Puntal | GRT / TB | NRT / TN | Dead Weight / Peso Muerto |
|---|---|---|---|---|---|
| 117.12 MTS | 36.60 MTS | 7.60 MTS | 9,638.00 | 2,891.00 | ********* |

PROPULSION SYSTEM / SISTEMA DE PROPULSION

| Type of Engines / Tipo de Máquina | Vessel Speed / Velocidad del Buque | Manufacture & Cylinders / Fabricantes y Cilindros | Engines Power / Potencia de la Máquina |
|---|---|---|---|
| S/Propulsión Propia<br>S/Propulsión Propia | ---------- | ----------<br>---------- | ---------- |

| Issuance Date / Fecha de Expedición | Expiration Date / Fecha de Expiración |
|---|---|
| DECEMBER 12th, 2017<br>DOCE (12) de DICIEMBRE de 2017 | DECEMBER 11th, 2022<br>ONCE (11) de DICIEMBRE de 2022 |

| Place of Issuance / Lugar de Emisión | Fees / Derechos |
|---|---|
| PANAMA | R.O 1142529/ 18-8-17 |

Renmarks / Observaciones

LIC. FERNANDO SOLORZANO
OFFICER SIGNATURE / FIRMA DEL FUNCIONARIO

PANAMA

This is Exhibit A referred to in the Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 24th
day of ~~November~~ October, 20 2022 28.

RCM-FNMT

# Exhibit "B"

This is Exhibit B referred to in the
Affidavit of Richard A. Spellang
Sworn or affirmed before me this 24th
day of October, 2022.

Nanny b's
Blue Beach Cove
Great St Lawrence Harbour
Cape Chapeau Rou

# Exhibit "C"

# VENDOR REGISTRATION APPLICATION

## Canada Fluorspar (NL) Inc.

St Lawrence Newfoundland

**Notes to vendors :** Vendor registration is essential for procurement and payment purposes.
Please answer all questions fully so that your application may proceed without delay
INFORMATION PROVIDED REMAINS CONFIDENTIAL IN PERPETUITY

| Date of Application | Prepared by | Title |
|---|---|---|
| 28-Oct-21 | Richard Spellacy | President |

Full company name *: Inaminka Marine Services Ltd.

Currency *: Canadian Dollars

Business Address *: Suite 202, 130 Lemarchant Road

| City * | Province/State * | Country * |
|---|---|---|
| St. Johns | Newfoundland and Labrador | Canada |

| Postal/Zip Code | Company registration number * | Payment Terms * |
|---|---|---|
| A1C 2H2 | 38557 | Net 30 days |

**Contacts**

| Operations Contact Name | Phone Number | Email Address |
|---|---|---|
| Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |
| **PO Contact Name** | **Phone Number** | **Email Address** |
| Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |
| **A/R Contact Name** | **Phone Number** | **Email Address** |
| Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |

VOLUNTARY: Is your business owned by a member of an underrepresented group (mark X in all that apply)

| | | | |
|---|---|---|---|
| | Women | | Disability |
| | Aboriginal | | Visible Minority |

**Banking information**

Name to appear on cheques or wire transfers *: Inaminka Marine Services Ltd

| Name of bank | Address of bank |
|---|---|
| CIBC | 215 Water Street, St. Johns, NL, A1C6C9 |

| Institution # (3 digits) * | IBAN/Account Number * | Swift * |
|---|---|---|
| 390 | 00063-010-4811410 | CIBCCATT |

| Transit # (5 digits) * | Country |
|---|---|
| 63 | CANADA |

**Mailing Address for Cheque (If applicable)**

Full company name *: Inaminka Marine Srvices Ltd.

Business Address *: Suite 202, 130 Lemarchant Road

| City * | Province/State * | Country * |
|---|---|---|
| St. Johns | NL | CANADA |

Postal/Zip Code: A1C 2H2

**Internal use Only (CFI)**

Entered in Sage date: _____ /_____ /_____ Entered By: _____

This is Exhibit C referred to in the Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 26th day of October, 2022.

# Exhibit "D"

Canada Fluorspar (NL) Inc.

**Purchase Requisition**

| Date | Page |
|---|---|
| 2021-11-05 | 1 |
| Purchase Requisition Number | |
| RQN0012966 | |

| Reference | Description | Required Date | | Requested By |
|---|---|---|---|---|
| Blue Beach | Review BB barge mooring away f | | CAP2021-001 | Serena Hickey |

| Ship To | Bill To | Ship Via | FOB Point |
|---|---|---|---|
| | | | |

| Item | Description | Vendor | Expected Arrival | GL Account | Quantity | UOM | Unit Cost | Extended Cost |
|---|---|---|---|---|---|---|---|---|
| CAPDC | Review BB barge mooring away from cribs | | | 18343-505-033 | 60.00 | EA | 1,500.00 CAD | 90,000.00 |

This is Exhibit D referred to in the Affidavit of Richard A' Spellacy Sworn or affirmed before me this 24th day of October, 2022.

Comment:
Vendor Richard Spellacy

Total Cost: 90,000.00

Approver Name: Approver Position / Title:

CFI
CANADA FLUORSPAR INC.

# Purchase Order

| Date | Page |
|---|---|
| Dec 14, 2021 | 1 |
| Purchase Order Number | |
| PO00021012 | |

Canada Fluorspar (NL) Inc.
P.O. Box 337
St. Lawrence, NL A0E 2V0

01/19/2022
7:27:52AM

REQUISITION # **RQN0012966**

**Vendor Address:**

Inaminka Marine Services Ltd.
Suite 202
130 Lemarchant Rd
St. John's, NL A1C 2H2
Canada

| Reference | Contact | Vendor Number | PO Date | Terms | Ship Via | Expected Arrival |
|---|---|---|---|---|---|---|
| Blue Beach | | INAMAR | Dec 14, 2021 | NET60 | | |

| Qty. Ordered | Vendor Item Number | Description | CFI Item Number | Unit Cost | UOM | Extended Price |
|---|---|---|---|---|---|---|
| 0.0000 | CAPDC | Review BB barge mooring away from cribs $220.00 PER HOUR<br>**Instructions:** Requisitioner: SHICKEY RQN0012966 | CAPDC | 1.000000 | EA | 0.00 |
| 0.0000 | CAPDC | MILELAGE .60 PER KM<br>**Instructions:** Requisitioner: SHICKEY RQN0012966 | CAPDC | 1.000000 | MT | 0.00 |
| 50,000.0000 | RQN13616 | Review BB Barge Mooring Away from Crib (220.00 per hr) | CAPDC | 1.000000 | EA | 50,000.00 |
| 3,000.0000 | CAPDC | MILELAGE | CAPDC | 1.000000 | EA | 3,000.00 |

**Comments:**
Richard Spellacy to SUBMIT DAILY RECORD OF WORK DONE WITH INVOICE

**Tax Summary:**
HSTGST 7,950.00

| | |
|---|---|
| **Less:** included tax | **0.00** |
| **Subtotal** | **53,000.00** |
| **Total tax** | **7,950.00** |
| **Total purchase order** | **60,950.00** |

CFI
CANADA FLUORSPAR INC.

# Purchase Order

| Date | Page |
|---|---|
| Dec 14, 2021 | 1 |

Purchase Order Number
PO00021012

12/14/2021
8:14:19AM

REQUISITION # RQN0012966

**Vendor Address:**

Inaminka Marine Services Ltd.
Suite 202
130 Lemarchant Rd
St. John's, NL A1C 2H2
Canada

Contact : Richard Spellacy
Phone: 7096851725
Email: richardspellacy@hotmail.com

**Ship To/Biling address**

**Canada Fluorspar (NL) Inc**
**141 Director Drive**
**P.O. Box 337**
**St. Lawrence, NL**
**A0E 2V0**
**Phone: (709) 873-3331**
**Fax: (709) 873-3335**

| Reference | Contact | Vendor Number | PO Date | Terms | Ship Via | Expected Arrival |
|---|---|---|---|---|---|---|
| Blue Beach | | INAMAR | 12/14/2021 | NET60 | | |

| Vendor Item Number | Description | CFI Item Number | Qty. Ordered | Expected Arrival | Unit Cost | UOM | Extended Price |
|---|---|---|---|---|---|---|---|
| GL ACCT: | Review BB barge mooring away from cribs $220.00 PER HOUR 18343-505-033 | CAPDC | 87,000.00 | | 1.000000 | EA | 87,000.00 |
| GL ACCT: | MILELAGE .60 PER KM 18343-505-033 | CAPDC | 3,000.00 | | 1.000000 | MT | 3,000.00 |

**Comments:**
Richard Spellacy to SUBMIT DAILY RECORD OF WORK DONE WITH INVOICE

**Tax Summary:**
HSTGST 13,500.00

| | |
|---|---|
| **Subtotal** | **90,000.00** |
| **Total tax** | **13,500.00** |
| **Total purchase order** | **103,500.00** |

**Approver Name:** **Approver Position / Title:**

Bill Dobbs
Jason Flood
Patrick Gannon
Ron Milmine
Serena Hickey
Terry Fleming

# Exhibit "E"

INAMINKA MARINE LTD.
130 LeMarchant Road, Suite #301
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

November 30th 2021

**Canada Fluorspar (NL) Inc.**
**PO Box 337**
**St. Lawrence, NL**
**A0E2V0**

This is Exhibit E referred to in the Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 24 day of October, 2022.

RQN #N0012966
Inaminka 20209

Attention: Jason Flood

Re Consulting on loading Barge

| | |
|---|---|
| 27.5 days @ C$1,500.00 per day | $41,250.00 |
| HST @15% | $6,187.50 |
| Expences as attached | $894.00 |
| **Total** | **$48,331.50** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #301
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

December 12th 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 20210

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 64.5 hours @$220.00/hour | $14,190.00 |
| A. Barclay 24 hours @$200.00/hour | $4,800.00 |
| HST @15% | $2,848.50 |
| Expences as attached | $539.17 |
| **Total** | **$22,377.67** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

December 31st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202111

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 140.0 hours @$220.00/hour | $30,800.00 |
| A. Barclay 30 hours @$200.00/hour | $6,000.00 |
| HST @15% | $5,520.00 |
| Expences as attached | $606.85 |
| **Total** | **$42,926.85** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

January 15th. 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202201

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 65.0 hours @$220.00/hour | $14,300.00 |
| HST @15% | $2,145.00 |
| **Total** | **$16,445.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

February 1st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202202

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 66.0 hours @$220.00/hour | $14,520.00 |
| Expences as attached | $91.00 |
| HST @15% | $2,178.00 |
| **Total** | **$16,789.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

# Exhibit "F"

March 1, 2022

This is Exhibit F referred to in the Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 24th
day of October, 2022.

Deborah L.J. Hutchings, Q.C.
Suite 900, Atlantic Place
215 Water Street, P.O. Box 1538
St. John's, NL
A1C 5N8

**Re: Registration #: 2022000479**

**Ship Arrest: Barge H-404**

Dear Ms. Hutchings,

Enclosed please find original Affidavits of Service for the following:

- Barge H-404
- Bill Power Harbour Master
- Barb Marsh Canada Fluorspar (NL) Inc. employee

If you have any questions, please contact the undersigned.

Thank you.

Kind regards,

Nicholas Bruce
Judgment Enforcement Officer

# AFFIDAVIT OF SERVICE

**BETWEEN:** INAMINKA MARINE SERVICES Limited (PLAINTIFF)

**AND:** (SHIP "BARGE H-404") (DEFENDANT)

I, Steven Hillier of Grand Bank, in the Province of Newfoundland and Labrador make oath and say that I did on the 18TH day of February A.D. 20 22, at approximately 2:30 o'clock in the After noon, serve Ship ("Barge H-404") with the within Warrant ~~affidavit to~~ Statement of Claim by leaving a true copy of same with The SHIP at Marystown and that I endorsed the date of service thereon Friday, the 18TH day of February A.D., 20 22.

**SWORN TO** at St. John's, in the Province of Newfoundland and Labrador, this 21 day of February A.D., 20 22.

K Keeping JP
Notary Public, Justice of the Peace
or Commissioner of Oaths

Kaleigh Keeping
Justice of the Peace

Signature

FEB 21/2022
Date

12/09/02

# AFFIDAVIT OF SERVICE

**BETWEEN:** Inaminka Marine Services Limited (PLAINTIFF)

**AND:** Ship "Barge H-404 (DEFENDANT)

I, Steven Hiller of Grand Bank, in the Province of Newfoundland and Labrador make oath and say that I did on the 18th day of February A.D. 20 22, at approximately 3:00 o'clock in the After noon, serve Bill Power with the within Warrant by leaving a true copy of same with him at Marystown, NL and that I endorsed the date of service thereon Friday, the 18 day of February A.D., 20 22.

**SWORN TO** at ~~St. John's~~ Grand Bank, in the Province of Newfoundland and Labrador, this 21 day of February A.D., 20 22.

K Keeping, JP
Notary Public, Justice of the Peace or Commissioner of Oaths

Signature

February 21/2022
Date

Kaleigh Keeping
Justice of the Peace

12/09/02

# AFFIDAVIT OF SERVICE

**BETWEEN:** INAMINKA MARINE SERVICES LIMITED (PLAINTIFF)

**AND:** SHIP "BARGE H-404" (DEFENDANT)

I, Steven Hiller of Grand Bank, in the Province of Newfoundland and Labrador make oath and say that I did on the 18th day of February A.D. 20 22, at approximately 4:30 pm o'clock in the After noon, serve Barb Marsh with the within Statement of Claim. Affidavit to Arrest Warrant documents/WARRANT by leaving a true copy of same with Her at St. Lawrence NL and that I endorsed the date of service thereon Friday, the 18th day of February A.D., 20 22.

**SWORN TO** at ~~St. John's~~ Grand Bank, in the Province of Newfoundland and Labrador, this 21 day of February A.D., 20 22.

K Keeping JP
Notary Public, Justice of the Peace or Commissioner of Oaths

Signature

February 21/2022
Date

Kaleigh Keeping
Justice of the Peace

12/09/02

# Exhibit "G"

This is Exhibit G referred to in the
Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 24th
day of October, 2022.

Court File No. T-279-22

**FEDERAL COURT**

**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.**, a body corporate

**Defendants**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

---

**AFFIDAVIT OF PHIL CLARKE**

---

I, Phil Clarke, CPA, CA, CIRP, LIT, of the City of Halifax, in the Province of Nova Scotia, MAKE OATH AND SAY AS FOLLOWS:

1. I am a Partner with Grant Thornton Limited ("**GTL**") and have personal knowledge of the matters deposed of herein.

2. Pursuant to an order dated February 21, 2022 (the "**Interim Receivership Order**"), the Supreme Court of Newfoundland and Labrador General Division appointed GTL as interim receiver of all of the current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, save and except

for the Excluded Property (as defined therein) of Canada Fluorspar Inc. and Canada Fluorspar (NL) Inc. ("**CFI**"). A copy of the Interim Receivership Order is attached hereto as **Exhibit "A"**.

3. Pursuant to an initial order dated March 11, 2022, which was order was subsequently amended and restated on March 18, 2022 (the "**CCAA Order**") the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency appointed GTL the monitor for Canada Fluorspar Inc., Canada Fluorspar (NL) Inc. ("**CFI**"), and Newspar (a General Partnership) pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C36. A copy of the CCAA Order filed on March 22, 2022 is attached hereto as **Exhibit "B"**.

4. Pursuant to an order on March 18, 2022 (the "**SISP Order**"), the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency approved a Sale and Investment Solicitation Process. A copy of the SISP Order filed on March 22, 2022 is attached hereto as **Exhibit "C"**.

5. Pursuant to an order dated June 10, 2022 (the "**Extension Order**") the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency extended the stay period granted pursuant to Section 14 of the CCAA Order to extended to September 2, 2022. A copy of the Extension Order is attached hereto as **Exhibit "D"**.

6. To the best of my knowledge, information and belief, the services provided by Inaminka Marine Services Limited ("**IMS**") to CFI were limited to consulting services in relation possible options to utilize Barge H-404 (the "**Barge**") at its Blue Beach port facility. No goods, materials or services were supplied by IMS to the Barge for its operation or maintenance. Copies of all invoices received from IMS are attached hereto as **Exhibit "E"**.

7. I make this Affidavit in good faith and in support of the motion brought by CFI for a stay of proceedings pursuant to Section 50(1) of the *Federal Courts Act*.

**SWORN** before me at the City of Halifax, in the Province of Nova Scotia, on the 26th day of July, 2022.

Notary Public or Commissioner for Oaths (affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

**PHIL CLARKE**

**This is Exhibit "A" referred to in the affidavit of Phil Clarke sworn before me this 26th day of July, 2022**

Notary Public or Commissioner of Oaths (affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

SCHEDULE "I"

2022 01G 0709
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

**BETWEEN:**

**PRICEWATERHOUSECOOPERS INC. in its capacity as court-appointed receiver and manager of BRIDGING FINANCE INC. and BRIDGING INCOME FUND LP**

**APPLICANT**

**AND:**

**CANADA FLUORSPAR (NL) INC. and CANADA FLUORSPAR INC.**

**RESPONDENTS**

## INTERIM RECEIVERSHIP ORDER

**BEFORE THE HONOURABLE CHIEF JUSTICE RAYMOND P. WHALEN:**

**UPON** The application of PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and Bridging Income Fund LP (formerly Sprott Bridging Income Fund LP) (the "**Applicant**"), for appointment of an interim receiver in respect of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. (collectively, the "**Debtor**");

**AND UPON READING** the Originating Application and the affidavit of Graham Page sworn February 19, 2022, and the consent of Grant Thornton Limited to act as interim receiver (in such capacity, the "**Interim Receiver**") of the Debtor;

**AND UPON HEARING** counsel for the Applicant any other counsel or other interested parties present;

Filed Feb 22, 2022

R.W.

**IT IS HEREBY ORDERED THAT:**

SERVICE

1. The time for service of the notice of application and the material filed herein for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today and any further service thereof is hereby dispensed.

APPOINTMENT

2. Pursuant to section 47(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "*BIA*") Grant Thornton Limited is hereby appointed Interim Receiver, without security, of all of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, save and except for the Excluded Property (the "**Property**").

3. For greater certainty, the Interim Receiver will not take possession of the Property except to the extent necessary to carry out its obligations hereunder.

DEFINED TERMS

4. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in **Schedule "A"**.

INTERIM RECEIVER'S POWERS

5. The Interim Receiver is not authorized or permitted to operate or conduct the business of the Debtor; provided, however, that the Receiver is hereby empowered and authorized, but not obligated, to take such steps as are necessary (or cause the Debtor to take such steps as are necessary) to protect, preserve, and secure the Property.

6. The Interim Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Interim Receiver is hereby expressly empowered and authorized to do any of the following where the Interim Receiver considers it necessary or desirable:

(a) to exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, protect, and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, preserve and protect the assets of the Debtor, including the power to incur any obligations in the ordinary course of business, and the powers to enter into any agreements, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

(d) to retain or hire any employees on behalf of the Debtor for any period of time on substantially the same terms and conditions as those existing between such employees and the Debtor, if applicable, prior to the appointment of the Interim Receiver;

(e) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Interim

Receiver's powers and duties, including without limitation those conferred by this Order;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor. For greater certainty, this provision shall not apply to the Excluded Property;

(g) to settle, extend or compromise any indebtedness owing to or by the Debtor;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Interim Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Interim Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to report to, meet with and discuss with such affected Persons (as defined below) as the Interim Receiver deems appropriate all matters relating to the Property and the interim receivership, and to share information, subject to such terms as to confidentiality as the Interim Receiver deems advisable;

(k) to register a copy of this Order and any other orders in respect of the Property against title to any of the Property, and when submitted by the Interim Receiver for registration this Order shall be immediately registered by the Registrar of Deeds

for the Province of Newfoundland and Labrador or any other similar government authority, notwithstanding Section 7 of the *Registration of Deeds Act*, 2009, SNL 2009, c R-10.01, or the provisions of any other similar legislation in any other province or territory, and notwithstanding that the appeal period in respect of this Order has not elapsed and the Registrar of deeds shall accept all Affidavits of Corporate Signing Authority submitted by the Interim Receiver in its capacity as Interim Receiver of the Debtor and not in its personal capacity;

(l) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Interim Receiver, in the name of the Debtor;

(m) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(n) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have;

(o) to commence proceedings for the Debtor pursuant to the *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act*; and

(p) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Interim Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons, including the Debtor, and without interference from any other Person (as defined below).

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE INTERIM RECEIVER

7. (i) The Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Interim Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Interim Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependent on maintaining possession) to the Interim Receiver upon the Interim Receiver's request.

8. All Persons shall forthwith advise the Interim Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records (and all transaction related thereof), and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Interim Receiver or permit the Interim Receiver to make, retain and take away copies thereof and grant to the Interim Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph or in paragraphs 7 and 9 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Interim Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

9. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Interim Receiver for the purpose of allowing the Interim Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the Information as the Interim Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Interim Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Interim Receiver with all such assistance in gaining immediate access to the information in the Records as the Interim Receiver may in its discretion require including providing the Interim Receiver with instructions on the use of any computer or other system and providing the Interim Receiver with any and all access codes, account names, and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE INTERIM RECEIVER

10. Without leave of the Court no action lies against the interim receiver with respect to any report made under, or any action taken pursuant to *BIA*.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

11. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Interim Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing

agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph; and (ii) affect a Regulatory Body's investigation in respect of the debtor or an action, suit or proceeding that is taken in respect of the debtor by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "**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.

NO EXERCISE OF RIGHTS OR REMEDIES

12. All rights and remedies of any Person, whether judicial or extra-judicial, statutory or non-statutory (including, without limitation, set-off rights) against or in respect of the Debtor or the Interim Receiver or affecting the Property are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided, however, that nothing in this Order shall:

    (a) empower the Debtor to carry on any business that the Debtor is not lawfully entitled to carry on;

    (b) prevent the filing of any registration to preserve or perfect a security interest;

    (c) prevent the registration of a claim for lien; or

    (d) exempt the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment.

13. Nothing in this Order shall prevent any party from taking an action against the Applicant where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such

party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Interim Receiver at the first available opportunity.

14. Nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Debtor with respect to the Excluded Property.

NO INTERFERENCE WITH THE INTERIM RECEIVER

15. No Person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, except with the written consent of the Debtor and the Interim Receiver, or leave of this Court.

CONTINUATION OF SERVICES

16. All persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Debtor, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Debtor

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Debtor or exercising any other remedy provided under such agreements or arrangements. The Debtor shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain

names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Debtor in accordance with the payment practices of the Debtor, or such other practices as may be agreed upon by the supplier or service provider and each of the Debtor and the Interim Receiver, or as may be ordered by this Court.

INTERIM RECEIVER TO HOLD FUNDS

17. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Interim Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, but excluding the Excluded Property, shall be deposited into one or more new accounts to be opened by the Interim Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Interim Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

EMPLOYEES

18. Subject to employees' rights to terminate their employment, all employees of the Debtor shall remain the employees of the Debtor until such time as the Interim Receiver, on the Debtor's behalf, may terminate the employment of such employees.

19. Despite anything in federal or provincial law, if the Interim Receiver, in that position, carries on the business of the Debtor or continues the employment of a debtor's employees, the interim receiver is not by reason of that fact personally liable in respect of a liability,

including one as a successor employer, that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees and that exists before the interim receiver is appointed or that is calculated by reference to a period before the appointment.

LIMITATION ON ENVIRONMENTAL LIABILITIES

20. Nothing herein contained shall require the Interim Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination (collectively, the "Environmental Legislation"), provided however that nothing herein shall exempt the Interim Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Interim Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

21. The Interim Receiver shall not be liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Interim Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Interim Receiver's appointment; or

(ii) after the Interim Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Interim Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Interim Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring the Interim Receiver to remedy any environmental condition or environmental damage affecting the Property, the Interim Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Interim Receiver, if the order is in effect when the Interim Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Interim Receiver:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Interim Receiver, if the order is in effect when the Interim Receiver is appointed, by.

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Interim Receiver to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) If the Interim Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

LIMITATION ON THE INTERIM RECEIVER'S LIABILITY

22. Except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of this Order the Interim Receiver shall incur no liability or obligation that exceeds an amount for which it may obtain full indemnity from the Property provided that the interim receiver shall act honestly and in good faith and deal with the Property in a commercially reasonable manner. Nothing in this Order shall derogate from any

limitation on liability or other protection afforded to the Interim Receiver under any applicable law.

INTERIM RECEIVER'S ACCOUNTS

23. The Interim Receiver and counsel to the Interim Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges.

24. The Interim Receiver and counsel to the Interim Receiver shall be entitled to the benefits of and are hereby granted a charge (the "**Interim Receiver's Charge**") on the Property, which charge shall not exceed an aggregate amount of $250,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Interim Receiver and such counsel, both before and after the making of this Order in respect of these proceedings, and the Interim Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person but subject to sections 14.06(7), 81.4(4) and 81.6(2) of the BIA.

25. The Interim Receiver and its legal counsel shall pass their accounts from time to time.

26. Prior to the passing of its accounts, the Interim Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Interim Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE INTERIM RECEIVERSHIP

27. Subject to prior approval of the Applicant, the Interim Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $2,000,000 (or such greater amount as this Court may by further order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Interim Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Interim Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Interim Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) of the BIA.

28. Neither the Interim Receiver's Borrowings Charge nor any other security granted by the Interim Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

29. The Interim Receiver is at liberty and authorized to issue certificates substantially in the form annexed as **Schedule "B"** hereto (the "**Interim Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

30. The monies from time to time borrowed by the Interim Receiver pursuant to this Order or any further order of this Court and any and all Interim Receiver's Certificates evidencing the same or any part thereof shall rank on a pari passu basis, unless otherwise agreed to by the holders of any prior issued Interim Receiver's Certificates.

31. The Interim Receiver shall be allowed to repay any amounts borrowed by way of Interim Receiver's Certificates out of the Property or any proceeds, including any proceeds from the sale of any assets without further approval of this Court.

ALLOCATION

32. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Interim Receiver's Charge and the Interim Receiver's Borrowings Charge amongst the various assets comprising the Property.

GENERAL

33. For greater certainty, neither the Interim Receiver's Charge nor the Interim Receiver's Borrowing Charge shall apply or attach to the Excluded Property.

34. The Interim Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

35. Unless otherwise ordered by this Court, the Interim Receiver will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Interim Receiver's reports shall be filed by the registry notwithstanding that they do not include an original signature.

36. Nothing in this Order shall prevent the Interim Receiver from acting as a receiver, a receiver and manager, a trustee in bankruptcy, or a monitor of the Debtor.

37. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction to give effect to this Order and to assist the Interim Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby

respectfully requested to make such orders and to provide such assistance to the Interim Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Interim Receiver in any foreign proceeding, or to assist the Interim Receiver and its agents in carrying out the terms of this Order.

38. The Interim Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, régulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Interim Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

39. The Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis, including legal costs on a solicitor-client full indemnity basis, to be paid by the Interim Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

40. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Interim Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

FILING

41. The Interim Receiver shall establish and maintain a website in respect of these proceedings at www.crantthornton.ca/cfi (the "**Interim Receiver's Website**") and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publicly available; and

(b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Interim Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

42. Service of this Order shall be deemed good and sufficient by:

a. serving the same on:

(i) the persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order; and

b. posting a copy of this Order on the Interim Receiver's Website.

and service on any other person is hereby dispensed with.

43. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 21 day of February, 2022.

COURT OFFICER

SCHEDULE "A"

**Defined Terms**

"**Excluded Property**" means: (i) any and all Receivables and / or Financed Receivables, as such terms are defined pursuant to a Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc. dated May 25, 2018, as amended, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favour of HSBC.

"**HSBC**" means HSBC Bank Canada.

R.W.

SCHEDULE "B"

**Interim Receiver Certificate**

Certificate No.

Amount $

This is to certify that Grant Thornton Limited, the interim receiver (the "**Interim Receiver**") of the assets, undertakings, and properties of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Debtors**") acquired for, or used in relation to, a business carried on by the Debtors, including all proceeds thereof (collectively, the "**Property**") appointed by order of the Supreme Court of Newfoundland and Labrador (the "**Court**") dated the day of February, 2022 (the "**Order**") made in an action having court file number 2022 01G 0709, has received as such Interim Receiver from the holder of this certificate (the "**Lender**") the principal sum of $ , being part of the total principal sum of $ which the Interim Receiver is authorized to borrow under and pursuant to the Order.

The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [*monthly/semi-annually/annually/other*] not in advance on the day of each month after the date hereof at a rate per annum equal to the rate of per cent above the prime commercial lending rate of from time to time.

Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Interim Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Interim Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at

Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Interim Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

The charge securing this certificate shall operate so as to permit the Interim Receiver to deal with the Property (as defined in the Order) as authorized by the Order and as authorized by any further or other order of the Court.

The Interim Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

[*signature page to follow*]

Dated the day of , 2022.

Grant Thornton Limited, solely in its capacity as Interim Receiver of the Property, and not in its personal capacity

Per:

Name:
Title:

**This is Exhibit "B" referred to in the affidavit of Phil Clarke sworn before me this 26 day of July, 2022**

Notary Public or Commissioner of Oaths (affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

2022 01G 0709

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

**AMENDED AND RESTATED INITIAL ORDER**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

**SERVICE**

Filed March 21, 22

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

   (b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

   (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect

of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("Rent"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

**RESTRUCTURING**

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

(a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

(b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

(c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "Restructuring").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants

during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

**NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY**

14 **THIS COURT ORDERS** that until and including the 10th day of July, 2022 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

## NO INTERFERENCE WITH RIGHTS

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

## CONTINUATION OF SERVICES

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

## NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to

advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

## APPOINTMENT OF MONITOR

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

    (d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

    (e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to

the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

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(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

OR

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the

"Administration Charge") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

## ENHANCEMENT OF MONITOR'S POWERS

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31 **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other

data storage media containing any such information ("Records") of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

**LIMITATION ON THE MONITOR'S LIABILITY**

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

**DIP FINANCING**

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the **"DIP Financing Agreement"**) dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

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(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as

made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "Chargees"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

(a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

(b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

(c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

## SERVICE AND NOTICE

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

## GENERAL

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

COURT OFFICER

Schedule "A"

Defined Terms

**"Excluded Inventory"** means inventory representing a value in the amount of USD2,500,000

**"Excluded Property"** means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

**"HSBC"** means HSBC Bank Canada; and

**"RFA"** means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.

**This is Exhibit "C" referred to in the affidavit of Phil Clarke sworn before me this 26 day of July, 2022**

Notary Public or Commissioner of Oaths (affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

2022 01G 0709
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

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

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

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## ORDER APPROVING A SALE AND INVESTMENT SOLICITATION PROCESS

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[1] **CONSIDERING** the Applicant's *Application for the issuance of (i) an Initial Order, (ii) an Amended and Restated Initial Order, (iii) an Order approving the DIP Financing Agreement :and (iv) an Order approving a Sale and Investment Solicitation Process* (the "**Application**"), the affidavit of Phil Clarke dated the 8th day of March, 2022 and the exhibits in support thereof;

[2] **CONSIDERING** the submissions of counsel;

[3] **CONSIDERING** the pre-filing report prepared by Grant Thornton Limited (the "**Monitor**");

[4] **CONSIDERING** the provisions of the *Companies' Creditors Arrangement Act* ("**CCAA**");

**THE COURT:**

[5] **GRANTS** the Application.

**DEFINITIONS**

[6] **DECLARES** that all capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Bidding Procedures (as defined below).

**SERVICE**

[7] **DECLARES** that sufficient prior notice of the presentation of the Application has been given by the Applicant to interested parties, and that further service thereof is hereby dispensed with.

[8] **PERMITS** the service of the present Order (this "**Order**") at any time and place and by any means whatsoever.

Filed Mar. 21/22 KA

**SISP**

[9] **APPROVES** and **RATIFIES** the Sale and Investment Solicitation Process ("**SISP**") set forth in the Procedures for the Sale and Investment Solicitation Process attached as Schedule "A" hereto (the "**Bidding Procedures**").

[10] **AUTHORIZES** the Applicant and the Company, to the extent the Company assists with the SISP, to implement the SISP and to take such steps and execute such documentation as may be necessary or incidental thereto, the whole in accordance with the Bidding Procedures.

[11] **ORDERS** that the Applicant and the Company, as well as respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of performing their duties under the SISP, except to the extent of such losses, claims, damages or liabilities resulting from gross negligence or wilful misconduct of any such person or entity, as applicable, as determined by this Court.

**GENERAL**

[12] **ORDERS** that the Applicant and the Company, to the extent the Company assists with the SISP are authorized and permitted under applicable law to disclose and transfer to Potential Bidders and to their advisors personal information in the custody or control of the Company relating to the operation of the business, including human resources and payroll information, records pertaining to the Company's past and current employees, and information about any consumer, website visitor or other individual (collectively, "**Personal Information**"), but only to the extent necessary to negotiate, determine whether to proceed with, and attempt to complete a transaction in accordance with the SISP (a "**Transaction**"). Each Potential Bidder to whom any Personal Information is disclosed shall maintain and protect the Personal Information with security safeguards appropriate to the sensitivity of the Personal Information and as may otherwise be required by applicable federal or provincial privacy legislation and limit the use of such information to its evaluation of a Transaction, and if it does not complete a Transaction with the Applicant, shall return all such information to the Applicant, or in the alternative permanently destroy all such information.

[13] **ORDERS** that the Applicant may from time to time apply to this Court for advice and directions in the discharge of their respective powers and duties hereunder or under the SISP.

[14] **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or elsewhere, to give effect to this Order and to assist the Applicant, as applicable, and their respective agents in carrying out the terms of this Order.

[15] **ORDERS** the provisional execution of this Order notwithstanding appeal and without any security or provision for costs whatsoever.

[16] **WITHOUT COSTS.**

C. Foley

COURT
OFFICER

02

# Schedule "A"

## Procedures for the Sale and Investment Solicitation Process

On March 7, 2022, Canada Fluorspar Inc., and Canada Fluorspar (NL) Inc., by their Interim Receiver, Grant Thornton Limited, and Newspar (a General Partnership) (collectively the "**Company**" or the "**Applicant**") commenced proceedings (the "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") before the Supreme Court of Newfoundland and Labrador (in Bankruptcy and Insolvency) in the City of St. John's, in the Province of Newfoundland and Labrador (the "**Court**") pursuant to an order granted by the Court on March 11, 2022. Said order was amended and restated by the Court on March 18, 2022 (collectively, as further amended or restated from time to time, the "**Initial Order**").

Pursuant to the Initial Order, Grant Thornton Limited was appointed as monitor in the CCAA Proceedings (in such capacity, the "**Monitor**").

On March 18, 2022, the Court granted an order (the "**Bidding Procedures Order**"), authorizing the Applicant to undertake a sale and investment solicitation process ("**SISP**") for the sale of the Company's business, property, assets and undertakings (collectively, the "**Business**"). The SISP shall be conducted by the Monitor, supported by the Company as required, in the manner set forth herein.

Among other things, the Bidding Procedures Order authorizes and directs the Monitor and the Company to conduct the SISP in accordance with the bidding procedures set out herein (the "**Bidding Procedures**") governing the solicitation of offers or proposals (each a "**Bid**") for the acquisition of the Business or some portion thereof.

### Defined Terms

1. Capitalized terms used in this SISP have the meanings given thereto in Appendix A.

### Bidding Procedures

*Opportunity*

2. The SISP is intended to solicit interest in, and opportunities for: (i) one or more sales or partial sales of all, substantially all, or certain portions of the Business; and/or (ii) for an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Company or its Business. Bids considered pursuant to the SISP may include one or more of an investment, restructuring, recapitalization, refinancing or other form of reorganization of the business and affairs of the Company as a going concern or a sale (or partial sales) of all, substantially all, or certain aspects of the Business, or a combination thereof (the "**Opportunity**").

3. All interested parties are encouraged to submit bids based on any form of Opportunity that they may elect to advance pursuant to the SISP, including as a Sale Proposal or an Investment Proposal.

4. The Bidding Procedures describe the manner in which prospective bidders may gain access to due diligence materials concerning the Company and the Business, the manner in which

bidders may participate in the SISP, the requirement of and the receipt and negotiation of bids received, the ultimate selection of a Successful Bidder and the requisite approvals to be sought from the Court in connection therewith. The Monitor shall conduct the SISP in the manner set forth herein.

The Monitor, in consultation with the Company and the DIP Lenders, may at any time and from time to time, modify, amend, vary or supplement, whether material or immaterial the SISP or the Bidding Procedures, if necessary or useful in order to give effect to the substance of the SISP, the Bidding Procedures and the Bidding Procedures Order.

The Monitor shall post on the Monitor's website, as soon as practicable, any such modification, amendment, variation or supplement to the Bidding Procedures and inform the bidders impacted by such modifications.

In the event of a dispute as to the interpretation or application of the SISP or Bidding Procedures, the Court will have exclusive jurisdiction to hear and resolve such dispute.

5. No bidder may request or receive any form of bid protection as part of any bid made pursuant to the SISP.

As more particularly set out herein, a summary of the key dates pursuant to the SISP are as follows:[1]

| Event | Date |
|---|---|
| **1. Solicitation Letter**<br>Monitor to distribute Solicitation Letter, to potentially interested parties | By no later than March 20 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **2. CIM and VDR**<br>Monitor to prepare and have available for parties having executed the NDA (Potential Bidders) the CIM and VDR | By no later than March 23, 2022, at 5:00 p.m. (Newfoundland Standard Time), or at such later time as the Monitor, in consultation with the Company, deems appropriate |
| **3. Phase 1 Qualified Bidders & Bid Deadline**<br>Phase 1 Bid Deadline (for delivery of non-binding LOIs by Phase 1 Qualified Bidders in accordance with the requirement of paragraph 14 of the Bidding Procedures) | By no later than April 17, 2022, at 5:00 p.m. (Newfoundland Standard Time) |

[1] All capitalized terms not already defined are defined further below. Titles in the chart are for presentation purposes only.

| Event | Date |
|---|---|
| **4. Phase 1 Successful Bid**<br>Monitor to notify each Phase 1 Qualified Bidder in writing as to whether its bid constituted a Phase 1 Successful Bid | By no later than April 24, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **5. Phase 2 Bid Deadline & Qualified Bidders**<br>Phase 2 Bid Deadline (for delivery of definitive offers by Phase 2 Qualified Bidders in accordance with the requirement of paragraph 22 of the Bidding Procedures) | By no later than June 12, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **6. Auction**<br>Auction Commencement Date (if needed) | By no later than June 19, 2022 |
| **7. Selection of final Successful Bid**<br>Deadline for selection of final Successful Bid | By no later than June 19, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **8. Definitive Documentation**<br>Deadline for completion of definitive documentation in respect of Successful Bid | By no later than June 26, 2022 |
| **9. Approval Motion – Successful Bid**<br>Deadline for filing of Approval Motion in respect of Successful Bid | By no later than July 3, 2022 |
| **10. Closing – Successful Bid**<br>Anticipated deadline for closing of Successful Bid being the Target Closing Date | July 10, 2022 or such earlier date as is achievable |
| **11. Outside Date – Closing**<br>Outside Date by which the Successful Bid must close | July 10, 2022 |

*Solicitation of Interest: Notice of the SISP*

6. As soon as reasonably practicable after the granting of the Bidding Procedures Order:

   (a) a notice of the SISP and such other relevant information which the Company, in consultation with the Monitor and the DIP Lenders, considers appropriate shall be published in the *National Post*, the *Telegram (NL)* and *The Globe & Mail* and such other publications as may be considered appropriate;

   (b) a press release setting out the notice and such other relevant information regarding the Opportunity as may be considered appropriate, shall be issued with *Canada Newswire* designating dissemination in Canada; and

   (c) any parties that have already reached out to the Monitor expressing their interest.

7. The Monitor shall send a letter describing the Opportunity (a "**Solicitation Letter**"), outlining the SISP and inviting recipients of the Solicitation Letter to express their interest pursuant to the SISP, for distribution to potential bidders as soon as practical.

*Virtual Data Room*

8. A confidential virtual data room (the "**VDR**") in relation to the Opportunity will be made available by the Company or the Monitor to Potential Bidders that have executed the NDA (as defined below) in accordance with paragraph 9 herein. The VDR will be made available as soon as practicable. Following the completion of "**Phase 1**", but prior to the completion of "**Phase 2**", additional information may be added to the VDR to enable Phase 2 Qualified Bidders to complete any confirmatory due diligence in respect of the Company and the Opportunity. The Monitor, in consultation with the Company and the DIP Lenders, may establish or cause the Company to establish separate VDRs (including "**clean rooms**"), if the Monitor reasonably determines that doing so would further the Company's and any Potential Bidders' compliance with applicable antitrust and competition laws, or would prevent the distribution of commercially sensitive competitive information. The Monitor may also, in consultation with the Company and the DIP Lenders, limit the access of any Potential Bidder to any confidential information in the VDR where the Monitor reasonably determines that such access could negatively impact the SISP, the ability to maintain the confidentiality of the information, the Business or its value.

**PHASE 1: NON-BINDING LOIS**

*Phase 1 Qualified Bidders and Delivery of Confidential Information Memorandum*

9. In order to participate in the SISP, and prior to the distribution of any confidential information to an interested party (including access to the VDR), such interested party must deliver to the Monitor at the address specified in Appendix B hereto (including by email) a Non Disclosure Agreement (an "**NDA**") which shall enure to the benefit of any Successful Bidder that closes a transaction contemplated by the Successful Bid. Pursuant to the terms of the NDA to be signed by a potential bidder (each potential bidder who has executed an NDA with the Monitor, a "**Potential Bidder**"), each Potential Bidder will be

prohibited from communicating with any other Potential Bidder regarding the Opportunity during the term of the SISP, without the consent of the Monitor. Prior to the Monitor executing an NDA with any potential bidder, any potential bidder may be required to provide evidence, reasonably satisfactory to the Monitor, in consultation with the Company, of its financial wherewithal to complete a transaction in respect of the Opportunity (either with existing capital or with capital reasonably anticipated to be raised prior to closing) and/or to disclose details of their ownership and/or investors. For the avoidance of doubt, a party who has executed an NDA or a joinder with a Potential Bidder for the purpose of providing financing to a Potential Bidder in connection with the Opportunity (such party a "**Financing Party**") shall not be deemed a Potential Bidder for purposes of the SISP, provided that such Financing Party undertakes to inform the Monitor in the event that it elects to act as a Potential Bidder.

10. A Potential Bidder that has executed an NDA and provided any additional information required pursuant to paragraph 9, will be deemed a "**Phase 1 Qualified Bidder**" and will be promptly notified of such classification by the Monitor.

11. The Monitor with the assistance of the Company and the DIP Lenders, as required, will prepare and send to each Phase 1 Qualified Bidder a confidential information memorandum providing additional information considered relevant to the Opportunity (a "**CIM**") as soon as practicable. The Monitor, the Company, the DIP Lenders and their respective advisors make no representation or warranty as to the information contained in the CIM or otherwise made available pursuant to the SISP.

12. The Monitor shall provide any person deemed to be a Phase 1 Qualified Bidder with access to the VDR. The Monitor, the Company, the DIP Lenders and their respective advisors make no representation or warranty as to the information contained in the VDR. The VDR shall contain a template letter of intent (the "**Template LOI**") and a template purchase and sale agreement ("**Template PSA**").

13. If a Phase 1 Qualified Bidder wishes to submit a bid, it must deliver a non-binding letter of intent (an "**LOI**") (each such LOI, provided in accordance with paragraph 14 below, a "**Phase 1 Qualified Bid**"), to the Monitor at the address specified in Appendix B hereto (including by email) so as to be received by the Monitor not later than 5:00 p.m. (Newfoundland Standard Time) on April 17, 2022, or such other date or time as may be agreed by the Monitor in consultation with the Company and the DIP Lenders (the "**Phase 1 Bid Deadline**"). To the extent possible, the Phase 1 Qualified Bid should follow the format as set out in the Template LOI.

14. An LOI submitted by a Phase 1 Qualified Bidder will only be considered a "**Phase 1 Qualified Bid**" if the LOI complies at a minimum with the following:

    (a) it has been duly executed by all required parties;

    (b) it is received by the Phase 1 Bid Deadline;

    (c) it provides written evidence, satisfactory to the Monitor, in consultation with the Company and the DIP Lenders, of the ability to consummate the transaction within

the timeframe contemplated by the SISP and to satisfy any obligations or liabilities to be assumed on closing of the transaction, including, without limitation, a specific indication of the sources of capital;

(d) it identifies all proposed material conditions to closing including, without limitation, any internal, regulatory or other approvals and any form of agreement or other document required from a government body, stakeholder or other third party, and an estimate of the anticipated timeframe and any anticipated impediments for obtaining such approvals;

(e) it: (i) identifies the Qualified Phase 1 Bidder and representatives thereof who are authorized to appear and act on behalf of the Qualified Phase 1 Bidder for all purposes regarding the contemplated transaction; and (ii) fully discloses the identity of each entity or person that will be sponsoring, participating in or benefiting from the transaction contemplated by the LOI;

(f) an outline of any additional due diligence required to be conducted in order to submit a binding offer;

(g) it clearly indicates:

(i) that the Phase 1 Qualified Bidder is seeking to acquire all or substantially all of the Business whether through an asset purchase, a share purchase or a combination thereof (either one being, a "**Sale Proposal**") or some other portion of the Business (a "**Partial Sale Proposal**"); and/or

(ii) whether the Phase 1 Qualified Bidder is offering to make an investment in, restructure, recapitalize, reorganize or refinance the Company or their business (an "**Investment Proposal**");

(h) it contains such other information as may be reasonably requested by the Monitor, in consultation with the Company and the DIP Lenders;

(i) it does not provide for any break fee or expense reimbursement;

(j) in the case of a Sale Proposal, it identifies or contains the following:

(i) the purchase price or price range and key assumptions supporting the valuation and the anticipated amount of cash payable on closing of the proposed transaction;

(ii) any contemplated purchase price adjustment;

(iii) a description of the specific assets that are expected to be subject to the transaction and any assets or obligations expected to be excluded;

(iv) a description of those liabilities and obligations (including operating liabilities, obligations to employees, and reclamation obligations) which the

Phase 1 Qualified Bidder intends to assume and which such liabilities and obligations it does not intend to assume;

(v) information sufficient for the Monitor, in consultation with the Company and the DIP Lenders, to determine that the Phase 1 Qualified Bidder has sufficient ability to satisfy and perform any liabilities or obligations assumed pursuant to subparagraph (iv) above; and

(vi) any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the transaction; and

(k) in the case of an Investment Proposal, it identifies the following:

(i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment, restructuring, recapitalization, refinancing or reorganization;

(ii) the aggregate amount of the equity and/or debt investment to be made in the Company or their business;

(iii) the underlying assumptions regarding the *pro forma* capital structure;

(iv) a description of those liabilities and obligations (including operating liabilities, obligations to employees, and reclamation obligations) which the Phase 1 Qualified Bidder intends to assume and which such liabilities and obligations it does not intend to assume;

(v) information sufficient for the Monitor, in consultation with the Company, to determine that the Phase 1 Qualified Bidder has sufficient ability to satisfy and perform any liabilities or obligations assumed pursuant to subparagraph (iv) above; and

(vi) any other terms or conditions of the Investment Proposal that the Phase 1 Qualified Bidder believes are material to the transaction.

15. Notwithstanding the foregoing, the Monitor in consultation with the Company and the DIP Lenders may waive compliance with any one or more of the requirements in paragraph 14 and deem any such non-compliant LOI to be a Phase 1 Qualified Bid, provided that doing so shall not constitute a waiver by the Monitor of the requirements of paragraph 14 or an obligation on the part of the Monitor to designate any other LOI as a Phase 1 Qualified Bid. The Monitor will be under no obligation to negotiate identical terms with, or extend identical terms to, each Phase 1 Qualified Bidder;

*Assessment of Phase 1 Qualified Bids and Subsequent Process*

16. The Monitor, in consultation with the Company and the DIP Lenders, may, following the receipt of any LOI, seek clarification with respect to any of the terms or conditions of such LOI and/or request and negotiate one or more amendments to such LOI prior to

determining if the LOI should be considered a Phase 1 Qualified Bid or a Phase 1 Successful Bid (as defined below).

17. Following the Phase 1 Bid Deadline, the Monitor shall determine, in accordance with the requirements of paragraph 14 and in consultation with the Company, the LOI(s) that are selected as the most favourable Phase 1 Qualified Bid(s), which Phase 1 Qualified Bid(s) shall be deemed a "**Phase 1 Successful Bid(s)**" and which Phase 1 Qualified Bidder(s) accordingly shall be deemed a "**Phase 2 Qualified Bidder(s)**". For greater certainty, there can be more than one Phase 1 Qualified Bid that may be determined as being a Phase 1 Successful Bid, and more than one Phase 1 Qualified Bidder that may be determined as being a Phase 2 Qualified Bidder.

18. Only Phase 2 Qualified Bidders – being those that have submitted a Phase 1 Successful Bid – shall be permitted to proceed to Phase 2 of the SISP.

19. The Monitor shall notify each Phase 1 Qualified Bidder in writing as to whether its Phase 1 Qualified Bid constituted a Phase 1 Successful Bid – such that it is a Phase 2 Qualified Bidder – within five (5) Business Days of the Phase 1 Bid Deadline, or at such later time as the Monitor deems appropriate, in consultation with the Company.

20. Without limiting the provisions governing amendment of the SISP set out in paragraph 33 below, and notwithstanding the process and timeline for Phase 1, the process to identify and designate Phase 2 Qualified Bidders and the terms upon which Phase 2 may be continued as described below, the Monitor may at any time before or after the Phase 1 Bid Deadline, determine that Phase 2 is not required and may proceed to execute a definitive agreement (which shall be subject to Court approval) with respect to a transaction contemplated in a Phase 1 Qualified Bid submitted at any time on or before the Phase 1 Bid Deadline.

## PHASE 2: FORMAL OFFERS AND REMOVAL OF CONDITIONS

### *Formal Binding Offers*

21. Any Phase 2 Qualified Bidder that wishes to make a formal offer with respect to his/her/its Sale Proposal or Investment Proposal shall submit a binding offer (a "**Binding Offer**"): (a) in the case of a Sale Proposal, in the form of the Template PSA provided in the VDR, along with a marked version showing edits to the original form of Template PSA provided in the VDR; or (b) in the case of an Investment Proposal, a plan or restructuring support agreement in form and substance satisfactory to the Monitor, in consultation with the Company and the DIP Lenders (each, such Binding Offer submitted in accordance with paragraph 22 below, a "**Phase 2 Qualified Bid**") in each case to the Monitor, at the address specified in Appendix B hereto (including by email) so as to be received by the Monitor not later than 5:00 p.m. (Newfoundland Standard Time) on June 12, 2022, or such other date or time as may be agreed by the Monitor in consultation with the Company and the DIP Lenders (as may be extended, the "**Phase 2 Bid Deadline**").

22. A Binding Offer will only be considered as a Phase 2 Qualified Bid if the Binding Offer:

(a) has been received by the Phase 2 Bid Deadline;

(b) is a Binding Offer: (i) to purchase all, substantially all, or a portion of the Business; and/or (ii) to make an investment in, restructure, recapitalize, reorganize or refinance the Company or their business, on terms and conditions reasonably acceptable to the Company and the DIP Lenders;

(c) identifies all executory contracts of the Company that the Phase 2 Qualified Bidder will assume and clearly describes, for each contract or on an aggregate basis, how all monetary defaults and non-monetary defaults will be remedied, as applicable;

(d) is not subject to any financing conditionality;

(e) is unconditional, other than upon the receipt of the Approval Order(s) (as defined below) and satisfaction of any other conditions expressly set forth in the binding offer;

(f) includes acknowledgments and representations of the Phase 2 Qualified Bidder that it: (i) has had an opportunity to conduct any and all due diligence regarding the Opportunity prior to making its Binding Offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Business in making its Binding Offer; (iii) did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Opportunity or the completeness of any information provided in connection therewith, other than as expressly set forth in the Binding Offer or other transaction document submitted with the Binding Offer; and (iv) promptly will commence any governmental or regulatory review of the proposed transaction by the applicable competition, antitrust or other applicable governmental authorities;

(g) the Binding Offer must be accompanied by a letter that confirms that the Binding Offer: (i) may be accepted by the Monitor by countersigning the Binding Offer, and (ii) is irrevocable and capable of acceptance until the earlier of (A) two business days after the date of closing of the Successful Bid; and (B) the Outside Date;

(h) does not provide for any break fee or expense reimbursement;

(i) is accompanied by a deposit in the amount of not less than 5% of the cash purchase price payable on closing or total new investment contemplated, as the case may be (the "Deposit"), along with acknowledgement that if the Phase 2 Qualified Bidder is selected as the Successful Bidder (as defined below), that the Deposit will be non-refundable subject to approval of the Successful Bid (as defined below) by the Court and the terms described in paragraph 32 below;

(j) contemplates and reasonably demonstrates a capacity to consummate a closing of the transaction set out therein on or before July 10 2022, or such earlier date as is practical for the parties to close the contemplated transaction, following the satisfaction or waiver of the conditions to closing (the "**Target Closing Date**") and in any event no later than July 10, 2022 (the "**Outside Date**"); and

(k) contains an agreement that the Phase 2 Qualified Bidder submitting such bid, if not chosen as the Successful Bidder, shall serve, without modification to such bid, as a Backup Bidder (as defined below), in the event the Successful Bidder fails to close.

23. The Monitor shall not purport to waive strict compliance with any one or more of the requirements specified above (for greater certainty, other than paragraph 22(c) above and paragraph 32 below and deem any such non-compliant Binding Offer to be a Phase 2 Qualified Bid.

*Selection of Successful Bid*

24. The Monitor, in consultation with the Company and the DIP Lenders, may, following the receipt of any Binding Offer, seek clarification with respect to any of the terms or conditions of such Binding Offer and/or request and negotiate one or more amendments to such Binding Offer prior to determining if the Binding Offer should be considered a Phase 2 Qualified Bid.

25. The Monitor, in consultation with the Company and the DIP Lenders, will: (a) review and evaluate each Phase 2 Qualified Bid; and (b) identify the highest or otherwise best bid (the "**Successful Bid**", and the Phase 2 Qualified Bidder making such Successful Bid, the "**Successful Bidder**") pursuant to the paragraphs below. Any Successful Bid shall be subject to approval by the Court.

26. In the event there is at least two Phase 2 Qualified Bids, the Successful Bid shall be identified through an Auction.

27. Auction: In the event that an auction (the "**Auction**") is required in accordance with the terms of this SISP, it shall be conducted in accordance with the procedures set forth in this paragraph:

(a) The Auction shall commence at a time to be designated by the Monitor, no later than June 19, 2022, and may, in the discretion of the Monitor, be held virtually due to the COVID-19 pandemic via videoconference, teleconference or such other reasonable means as the Monitor deems appropriate. The Monitor and the Company shall work in good faith with the parties entitled to attend the Auction to arrange for the Auction to be so held. The Monitor reserves the right to cancel or postpone the Auction in the consultation with the DIP Lenders.

(b) The identity of each Phase 2 Qualified Bidder participating in the Auction will be disclosed, on a confidential basis, to each other Phase 2 Qualified Bidder participating in the Auction.

(c) Except as otherwise permitted in the Monitor's discretion, only the Company, the Dip Lenders, the Monitor and the Phase 2 Qualified Bidders, and, in each case, their respective professionals shall be entitled to attend the Auction. Only a Phase 2 Qualified Bidder is eligible to participate in the Auction.

(d) Phase 2 Qualified Bidders shall appear at the Auction, or through a duly authorized representative.

(e) Except as otherwise set forth herein, the Monitor, in consultation with the Company and the DIP Lenders, may waive and/or employ and announce at the Auction additional rules, including rules to facilitate the participation of parties participating in an aggregated bid, that are reasonable under the circumstances for conducting the Auction, provided that such rules are: (i) not inconsistent with the Initial Order, the SISP, the Bidding Procedures, the DIP, the CCAA, or any order of the Court entered in connection with the CCAA Proceedings; (ii) disclosed to each Phase 2 Qualified Bidder; and (iii) designed, in the Monitor's business judgment, to result in the highest and otherwise best offer.

(f) The Monitor will arrange for the actual bidding at the Auction to be transcribed or recorded. Each Phase 2 Qualified Bidder participating in the Auction shall designate a single individual to be its spokesperson during the Auction.

(g) Each Phase 2 Qualified Bidder participating in the Auction must confirm on the record, at the commencement of the Auction and again at the conclusion of the Auction, that it has not engaged in any collusion with the Company or any other person regarding the SISP that has not been disclosed to all other Phase 2 Qualified Bidders.

(h) Prior to the Auction, the Monitor shall identify, in consultation with the Company and the DIP Lenders, the highest and best of the Phase 2 Qualified Bids received and such Phase 2 Qualified Bid shall constitute the opening bid for the purposes of the Auction (the "**Opening Bid**"). Subsequent bidding will continue in minimum increments valued at not less than $[250,000] cash in excess of the Opening Bid. For the purposes of facilitating bidding, the Monitor may ascribe a monetary value to non-cash considerations, including by way of example, to different levels of conditionality to closing. Each Phase 2 Qualified Bidder shall provide evidence of its financial wherewithal and ability to consummate the transaction at the increased purchase price, if so requested by the Monitor. Further, in the event that an Aggregated Bid qualifies to participate in the Auction, modifications to the bidding requirements may be made by the Monitor to facilitate bidding by the participants in the Aggregated Bid.

(i) All Phase 2 Qualified Bidders shall have the right to, at any time, request that the Monitor announce, subject to any potential new bids, the then-current highest and best bid and, to the extent requested by any Phase 2 Qualified Bidder, use reasonable efforts to clarify any and all questions such Phase 2 Qualified Bidder

may have regarding the Monitor's announcement of the then-current highest and best bid.

(j) Each participating Phase 2 Qualified Bidder shall be given reasonable opportunity to submit an overbid at the Auction to any then-existing overbids. The Auction shall continue until the bidding has concluded and there is one remaining Phase 2 Qualified Bidder that the Monitor, in consultation with the Company and the DIP Lenders, determine has submitted the highest and otherwise best Phase 2 Qualified Bid of the Auction. At such time and upon the conclusion of the bidding, the Auction shall be closed and the final remaining Phase 2 Qualified Bidder shall be the Successful Bidder.

(k) Upon selection of a Successful Bidder, the Monitor shall require the Successful Bidder to deliver as soon as practicable an amended and executed transaction document that reflects its final bid and any other modifications submitted and agreed to during the Auction, prior to the filing of the application material for the hearing to consider the Approval Motion (as defined below).

(l) The Monitor shall not consider any bids submitted after the conclusion of the Auction.

28. The final Successful Bid and the Backup Bid (as defined below) shall be selected by no later than June 19, 2022 and the definitive documentation in respect of the Successful Bid must be finalized and executed no later than June 26, 2022, which definitive documentation shall be conditional only upon the receipt of the Approval Order(s) and the express conditions set out therein and shall provide that the Successful Bidder shall use all reasonable efforts to close the proposed transaction by no later than the Target Closing Date, or such longer period as shall be agreed to by the Monitor in consultation with the Company, the DIP Lenders and the Successful Bidder. In any event, the Successful Bid must be closed by no later than the Outside Date, unless with the authorization of the DIP Lenders, acting reasonably.

29. Notwithstanding anything in the SISP to the contrary, if an Auction is conducted, the Phase 2 Qualified Bidder with the next highest or otherwise best Phase 2 Qualified Bid at the Auction, as determined by the Monitor will be designated as the backup bidder (the "**Backup Bidder**"). The Backup Bidder shall be required to keep its initial Phase 2 Qualified Bid (or if the Backup Bidder submitted one or more overbids at the Auction, the Backup Bidder's final overbid) (the "**Backup Bid**") open until the earlier of: (A) two business days after the date of closing of the Successful Bid; and (B) the Outside Date.

*Approval of Successful Bid*

30. The Monitor shall apply to the Court (the "**Approval Motion**") for one or more orders: (i) approving the Successful Bid and the Backup Bid (as applicable) and authorizing the taking of such steps and actions and completing such transactions as are set out therein or required thereby; and (ii) granting a vesting order and/or reverse vesting order to the extent that such relief is contemplated by the Successful Bid or the Backup Bid, as applicable, so

as to vest title to any purchased assets in the name of the Successful Bidder or the Backup Bidder (as applicable) and/or vesting unwanted liabilities out of one or more of the Company (collectively, the "Approval Order(s)"). The Approval Motion will be held on a date to be scheduled by the Monitor and confirmed by the Court upon application by the Monitor, who shall use their best efforts to schedule the Approval Motion on or before July 3, 2022, subject to Court availability. The Approval Motion may be adjourned or rescheduled by the Monitor without further notice, by an announcement of the adjourned date at the Approval Motion or in a notice to the service list of the CCAA Proceedings prior to the Approval Motion.

31. All Phase 2 Qualified Bids (other than the Successful Bid) shall be deemed rejected on and as of the date of the closing of the Successful Bid, with no further or continuing obligation of the Monitor to any unsuccessful Phase 2 Qualified Bidders.

*Deposits*

32. The Deposit(s):

(a) shall, upon receipt from the Phase 2 Qualified Bidder(s), be retained by the Monitor and deposited in a non-interest-bearing trust account.

(b) received from the Successful Bidder, shall:

(i) be applied to the purchase price to be paid by the applicable Successful Bidder whose Successful Bid is the subject of the Approval Order(s), upon closing of the approved transaction; and

(ii) shall otherwise be held and refundable in accordance with the terms of the definitive documentation in respect of any Successful Bid, provided that all such documentation shall provide that the Deposit shall be retained by the Monitor and forfeited by the Successful Bidder, if the Successful Bid fails to close by the Outside Date, and such failure is attributable directly to any failure or omission of the Successful Bidder to fulfil its obligations under the terms of the Successful Bid;

(c) received from the Backup Bidder, unless it is subsequently selected as the Successful Bidder, shall be fully refunded, to the Backup Bidder on or before the earlier of: (i) two (2) Business Days after the date of the closing to the Successful Bid; or (ii) July 17, 2022; and

(d) received from the Phase 2 Qualified Bidder(s) that are not the Successful Bidder or the Backup Bidder shall be fully refunded, to the Phase 2 Qualified Bidder(s) that paid the Deposit(s) as soon as practical following the selection of the Successful Bidder and in any event no later than July 17, 2022.

**Amendment**

33. The Monitor shall have the right at any time, in consultation with the Company and the DIP Lenders, to: (i) make material amendments to the SISP (including by extending the Phase 1 Bid Deadline or the Phase 2 Bid Deadline); and (ii) make non-material amendments to the SISP, in each case if, in the Monitor's reasonable judgment in consultation with the Company and/or the DIP Lenders, such material or non-material amendment will enhance the procedure for conducting the SISP or maximize the value of a transaction pursuant to the SISP. The Monitor shall advise the Service List in the CCAA Proceedings of any material amendment to the SISP. Without limiting the foregoing and notwithstanding the process and timeline for Phase 1 and the continuation of the SISP into Phase 2, the Monitor may at any time during Phase 1 or Phase 2: (i) subject to Court approval, enter into a stalking horse agreement involving a transaction with respect to some or all of the Business with a party identified through the SISP or otherwise; or (ii) subject to Court approval, enter into a definitive agreement with respect to a transaction involving some or all of the Business with a party identified through the SISP or otherwise and suspend or terminate the SISP.

**"As is, Where is"**

34. Any sale (or sales) of the Business will be on an "as is, where is" basis except for representations and warranties that are customarily provided in purchase agreements for a company subject to CCAA proceedings and any such representations and warranties provided for in the definitive documents shall not survive closing.

**Free of Any and All Claims And Interests**

35. In the event of a sale, to the extent permitted by law, all of the rights, title and interests of the Company in and to the Business to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the "**Claims and Interests**") pursuant to section 36(6) of the CCAA, such Claims and Interests to attach to the net proceeds of the sale of such Business (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof), except to the extent otherwise set forth in the relevant transaction documents with a Successful Bidder.

**Credit Bidding**

36. Any party or parties holding a valid, enforceable, and properly perfected security interest in the Business may, subject in all respects to such party's compliance with the Bidding Procedures, credit bid the amount of debt secured by such lien as part of any transaction contemplated by the Bidding Procedures; provided, however, that such transaction shall also provide for the indefeasible and irrevocable repayment in full in cash on the date of closing of any such transaction of any and all obligations: (i) owing to the DIP Lenders; (ii) owing pursuant to any charges granted by the Court in the CCAA Proceedings; and (iii) secured by a security interest in the Business that is to be acquired under such transaction that is senior to the security interest held in such Business by the party

submitting such credit bid unless the holder or indenture trustee or agent of any such senior security interest otherwise agrees. Nothing contained in this paragraph 36 is intended to, or shall, alter or amend the rights, terms or obligations under any intercreditor agreement or other form of agreement in respect of existing indebtedness of the Company.

**Confidentiality**

37. For greater certainty other than as shall be required in connection with any Auction or Approval Motion, neither the Company nor the Monitor will share: (i) the identity of any Potential Bidder, or Phase 1 Qualified Bidder; or (ii) the terms of any bid, LOI, Phase 1 Qualified Bid, Sale Proposal, Investment Proposal or Phase 2 Qualified Bid, with any other bidder without the consent of such party (including by way of email).

**Further Orders**

38. At any time during the SISP, the Monitor may apply to the Court for advice and directions with respect to any aspect of this SISP and the Bidding Procedures including, but not limited to, the continuation of the SISP or with respect to the discharge of its powers and duties hereunder.

**Additional Terms**

39. In addition to any other requirement of these Bidding Procedures:

(a) The Monitor, as applicable, shall at all times prior to the selection of a Successful Bid use commercially reasonable efforts to facilitate a competitive bidding process in the SISP including, without limitation, by actively soliciting participation by all persons who would be customarily identified as high potential bidders in a process of this kind or who may be reasonably proposed by any of the Monitor, the DIP Lenders or the Company's stakeholders as a high potential bidder.

(b) Any consent, approval or confirmation to be provided by the Company and/or the Monitor is ineffective unless provided in writing and any approval required pursuant to the terms hereof is in addition to, and not in substitution for, any other approvals required by the CCAA or as otherwise required at law in order to implement a Successful Bid. For the avoidance of doubt, a consent, approval or confirmation provided by email shall be deemed to have been provided in writing for the purposes of this paragraph.

(c) All Phase 1 Qualified Bidders and Phase 2 Qualified Bidders shall at all times be granted information, access and facilitation that is no less complete and timely than is granted by the Monitor, or their representatives, to other Phase 1 Qualified Bidders and Phase 2 Qualified Bidders pursuant to the SISP. This shall include, without limitation, reasonable access to the Company's books, records, financial information, management, advisors and business partners. The Monitor shall review all information and materials provided by the Company or its representatives to the DIP Lenders or their representatives pursuant to the DIP and, to the extent that the Monitor, in consultation with the Company, is of the view that

any such information or materials are materially relevant to a Potential Bidder or Phase 1 Qualified Bidder or Phase 2 Qualified Bidder, then such information or materials shall be promptly posted to the VDR or otherwise made available to all Potential Bidders, Phase 1 Qualified Bidders and Phase 2 Qualified Bidders. Nothing in this paragraph creates binding obligations of third parties.

(d) Nothing in this SISP shall require that a Successful Bid, Backup Bid or any other bid must be approved by the Court. The Court at all times retains the discretion to direct the clarification, termination, extension or modification of the SISP and Bidding Procedures on application of any interested party.

(e) Prior to the seeking of Court approval for any transaction or bid contemplated by this SISP, the Monitor will provide a report to the Court on the SISP process, parts of which may be filed under seal, including in respect of any and all bids received.

## APPENDIX A
## DEFINED TERMS

**"Applicant"** shall have the meaning set forth in the preamble.

**"Approval Motion"** shall have the meaning set forth in paragraph 30.

**"Approval Order(s)"** shall have the meaning set forth in paragraph 30.

**"Auction"** shall have the meaning set forth in paragraph 27.

**"Backup Bid"** shall have the meaning set forth in paragraph 29.

**"Backup Bidder"** shall have the meaning set forth in paragraph 29.

**"Bid"** shall have the meaning set forth in the preamble.

**"Bidding Procedures"** shall have the meaning set forth in the preamble.

**"Bidding Procedures Order"** shall have the meaning set forth in the preamble.

**"Binding Offer"** shall have the meaning set forth in paragraph 21.

**"Business"** shall have the meaning set forth in the preamble.

**"Business Day"** means a day on which banks are open for business in St. John's, Newfoundland and Labrador but does not include a Saturday, Sunday or statutory holiday in the Province of Newfoundland and Labrador.

**"CCAA"** shall have the meaning set forth in the preamble.

**"CCAA Proceedings"** shall have the meaning set forth in the preamble.

**"CIM"** "shall have the meaning set forth in paragraph 11.

**"Claims and Interests"** shall have the meaning set forth in paragraph 35.

**"Court"** shall have the meaning set forth in the preamble.

**"Deposit"** shall have the meaning set forth in paragraph 22(i).

**"DIP"** means the DIP Financing Agreement dated March 7, 2022 among Grant Thornton Limited, as the Monitor/Interim Receiver of the Company and the lenders party thereto from time to time providing for DIP financing.

**"DIP Lenders"** means, collectively, Bridging Finance Inc. and/or an affiliate to be named, and Her Majesty in Right of Newfoundland and Labrador, as represented by the Minister of Industry, Energy and Technology, each in its capacity as lender under the DIP.

"**Financing Party**" shall have the meaning set forth in paragraph 9.

"**Initial Order**" shall have the meaning set forth in the preamble.

"**Investment Proposal**" shall have the meaning set forth in paragraph 14(g)(ii).

"**LOI**" shall have the meaning set forth in paragraph 13.

"**Monitor**" shall have the meaning set forth in the preamble.

"**NDA**" shall have the meaning set forth in paragraph 9.

"**Opening Bid**" shall have the meaning set forth in paragraph 27(h)27(h).

"**Opportunity**" shall have the meaning set forth in paragraph 2.

"**Outside Date**" shall have the meaning set forth in paragraph 22(j).

"**Partial Sale Proposal**" shall have the meaning set forth in paragraph 14(g)(i).

"**Phase 1**" shall have the meaning set forth in paragraph 8.

"**Phase 1 Bid Deadline**" shall have the meaning set forth in paragraph 13.

"**Phase 1 Qualified Bid**" shall have the meaning set forth in paragraph 13.

"**Phase 1 Qualified Bidder**" shall have the meaning set forth in paragraph 10.

"**Phase 1 Successful Bid**" shall have the meaning set forth in paragraph 17.

"**Phase 2**" shall have the meaning set forth in paragraph 8.

"**Phase 2 Bid Deadline**" shall have the meaning set forth in paragraph 21.

"**Phase 2 Qualified Bid**" shall have the meaning set forth in paragraph 21.

"**Phase 2 Qualified Bidder**" shall have the meaning set forth in paragraph 17.

"**Potential Bidder**" shall have the meaning set forth in paragraph 9.

"**Sale Proposal**" shall have the meaning set forth in paragraph 14(g)(i).

"**SISP**" shall have the meaning set forth in the preamble.

"**Successful Bid**" shall have the meaning set forth in paragraph 25.

"**Successful Bidder**" shall have the meaning set forth in paragraph 25.

"**Target Closing Date**" shall have the meaning set forth in paragraph 22(j).

**"Solicitation Letter"** shall have the meaning set forth in paragraph 7.

**"Template LOI"** shall have the meaning set forth in paragraph 12.

**"Template PSA"** shall have the meaning set forth in paragraph 12.

**"VDR"** shall have the meaning set forth in paragraph 8.

## APPENDIX B

**TO the Company:**

Canada Fluorspar Inc., Canada Fluorspar (NL) Inc. and Newspar (a General Partnership)

with a copy to:

Cox & Palmer

**Attention:** **Darren O'Keefe and Allison Philpott**
Email: dokeefe@coxandpalmer.com and aphilpott@coxandpalmer.com

**TO THE MONITOR:**

Grant Thornton Limited

**Attention:** **Phil Clarke and Sean MacNeil**
Email: phil.clarke@ca.gt.com and sean.macneil@ca.gt.com

with a copy to:

McInnes Cooper

**Attention:** **Meghan King and Geoff Spencer**
Email: meghan.king@mcinnescooper.com and geoffrey.spencer@mcinnescooper.com

**This is Exhibit "D" referred to in the affidavit of Phil Clarke sworn before me this 26 day of July, 2022**

Notary Public or Commissioner of Oaths (affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

2022 01G 0709

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN BANKRUPTCY AND INSOLVENCY

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

**AND IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "CFI" or the "Company"); and

**AND IN THE MATTER OF** a Plan of Compromise or Arrangement of the Company;

**ORDER**

Before the Honourable Justice MacDonald;

**THIS APPLICATION**, made by Grant Thornton Limited ("GTL" or the "**Monitor**"), in its capacity as Court-Appointed Monitor of the Company, pursuant to the *Companies Creditors Arrangement Act* R.S.C., 1985 c. C-36 as Amended ("**CCAA**") and *Wage Earners Protection Program Act* S.C. 2005, c. 47, s. 1 ("**WEPPA**") for an Order substantially in the form filed with the Application was heard on this 10th day of June, 2022.

**ON READING** the affidavits of Phil Clarke sworn on the 30th day of May, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and of Melissa Spearns sworn on the 27th day of May, 2022 (the "**Spearns Affidavit**") and the Exhibits thereto, and the Monitor's Third Report;

**UPON HEARING** Meghan M. King of Counsel for the Monitor, Darren D. O'Keefe of Counsel for the Company, other counsel as they may appear, no one else appearing for any party duly served as outlined in the affidavit of service dated the __ day of _____, 2022 ,

**IT IS HEREBY ORDERED:**

1. **THAT** the time for service of the within Notice of Motion and materials filed, as set out in

Filed June 10/22

the affidavit of served is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

2. **THAT** all terms not otherwise defined herein shall have the meaning ascribed to them in the Amended and Restated Initial Order of this Court dated March 18th, 2022 (the "**ARIO**"), the order of this Court dated March 18th, 2022, approving the Sales, Solicitation and Investment Process (the "**SISP Order**"), the Clarke Affidavit, the Spearns Affidavit, and the Third Report of the Monitor filed on May 30th, 2022 (the "**Monitors Third Report**");

**EXTENSION OF THE STAY PERIOD**

3. **THIS COURT ORDERS** that the current Stay Period under the CCAA be and is hereby extended to and including September 2, 2022.

**WAGE EARNER PROTECTION PROGRAM ACT**

4. **THIS COURT ORDERS AND DECLARES** that pursuant to section 5(5) of WEPPA the Company and their collective former employees meet the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations,* SOR/2008-222 and are a former employer, employees and individuals to whom the WEPPA applies as of March 21, 2022.

**AMENDMENTS TO THE SISP AND ARIO**

5. **THIS COURT ORDERS** that the amendments to the SISP Order as proposed by the Monitor attached hereto as **Exhibit "A"**, and the amendments to the ARIO as proposed by the Monitor, attached hereto as **Exhibit "B"**, are hereby approved.

6. **THIS COURT ORDERS** that in carrying out the terms of this Order, the Monitor whether in its personal capacity or in its capacity as the Monitor:

   (a) shall have all the protections provided to it as an officer of the Court, including the protections granted pursuant to the CCAA and other orders granted in

these CCAA proceedings, including the stay of proceedings; and

(b) shall incur no liability or obligation as a result of carrying out any duties or work in connection with this Order, save and except for any gross negligence or willful misconduct on its part.

**APPROVAL OF THE MONITORS THIRD REPORT**

7. **THIS COURT ORDERS** that the Third Report, and the activities of the Monitor and its counsel referred to therein be and are hereby approved; provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 10 day of June, 2022.

COURT OFFICER

# Exhibit "A"

**2022 01G 0709**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**IN BANKRUPTCY AND INSOLVENCY**

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

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

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**ORDER APPROVING A REVISED SALE AND INVESTMENT SOLICITATION PROCESS**

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[1] **CONSIDERING** the Applicant's *Application for the Issuance of (i) an Initial Order, (ii) an Amended and Restated Initial Order, (iii) an Order –approving the DIP Financing Agreement-; and (iv) an Order approving a Sale and Investment Solicitation Process* (the "**Application**"), the affidavit of Phil Clarke dated the 8th day of March, 2022 and the exhibits in support thereof;

[2] **CONSIDERING** the submissions of counsel;

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[3] **CONSIDERING** the pre-filing report prepared by Grant Thornton Limited (the "Monitor");

[4] **CONSIDERING** the further materials filed with this Court since March 8th, 2022, including the First, Second and Third Reports of the Monitor, and the affidavit of Phil Clarke dated the 30th day of May, 2022 and Melissa Spearns dated May 26th, 2022 and the exhibits thereto;

[4][5] **CONSIDERING** the provisions of the *Companies' Creditors Arrangement Act* ("CCAA");

**THE COURT:**

[5] **GRANTS** the Application.

[6] **CONFIRMS ITS GRANT** of the original Order dated March 18th, 2022, in connection with the Application (defined above), with the modifications blacklined herein being approved and deemed effective as of the date of the Order to which this revised Order is attached as Exhibit "A"

**DEFINITIONS**

[6][7] **DECLARES** that all capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Bidding Procedures (as defined below).

**SERVICE**

[7][8]**DECLARES** that sufficient prior notice of the presentation of the Application has been given by the Applicant to interested parties, and that further service thereof is hereby dispensed with.

[8][9]**PERMITS** the service of the present Order (this "Order") at any time and place and by any means whatsoever.

**SISP**

[9][10] **APPROVES** and **RATIFIES** the Revised Sale and Investment Solicitation Process ("SISP") set forth in the Procedures for the Sale and Investment Solicitation Process attached as Schedule "A" hereto (the "Bidding Procedures").

[10][11] **AUTHORIZES** the Applicant and the Company, to the extent the Company assists with the SISP, to implement the SISP and to take such steps and execute such documentation as may be necessary or incidental thereto, the whole in accordance with the Bidding Procedures.

[11][12] **ORDERS** that the Applicant and the Company, as well as respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of performing their duties under the SISP, except to the extent of such losses, claims, damages or liabilities resulting from gross negligence or wilful misconduct of any such person or entity, as applicable, as determined by this Court.

**GENERAL**

[12][13] **ORDERS** that the Applicant and the Company, to the extent the Company assists with the SISP are authorized and permitted under applicable law to disclose and transfer to Potential Bidders and to their advisors personal information in the custody or control of the Company relating to the operation of the business, including human resources and payroll information, records pertaining to the Company's past and current employees, and information about any consumer, website visitor or other individual (collectively, "Personal Information"), but only to the extent necessary to negotiate, determine whether to proceed with, and attempt to complete a transaction in accordance with the SISP (a "Transaction"). Each Potential Bidder to whom any Personal Information is disclosed shall maintain and protect the Personal Information with security safeguards appropriate to the sensitivity of the Personal Information and as may otherwise be required by applicable federal or provincial privacy legislation and limit the use of such information to its evaluation of a Transaction, and if it does not complete a Transaction with the Applicant, shall return all such information to the Applicant, or in the alternative permanently destroy all such information.

[13][14] **ORDERS** that the Applicant may from time to time apply to this Court for advice and directions in the discharge of their respective powers and duties hereunder or under the SISP.

[14][15] **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or

elsewhere, to give effect to this Order and to assist the Applicant, as applicable, and their respective agents in carrying out the terms of this Order.

~~[15]~~[16]____**ORDERS** the provisional execution of this Order notwithstanding appeal and without any security or provision for costs whatsoever.

~~[16]~~[17]____**WITHOUT COSTS.**

# Exhibit "B"

**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER – AMENDMENT #1**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON READING** the affidavits of Phil Clarke sworn the 30th day of March, 2022 (the "Clarke Affidavit") and the Exhibits thereto, and of Melissa Spearns on the 26th day of May, 2022 (the "Spearns Affidavit") and the Exhibits thereto, and the Monitors First, Second and Third Reports

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

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## SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such

other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

   (b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

## RESTRUCTURING

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

    (a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

    (b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

    (c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

    All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice

period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

## NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including the 2 day of September, 2022 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

## NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which

the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

## NO INTERFERENCE WITH RIGHTS

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

## CONTINUATION OF SERVICES

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

## NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

**APPOINTMENT OF MONITOR**

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

    (d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

(e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the

"**Administration Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

## ENHANCEMENT OF MONITOR'S POWERS

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other

data storage media containing any such information ("**Records**") of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

**LIMITATION ON THE MONITOR'S LIABILITY**

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

**DIP FINANCING**

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the "**DIP Financing Agreement**") dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as

made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

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44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

    (a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

    (b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

    (c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

## SERVICE AND NOTICE

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

## GENERAL

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

Schedule "A"

Defined Terms

**"Excluded Inventory"** means inventory representing a value in the amount of USD2,500,000

**"Excluded Property"** means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

**"HSBC"** means HSBC Bank Canada; and

**"RFA"** means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.

**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER – AMENDMENT #1**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON READING** the affidavits of Phil Clarke sworn the 30th day of May, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and of Melissa Spearns on the 26th day of May, 2022 (the "**Spearns Affidavit**") and the Exhibits thereto, and the Monitors First, Second and Third Reports

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

Filed June 10, 20

amended ario (clean final- may 27 2022).docx

## SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such

other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

   (b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

## RESTRUCTURING

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

    (a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

    (b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

    (c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

    All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice

period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

## NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including the 2 day of September, 2022 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

## NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which

the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

**NO INTERFERENCE WITH RIGHTS**

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

**CONTINUATION OF SERVICES**

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

**NON-DEROGATION OF RIGHTS**

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

**APPOINTMENT OF MONITOR**

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

    (d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

(e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the

**"Administration Charge"**) on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

## ENHANCEMENT OF MONITOR'S POWERS

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other

data storage media containing any such information (**"Records"**) of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

**LIMITATION ON THE MONITOR'S LIABILITY**

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

**DIP FINANCING**

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the **"DIP Financing Agreement"**) dated the 7th day of March, 2022 between, the Company, as borrower, and Bridging Finance Inc., Bridging Income Fund LP, Bridging Private Debt

**This is Exhibit "E" referred to in the affidavit of Phil Clarke sworn before me this 26 day of July, 2022**

Notary Public or Commissioner of Oaths (affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

INAMINKA MARINE LTD.
130 LeMarchant Road, Suite #301
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

November 30th 2021

**Canada Fluorspar (NL) Inc.**
**PO Box 337**
**St. Lawrence, NL**
**A0E2V0**

RQN #N0012966
Inaminka 20209

Attention: Jason Flood

Re Consulting on loading Barge

| | |
|---|---|
| 27.5 days @ C$1,500.00 per day | $41,250.00 |
| HST @15% | $6,187.50 |
| Expences as attached | $894.00 |
| **Total** | **$48,331.50** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

INAMINKA MARINE LTD.
130 LeMarchant Road, Suite #301
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

December 12th 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 20210

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 64.5 hours @$220.00/hour | $14,190.00 |
| A. Barclay 24 hours @$200.00/hour | $4,800.00 |
| HST @15% | $2,848.50 |
| Expences as attached | $539.17 |
| **Total** | **$22,377.67** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

INAMINKA MARINE LTD.
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

December 31st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202111

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 140.0 hours @$220.00/hour | $30,800.00 |
| A. Barclay 30 hours @$200.00/hour | $6,000.00 |
| HST @15% | $5,520.00 |
| Expences as attached | $606.85 |
| **Total** | **$42,926.85** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns
A/C # 00063-010-4811410
IBAN # //CC001000063
BIC/SWIFT CIBCCATT

Kind regards

R. A. Spellacy

INAMINKA MARINE LTD.
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

January 15th. 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202201

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 65.0 hours @$220.00/hour | $14,300.00 |
| HST @15% | $2,145.00 |
| **Total** | **$16,445.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

INAMINKA MARINE LTD.
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

February 1st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202202

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 66.0 hours @$220.00/hour | $14,520.00 |
| Expences as attached | $91.00 |
| HST @15% | $2,178.00 |
| **Total** | **$16,789.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

# Exhibit "H"

# Form 31

# Proof of Claim

**Section 50.1, subsections 65.2(4), 81.2(1), 81.3(8), 81.4(8), 102(2), 124(2), 128(1), and paragraphs 51(1)(e) and 66.14(b) of the Act)**

*All notices or correspondence regarding this claim must be forwarded to the following address:* MacNab, Fagan & Murphy, Prince Charles Building, 120 Torbay Road, Suite W240, St. John's, NL A1A 2G8 Attention: Deborah L.J. Hutchings, Q.C.

In the matter of the bankruptcy (or the proposal, or the receivership) of Canada Fluorspar (NL) Inc. (name of debtor) of St. Lawrence, Newfoundland and Labrador (city and province) and the claim of Richard A. Spellacy, MM, creditor.

I, Richard A. Spellacy (name of creditor or representative of the creditor), of St. John's, Newfoundland and Labrador (city and province), do hereby certify:

1. That I am a creditor of the above-named debtor (or that I am (state position or title) of (name of creditor or representative of the creditor)).

2. That I have knowledge of all the circumstances connected with the claim referred to below.

3. That the debtor was, at the date of bankruptcy (or the date of the receivership, or in the case of a proposal, the date of the notice of intention or of the proposal, if no notice of intention was filed), namely the 21st day of February, 2022, and still is, indebted to the creditor in the sum of $252900, as specified in the statement of account (or affidavit) attached and marked Schedule "A", after deducting any counterclaims to which the debtor is entitled. (The attached statement of account or affidavit must specify the vouchers or other evidence in support of the claim.)

4. *(Check and complete appropriate category.)*

☐ A. UNSECURED CLAIM OF $

(other than as a customer contemplated by Section 262 of the Act)

That in respect of this debt, I do not hold any assets of the debtor as security and

*(Check appropriate description)*

☐ Regarding the amount of $ , I claim a right to a priority under section 136 of the Act.

☐ Regarding the amount of $ , I do not claim a right to a priority.

(Set out on an attached sheet details to support priority claim.)

This is Exhibit H referred to in the Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 24th day of October, 2022.

☐ B. CLAIM OF LESSOR FOR DISCLAIMER OF A LEASE $

That I hereby make a claim under subsection 65.2(4) of the Act, particulars of which are as follows:

(Give full particulars of the claim, including the calculations upon which the claim is based.)

☒ C. SECURED CLAIM OF $252900

That in respect of this debt, I hold assets of the debtor valued at $252900.00 plus HST and/or other applicable taxes as security, particulars of which are as follows:

(Give full particulars of the security, including the date on which the security was given and the value at which you assess the security, and attach a copy of the security documents.)

☐ D. CLAIM BY FARMER, FISHERMAN OR AQUACULTURIST OF $

That I hereby make a claim under subsection 81.2(1) of the Act for the unpaid amount of $

*(Attach a copy of sales agreement and delivery receipts.)*

☒ E. CLAIM BY WAGE EARNER OF $252900

☒ That I hereby make a claim under subsection 81.3(8) of the Act in the amount of $252900

☐ That I hereby make a claim under subsection 81.4(8) of the Act in the amount of $

☐ F. CLAIM AGAINST DIRECTOR $

*(To be completed when a proposal provides for the compromise of claims against directors.)*

That I hereby make a claim under subsection 50(13) of the Act, particulars of which are as follows:

*(Give full particulars of the claim, including the calculations upon which the claim is based.)*

☐ G. CLAIM OF A CUSTOMER OF A BANKRUPT SECURITIES FIRM $

That I hereby make a claim as a customer for net equity as contemplated by section 262 of the Act, particulars of which are as follows:

(Give full particulars of the claim, including the calculations upon which the claim is based.)

5. That, to the best of my knowledge, I am (or the above-named creditor is) (or am not or is not) related to the debtor within the meaning of section 4 of the Act, and have (*or* has) (*or* have not *or* has not) dealt with the debt or in a non-arm's length manner.

6. That the following are the payments that I have received from, and the credits that I have allowed to, and the transfers at undervalue within the meaning of subsection 2(1) of the Act that I have been privy to or a party to with the debtor within the three months (or, if the creditor and the debtor are related within the meaning of section 4 of the Act, within the 12 months) immediately before the date of the initial bankruptcy event within the meaning of Section 2 of the Act: *(Provide details of payments, credits and transfers at undervalue.)*

*(Applicable only in the case of the bankruptcy of an individual.)*

☒ I request that a copy of the report filed by the trustee regarding the bankrupt's application for discharge pursuant to subsection 170(1) of the Act be sent to the above address.

Dated at St. John's, Newfoundland and Labrador, this 2 day of September, 2022

Witness

Creditor

Phone Number: 709-579-1143

Fax Number: 709-726-5705
E-mail Address: dhutchings@yourlegalteam.ca

**DEBORAH L.J. HUTCHINGS, QC**
**Barrister of the Supreme Court of Newfoundland & Labrador**

Note: If an affidavit is attached, it must have been made before a person qualified to take affidavits.

Warnings: A trustee may, pursuant to subsection 128(3) of the Act, redeem a security on payment to the secured creditor of the debt or the value of the security as assessed, in a proof of security, by the secured creditor.

Subsection 201(1) of the Act provides severe penalties for making any false claim, proof, declaration or statement of account.

Note: If a copy of this Form is sent electronically by means such as email, the name and contact information of the sender, prescribed in Form 1.1, must be added at the end of the document.

**SCHEDULE "A"**

IN THE MATTER OF the
*Bankruptcy and Insolvency Act*,
R.S.C. 1992, c-27 ("BIA") in respect
Of Canada Fluorspar (NL) Inc.

AND IN THE MATTER OF the
*Companies' Creditors Arrangement Act*, R.S.C. 1985, c-36 ("CCAA") in
Respect of Canada Fluorspar (NL) Inc.

## AFFIDAVIT OF RICHARD A. SPELLACY

I, Richard A. Spellacy, Master Mariner, of the City of St. John's, in the Province of Newfoundland and Labrador, being duly sworn, do depose and say that:

1. I hereby give this Affidavit to support my Proof of Claim, being my personal claim for master's wages, as creditor of Canada Fluorspar (NL) Inc. ("CFI"), and as more particularly set out in the attached Proof of Claim form duly completed and executed by me.

2. I am a master mariner and I am the sole shareholder, director, and the President of Inaminka Marine Services Limited ("IMS"), a duly incorporated entity under the laws of the Province of Newfoundland and Labrador which is in good standing. As such, I am aware of the matters relating to the arrest of the ship "BARGE H-404" (the "Barge") and the claim of IMS against CFI.

3. I provide marine consultation and other services, such as master mariner services, through IMS.

4. IMS commenced an action in the Federal Court, Court No. 279-22, *in personam* claim against CFI and an *in rem* claim against the Barge and its owners and all those interested in, on February 16, 2022 ("Action") and on same date IMS caused a Warrant for the Arrest of the Barge to be issued. The Barge, namely Barge H-404, CFI Pontoon 1, is owned by CFI and was subsequently arrested by Sherriff's Officers, on behalf of IMS, on February 18, 2022 at Marystown, NL.

5. The Action arises out of a claim by IMS for the recovery of money owed by CFI (and the Owners and All others interested in the Barge) to IMS for consultation, design and other services relating to the Barge and its usage by CFI.

6. I understand that CFI was placed into a court-appointed receivership and management pursuant to the BIA on February 21, 2022. On March 11, 2022, CFI was granted protection from its creditors under CCAA.

7. IMS registered its Proof of Claim against CFI pursuant to the BIA/CCAA matters; however, my personal claim for master's wages has not yet been registered until now.

8. I, therefore, give this Affidavit to set out the particulars of a maritime lien, for which I have for unpaid master's wages to me, upon the Barge to secure my personal claim acting as master of the Barge for CFI. This claim does not overlap with the claim of IMS, as I shall explain below.

9. Inaminka was initially appointed by CFI on Tuesday October 12, 2021, to assess the mooring and continuing safe operation of the Barge at CFI's facility in St. Lawrence, NL. As part of any activities undertaken by CFI, I kept and submitted daily log sheets wherein all of my activities and those of my subcontractors were detailed. Attached hereto as Exhibit "A" are true copies of my personal daily log of my activities (and daily log of subcontractors) performed for and at CFI's request, commencing October 13, 2021 through to and inclusive of January 31, 2022.

10. As part of the ongoing operations concerning the Barge, on December 15, 2021 my naval architect, Anthony Barclay, and I visited Marystown to make an in-depth inspection of the internals of the Barge using the services of a local inspection company, Adaptive Marine Solutions Inc. ("AMS").

11. To facilitate the ongoing inspection of the Barge's internals, ballast water had to be transferred internally and as the ballast was and still is under the control of Transport Canada, the operation had to be monitored by a licensed person. Accordingly, I was asked by Jason Flood of CFI if I, as such a licensed person, would act in this capacity and sign off on the transfers as master of the Barge. I note that this appointment has never been rescinded to the date hereof and, in fact, I still have physical possession of the Ballast water record book, as master of the Barge, wherein I signed off on the transfer as master of the Barge.

12. From October 12, 2021 to February 1, 2022, any work that I performed purely as master of the Barge, being my master's wages, were charged to CFI pursuant to the purchaser orders between CFI and IMS and were included as part of the $1500.00 per day rate. IMS would have then paid the master's wages directly to me **as required.**

13. After the arrest of the Barge by Inaminka, I continued to act as master of the said Barge, but not through the purchase orders as previously followed. For example, on April 1, 2022 I was contacted by Paul Antle, the owner of the docking facility wherein the Barge was moored, and I was advised that his company had a vessel arriving at the end of April, and that they would require the Barge to be moved. Also, I duly contacted the Receiver of CFI, Phil Clarke of Grant Thornton Limited, respecting this request and kept him informed, as master of the Barge, even to the extent that I had been contacted by a local shipowner, Pat Miller of Miller Shipping, who was interested in purchasing the Barge. On April 11, 2022 I was asked by Mr. Clarke to put the potential purchaser in direct contact with him

which I did and then continued to facilitate this matter to ensure that a successful conclusion was reached. I am advised by Mr. Miller, and do verily believe, that a firm offer for the purchase of the Barge was made by Miller Shipping.

14. The foregoing and subsequent actions by myself indicated that I continued to act as master of the Barge and email documentation to this effect is available. Since the arrest of the Barge and subsequent financial issues with CFI arose, I charged my hourly rate of $225.00, as discussed with and agreed to by CFI previously. I attached hereto as Exhibit "B" a true copy of an email chain between myself and CFI from November 20, 2021 to, and including, November 26, 2021 wherein my rate for master mariner work was discussed and agreed upon.

15. Therefore, I would maintain, that since December 15, 2021, I have been acting in the capacity of master of the Barge without interruption up to and including the date hereof. Until CFI went into receivership, the compensation for my actions as master of the Barge were invoiced through IMS and were included in the terms of the flat rate of $1500.00 per day. At the request of CFI, my compensation for master's wages reverted to my original terms of $225 per hour for the intervening period and will continue until my appointment as master is cancelled.

16. As I indicated above my master's wages were covered by the invoices from IMS to CFI until January 31, 2022. The period from February 1, 2022 to August 31, 2022 covers 212 days. For seventy-one point five (71.5) days during that period I was compelled to work on other projects to gather some income and could not be available to attend to the Barge as master. Therefore, there were 140.5 days where I acted as the Barge's master, particularly for ballast transfers and its movement. At my hourly rate of $225.00, to which IMS and CFI agreed in October/November 2021, the current total of my claim to August 31, 2022 is $252,900.00 plus HST. Attached hereto as Exhibit "C" is a true copy of my invoice for my master's wages.

17. A second invoice to cover the intervening period commencing September 1, 2022, until the date upon which my appointment is cancelled will be issued once that cancellation notice is received.

18. All facts deposed above in this my Affidavit I believe to be true except where stated to be based upon information and belief.

**SWORN** before me at the City of St. John's, in the Province of Newfoundland and Labrador, this 2nd day of September, 2022, before me:

Commissioner for Oaths /
Barrister /Notary Public

**DEBORAH L.J. HUTCHINGS, QC**
**Barrister of the Supreme Court of Newfoundland & Labrador**

RICHARD A. SPELLACY, MM

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **CFI St. Lawrence Barge Moorings**

**Page 1**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Week of Wednesday October 13 to Tuesday October 19** |
| 0800/1700 | Chase down data to assemble plan for barge, liaise with Ron Milmine on acceptability of CPE Express, procure charts for area, meet with Pat Gannon, Leo Power and Naval Architect Anthony Barclay re acceptability of plans, answer questions from management team on orientation of barge<br>**Total of 7 days** |
| | |
| | **Week of Wednesday October 20 to Tuesday October 26** |
| | Review concerns of project engineers and respond,<br>**total of 1.0 days** |
| | |
| | **Week of Wednesday October 27 to Tuesday November 02** |
| | Teleconference call with project staff out west devise new mooring plans and Liaise with Jason Flood et al<br>**Total 7.0 days** |
| | |
| | **Week of Wednesday November 03 to Tuesday November 09** |
| | Chasing down winches, chain etc. revising mooring plans to suit meeting in St. Lawrence with project staff and Consultant Norman, proceed to Bay Bulls and inspect anchors and chain<br>**Total of 7.0 Days** |
| | |
| | **Week of Wednesday November 10 to Sunday November 14 (part week)** |
| | Project meeting with all hands at St. Lawrence, review schedule, mooring plan, revise as appropriate<br>**Total of 5.5 Days** |
| | |
| | **Total days for period 27.5 days** |

This is Exhibit A referred to in the Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 2nd
day of September, 2022.

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 4** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy, Time sheet for balance of November**

| Time & Date | Description of Event |
|---|---|
| | **Friday November 19th** |
| 4 Hours | 1500/1900 Working with AMS on barge inspection plan |
| | |
| | **Sunday November 21st** |
| 4 hours | 1600/2000 Working with Naval Architect Barclay on inspection procedure |
| | |
| | **Monday November 22nd** |
| 13.5 hours | 0530/1900 Drive to Marystown and St. Lawrence and return, assist with preliminary inspection procedures on barge, inspect barge deck layout, Chase potential anchor handling jewellery sites. |
| | |
| | **Tuesday November 23rd** |
| 8.0 hours | 0800/1700 Meet with Naval architect and go over potential winch sites and further inspection procedures. Liaise with Jason and AMS rep re ongoing inspection work on barge |
| | |
| | **Wednesday November 24th** |
| 4 hours | 0800/1200 Review project documentation, emails etc., push for winch Review barge inspection report, note hole in #4Stbad, discuss same with jason |
| 3 hours | 1500/1800 Push for winch inspection quote, liaise with winch provider to get extra quote for winch wires |
| | |
| | **Thursday November 25th** |
| 4 hours | 0800/1200 Review winch inspection quote, pass on to Jason commence design of anchor winch pattern. |
| | |
| | **Friday November 26th** |
| 5 hours | 0800/1300 Reviewing anchor pattern details with Jason also discussion with John Norman regarding procedures and potential shore mooring legs |
| | |
| | **Monday November 29th** |
| 4 hours | 0900/1300 Liaise with winch supplier re winch lines, work with Kevin Doyle re Global Maritime proposal. Discuss potential ballast system issues with Jason. |
| 8 hours | 1400/2000 Do complete high level job list and pas to jason in preparation for tomorrow's meeting |

| | |
|---|---|
| | **Tuesday November 30th** |
| 3 hours | 0900/1200 review AMS correspondence and reports with Naval architect |
| 2 hours | 1200/1400, Conference call with Global Maritime U/K, |
| 3 hours | 1500/1800 Review results of conference call, assemble list of files to pass on to support quote Review barge mooring plan |
| | |
| | **Total of 65.5 hours** |
| | |
| | |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 5** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy December Time Sheet**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Wednesday December 1st.** |
| 4 hours | 1900/1200 Reviewing Global Maritime discussion with Tomas Serafinavicius of Global Aberdeen, reviewing tasks for tomorrow's meeting. |
| 3 hours | 1300/1600 Reviewing task list for upcoming meeting |
| | |
| | **Thursday December 2nd** |
| 4 hours | 0800/1200 Reviewing job list and preparing for PM teams meeting |
| 6 hours | 1300/1900 Teams meeting and working on upcoming task lists |
| | |
| | **Friday December 3rd** |
| 4 hours | 0900/1300 Receive and review Global Maritime proposal, send on to Jason for further discussion |
| 3 hours | 1400/1700 Discussions re various jobs with Jason et al |
| | |
| | **Sunday December 5th** |
| 3 hours | 1000/1300 Reviewing list from John Norman and working up extra tasks |
| 2 hours | 1400/1600 Working on mooring drawing with Barclay |
| | |
| | **Monday December 6th** |
| 4 hours | 0800/1200 working on task list for upcoming meeting, working on mooring diagram with Barclay, instructing same on winch seats |
| 5 hours | 1300/1800 various tasks, working on teams meeting with Jason and John |
| | |
| | **Tuesday December 7th.** |
| 3 hours | 1000/1300 working on alternate mooring diagram, chasing Jewellery |
| 2 hours | 1400/1600 Designing anchor spread |
| 2 hours | 1730/1930 Working on anchor spread |
| | |
| | **Wednesday December 8th.** |
| 3 hours | 1300/1600 Working on jewellery with Extreme East Rigging |
| | |
| | **Thursday December 9th.** |
| 4 hours | 1230/ 1630 Reviewing Jewellery quotes from Extreme East Rigging and instructing Barclay on Winch seat bid package preparation |

| | |
|---|---|
| | **Friday December 10th** |
| 4 hours | 1100/1500 Organizing nest weeks trip for barge and compiling anchor design |
| | |
| | **Monday December 13th.** |
| 2 hours | 0900/1100 Compiling anchor spread design |
| 4 hours | 1200/1600 Anchor system design meeting with C. Gaetz |
| | |
| | **Tuesday December 14th.** |
| 3 hours | O900/1200 various items regarding tomorrows trip |
| 6 hours | 1400/2000 Anchor spread design |
| | |
| | **Wednesday December 15th.** |
| 13 Hours | 0600/1900 Drive to Marystown monitor ongoing procedures at Marbase |
| | |
| | **Thursday December 16th.** |
| 12 hours | 0700/1900 Monitor ongoing ballast transfer operation at barge and return to St Johns |
| | |
| | **Friday December 17th.** |
| 2 hours | 0800/1000 Prepare and meet with John Norman |
| 4 hours | 1000/1400 Finalise anchoring plan and prepare for distribution to all hands, monitor ongoing ballast operations |
| | |
| | **Monday December 20th** |
| 2 hours | 0800/1000 Ballast water control |
| 4 hours | 1300/1700 Ballast water control and repair preparations |
| | |
| | **Tuesday December 21st** |
| 4 hours | 0800/1200 Ballast water control operations |
| 3 hours | 1400/1700 Ballast control and repair options |
| | |
| | **Wednesday December 22nd.** |
| 3 hours | 099/1200 Reviewing repair options with Butler and Barclay |
| | |
| | **Thursday December 23rd.** |
| 5 hours | 1200/1700 Reviewing repair options and final report with Butler et al |
| | |
| | **Friday December 24th.** |
| 2 hours | 0900/1100 Preparing final repair options updating Jason |
| | |
| | **Monday December 27th** |
| 2 hours | 1000/1200 Working with Barclay, Butler et al on final repair options. |
| 2 hours | 1400/1600 Obtaining quotes from Delmar on anchor handling jewellery |
| | |
| | |

| | |
|---|---|
| | **Tuesday December 28th** |
| 2 hours | 1100 /1300 Chasing up repair estimates |
| | |
| | **Thursday December 30th** |
| 2 hours | 0900/1100 Chasing down alternate marine solutions |
| 7 hours | 1300/2000 Compiling repair option report |
| | |
| | |
| | **Total Hours for December 140** |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 6** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy January Time Sheet**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Monday January 3rd** |
| 2 hours | 1300/1500 Working on repair estimates. |
| | |
| | **Tuesday January 4th** |
| 4 hours | 0800/1200 Working on repair estimates with Messrs Barclay, Pitt and Jason |
| 5 hours | 1300/1800 Working on repair estimates with Messrs Barclay and Pitt |
| | |
| | **Wednesday January 5th** |
| 2 hours | 1000/1200 Finalising repair quotes with Barclay and Pitt |
| 2 hours | 1600/1800 e and resubmitting repair work |
| | |
| | **Thursday January 6th** |
| 4 hours | 0900/1300 Continue working on Repair options and prepare for upcoming teams meeting meting |
| 4 hours | 1400/1900 Teams meeting with Jason, John and Pat et al on repair options |
| | |
| | **Friday January 7th** |
| 2 hours | 1000/1200 Working on mooring options. |
| 3 hours | 1400/1700 Working on mooring drawing with Barclay as well as repair costs |
| | |
| | **Sunday January 9th** |
| 2 hours | 1000/1200 Working on task list for upcoming meetings, |
| 5 hours | 1800/2300 working on mooring plan as well as way forward |
| | |
| | **Monday January 10th.** |
| 3 hours | 1000/1300 working on alternate mooring diagram, chasing Jewellery |
| 2 hours | 1400/1600 Designing anchor spread |
| 2 hours | 1730/1930 Working on anchor spread and finalizing so-ordinates |
| | |
| | **Tuesday January 11th.** |
| 3 hours | 0800/1200 Working on moorings, preparing for afternoon meeting |
| 3 hours | 1300/1600 Visit Pennecon site and inspect anchors and chains with Master of Arctic, deliver mooring plan for his critique |

| | |
|---|---|
| | **Tuesday January11th (Cont.)** |
| 3 hours | 1600/1900 Teams meeting on moorings and final costs |
| | |
| | **Wednesday January 12th** |
| 1 hour | 1000/1400 Working with Global Maritime on new procedures proposal, sourcing data for same |
| 4 hours | 1200/1600 Working on mooring spread and value of chain on offer |
| | |
| | **Thursday January 14th.** |
| 2 hours | 0900/1100 Compiling anchor spread design |
| 4 hours | 1200/1400 Anchor system design |
| 1 hour | 1500/1600 Meeting with John Norman |
| 2 hours | 1600/1800 Finalizing anchor spread costs |
| | |
| | Total 65 hours |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 6** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy January Time Sheet 15/31st**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Saturday January 15th** |
| 2 hours | 1500/1700 Phone calls to Texas, trying to locate jewellery at appropriate prices |
| | |
| | **Monday January 17th** |
| 3 hours | 0900/1200 Working on anchor plans pair o-ordinating mooring procedures with Global Maritime |
| 3 hours | 1300/1600 Working on mooring plan |
| | |
| | **Tuesday January 18th** |
| 4 hours | 0800/1200 Chasing down alternative anchor and chain proposals from Europe |
| 3 hours | 1300/1600 Chasing down alternative anchor suppliers locally, liaising with Damen shipyards regarding utility vessels. |
| | |
| | **Wednesday January 19th** |
| 4 hours | 1000/1200 and 1399/1500 Continue working on alternative anchor supply options, clarify ballast control options with Horizon |
| | |
| | **Thursday January 20th** |
| 5 hours | 0800/1300 Working on mooring options. Teams meeting with Global Maritime UK, review Multi-Cat Oderin in harbour |
| 3 hours | 1400/1700 sourcing alternative anchoring operations |
| | |
| | **Friday January 21st** |
| 5 hours | 0900/1200 and 1400/1600 Reviewing Intermoor proposal, reviewing ballast proposals redoing mooring spread and sending to all concerned |
| | |
| | **Monday January 24th.** |
| 3 hours | 0900/1200 Reviewing mooring plans |
| 3 hours | 1300/1600 Meet with Horizon, redoing anchor spread |
| 2 hours | 1730/1930 Working on anchor spread and finalizing co-ordinates sending new drawings to all concerned |
| | |
| | **Tuesday January 25th** |
| 2 hours | 0900/1100 Working on moorings and ballast control issues |

| | |
|---|---|
| | |
| | **Wednesday January 26th** |
| 1 hour | 1000/1100 reviewing various items on mooring spread |
| 2 hours | 1400/1600 Working on mooring spread and value of chain on offer |
| | |
| | **Thursday January 27th.** |
| 4 hours | 1200/1500 Travel to Bay Bulls and review available jewellery |
| 3 hours | 1500/1800 Reviewing costs with Pennecon |
| | |
| | **Friday January 28th** |
| 3 hours | 0900/1200 Reviewing Ballast plan comments and rental prices from Pennecon |
| | |
| | **Saturday January 29th** |
| 1 hour | Reviewing Loading costs from Pennecon |
| | |
| | **Sunday January 30th** |
| 8 hours | 1000/1200 and 1300/1900 Finalising and sending budget |
| | |
| | Monday January 31st |
| 2 hours | 0900/1000 and 1700/1800 Budget and project discussions with Jason Flood |
| | |
| | **Total of 66 hours** |
| | |
| | |
| | |
| | |
| | |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 5** **CFI St. Lawrence Barge Moorings**

**Anthony Barclay December Time Sheet**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Wednesday December 13th.** |
| 8 hours | 0800/1600 Finalising design of winch seats and obtaining pricing for same |
| | |
| | **Monday December 20th** |
| 8 hours | 0800/1700 Reviewing damage survey reports and preparing specification for remedial options |
| | |
| | **Wednesday December 22nd** |
| 4 hours | 0900/1300 Continue reviewing damage survey reports and preparing specification for remedial options |
| | |
| | **Thursday December 30th** |
| 10 Hours | 0800/1900 Cost estimation work for repairs |
| | |
| | |
| | **Total for December, 30 Hours** |
| | |
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## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** August 31, 2022 5:24 PM
**To:** Deborah Hutchings
**Subject:** FW: Invoice
**Attachments:** Inaminka2021089 CFIdocbrokerage.doc; Expences CFI.xlsx; CFI timesheet P1.docx

Fyi 2

This is Exhibit B referred to in the Affidavit of Richard A. Spellacy Sworn or affirmed before me this 2nd day of September, 2022.

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Friday, November 26, 2021 9:56 AM
**To:** Ron Milmine <rmilmine@canadafluorspar.com>
**Subject:** RE: Invoice

Ron

As discussed and from today, I will bill at an hourly rate of $225.00

Cheers

Dick

**From:** Ron Milmine <rmilmine@canadafluorspar.com>
**Sent:** November 26, 2021 9:13 AM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Subject:** FW: Invoice

Hi Dick: When u get some time please call me so we can go over your invoices that you submitted

1-709-873-3331 ext 133

**Ron Milmine**
Procurement/Warehouse Supervisor
Canada Fluorspar Inc.
P.O. Box 337, St. Lawrence, NL, A0E 2V0
Tel: 709-873-3331 Cell 709-277-6805 Fax: 709-873-3335 www.canadafluorspar.ca

**From:** Jason Flood <jflood@canadafluorspar.com>
**Sent:** November-23-21 8:59 AM
**To:** Ron Milmine <rmilmine@canadafluorspar.com>; Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** FW: Invoice

Please review the time sheet attachment and advise if you agree with the work performed by Dick? Specifically the work performed in early Oct as I did not get involved until later in Oct or early Nov.

Best Regards,

Jason Flood

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** November 20, 2021 4:13 PM
**To:** Jason Flood <jflood@canadafluorspar.com>
**Cc:** Leo Power <leo.power.nl@gmail.com>; Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** Invoice

Jason

Please find attached the invoice for services to date, I had a hard time trying to pin down the actual times for everything so I just gave a general description as this is the only job that I have been working on since mid-October except the few days I took out last week and that is reflected in the time sheet

Cheers

Dick

## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** August 31, 2022 5:25 PM
**To:** Deborah Hutchings
**Subject:** FW: Tugboat

Fyi4

---

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Friday, October 15, 2021 12:15 PM
**To:** Ron Milmine <rmilmine@canadafluorspar.com>
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** RE: Tugboat

Ron

Just for your own information going forward, one of the main problems of small tugs and big barges is the propensity of the barge to overrun the tug in any kind of weather and there has been a number of cases in North America of late with the last one being in BC about two years ago in calm water where the barge overran the tug killing two of the tug's crew.

Cheers

Dick

---

**From:** Ron Milmine <rmilmine@canadafluorspar.com>
**Sent:** October 15, 2021 8:04 AM
**To:** RICHARDSPELLACY@HOTMAIL.COM
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** FW: Tugboat

Hi Richard: It was a pleasure to meet with you last week to learn more about tugboat availability.
Can you read below and let me know if you feel this tugboat
CRT EXPRESS is capable of safely towing our barge.

Regards
Ron
**Ron Milmine**
Procurement/Warehouse Supervisor
Canada Fluorspar Inc.
P.O. Box 337, St. Lawrence, NL, A0E 2V0
Tel: 709-873-3331 Cell 709-277-6805 Fax: 709-873-3335 www.canadafluorspar.ca

---

**From:** Ron Milmine <rmilmine@canadafluorspar.com>
**Sent:** October-15-21 7:43 AM
**To:** Ron Milmine <rmilmine@canadafluorspar.com>
**Subject:** Fwd: Tugboat

Sent from my iPhone

Begin forwarded message:

**From:** Greg Pittman <gpittman@canadafluorspar.com>
**Date:** October 14, 2021 at 5:36:46 PM NDT
**To:** Ron Milmine <rmilmine@canadafluorspar.com>
**Subject: RE: Tugboat**

Ron:
Name: CRT Express
Crewing and contract agency: Canship
Length: 29.8 m
Gross Tonnage: 239
Deadweight: 50 t
Bollard Pull; 32 t

Cheers
Greg

-----Original Message-----
From: Ron Milmine <rmilmine@canadafluorspar.com>
Sent: October 14, 2021 5:33 PM
To: Greg Pittman <gpittman@canadafluorspar.com>
Subject: Tugboat

Can u provide details on the tug
Name
Size specs etc

Sent from my iPhone

## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** August 31, 2022 5:23 PM
**To:** Deborah Hutchings
**Subject:** FW: PO 21012 RQN12966 INAMINKA $90,000.00

Debbie I am just sending you the initial email contacts with CFI from October of last year and you can see that it is all related to the safe operation of the barge

-----Original Message-----
From: Dick Spellacy <richardspellacy@hotmail.com>
Sent: Tuesday, December 14, 2021 8:34 AM
To: Ron Milmine <rmilmine@canadafluorspar.com>
Cc: Jason Flood <jflood@canadafluorspar.com>
Subject: RE: PO 21012 RQN12966 INAMINKA $90,000.00

Hi Ron well received with thanks

Dick

-----Original Message-----
From: Ron Milmine <rmilmine@canadafluorspar.com>
Sent: December 14, 2021 8:26 AM
To: Dick Spellacy <richardspellacy@hotmail.com>
Cc: Andrea Lockyer <anlockyer@canadafluorspar.com>; Jason Flood <jflood@canadafluorspar.com>; Lucy Kelly <lkelly@canadafluorspar.com>; Paula Marie Slaney <pslaney@canadafluorspar.com>
Subject: PO 21012 RQN12966 INAMINKA $90,000.00

-----Original Message-----
From: Purchasing Workflow <noreply@canadafluorspar.com>
Sent: December 14, 2021 8:14 AM
To: Purchasing <purchasing@canadafluorspar.com>
Subject: Purchase Order

Dear Vendor;

The attached file lists the items that we wish to purchase from your company. PO Number 21012: RQN0012966 in the amount of $90,000.00 .

All packing slips must contain PO number and any back-order quantities to be stated on packing slip.

For Collect shipments, please email purchasing@canadafluorspar.com the following when ready for pick up:

Please acknowledge receipt of this Purchase Oorder

Warehouse receiving Hours are from:
8:30am - 2:30pm Monday to Friday

All packing slips should indicate CFI part numbers.

Pick up location
Contact person
Hours of operation
Number of cartons/skids
DIM
Weight

Invoice to: Canada Fluorspar (NL) Inc., P. O. Box 337 St. Lawrence, NL A0E 2V0 Please ensure that the CFI (NL) PO # and your Company HST# are printed on the invoice.
Forward invoice to A/P email address: ap@canadafluorspar.com

If you have any questions regarding this purchase order, please contact a member of our Purchasing Group at 709-873-3331 Select # 2.

Regards,
Purchasing Group
Canada Fluorspar (NL) Inc.
P. O. Box 337
St. Lawrence, NL
A0E 2V0

This is Exhibit "C" referred to in the
Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 2nd
day of September, 2022.

Suite 202, 130, Lemarchant Road

St. Johns

Newfoundland

A1C 2H2

September 01, 2022

The Owners, Directors and Monitor of CFI

St. Lawrence

Newfoundland

**To invoice you for my services as master of the BARGE H-404**

For the period February 01, 2022, until August 31, 2022 a total 212 days less time working on other projects

| | |
|---|---|
| A total of 141.5 days at $225 per hour | $252,900 |
| HST @15% | $37,935 |
| | $290,835.00 |

Sincerely

Captain R. Spellacy

**Court File No. 279-22**

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC. ("CFI")**, a body corporate

**Defendant**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL INTERESTED IN THE SHIP "BARGE H-404" (the "Barge") (the "Action")**

**Defendant**
*(In Rem)*

## CAVEAT RELEASE

**(Rule 493)**

**TAKE NOTE THAT I**, Richard A. Spellacy, MM, of Suite 202, 103 LeMarchant Road, St. John's, NL A1C 2H2, apply for a caveat against the release of the ship Barge H-404, now under arrest pursuant to the warrant issued February 16, 2022 without notice first being given to me.

**MY ADDRESS FOR SERVICE** is: MacNab, Fagan & Murphy, Prince Charles Building, 120 Torbay Road, Suite W240, St. John's, NL A1A 2G8 Attention: Deborah L. J. Hutchings, Q.C.

Dated September 2, 2022 at St. John's, NL.

**Richard A. Spellacy, MM**

Court File No. T – 279-22

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.**, a body corporate

**Defendants**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

**SOLICITOR'S CERTIFICATE OF SERVICE**

I, Deborah L. J. Hutchings, Q.C., Solicitor, certify that I caused the Solicitor for the Defendants (both *In Personam* and *In Rem*), William T. Cahill of Cox and Palmer, to be duly served with the Caveat Release of Richard A. Spellacy by courier and electronic transmission (E-mail) on September 2, 2022.

**MACNAB, FAGAN & MURPHY**
Per: _____
**DEBORAH L. J. HUTCHINGS, Q.C.**
Solicitor for the Plaintiff
*Whose Address for Service is:*
120 Torbay Road, Suite W240
St. John's, NL A1A 2G8
Email: dhutchings@yourlegalteam.ca

MACNAB FAGAN & MURPHY
**Barristers, Solicitors & Notaries**

Prince Charles Building
120 Torbay Road, Suite W240
St. John's, NL A1A 2G8

Deborah L. J. Hutchings, Q.C.

Email: dhutchings@yourlegalteam.ca
Telephone: (709) 726-8844
Facsimile: (709) 726-5705
Website: www.yourlegalteam.ca

*By Courier / Electronic Transmission:* phil.clarke@ca.gt.com

September 2, 2022

COPY

Grant Thornton Limited
Court Appointed Monitor
Suite 300 – 15 International Place
St. John's, NL A1A 0L4
Attention: Mr. Phil Clarke

Dear Mr. Clarke:

**Re: (1) Proceedings pursuant to the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* in respect of Canada Fluorspar (NL) Inc. et al.**

**(2) Federal Court Action No. 297-22 – Inaminka Marine Services Limited v. Canada Fluorspar (NL) Inc. et al.**

As you are aware, we are the solicitors for Inaminka Marine Services Limited ("IMS") in relation to the above noted matter. We are also the solicitors for Richard A. Spellacy, Master Mariner, who is the sole shareholder, director and officer of IMS.

In our capacity as Captain Spellacy's solicitor, we enclose herewith a Proof of Claim filed for Captain Spellacy's personal claim against Canada Fluorspar (NL) Inc. ("CFI") for unpaid master's wages for which he claims a maritime lien and as a secured creditor against Barge H-404, Pontoon 1 (the "Barge"). Attached to the Proof of Claim you will find Captain Spellacy's Affidavit setting out his claim for master's wages.

In respect of the action by IMS against CFI in the Federal Court and subsequent arrest of the Barge on February 18, 2022, Captain Spellacy has filed a Caveat Release with the Federal Court, the effect of which is to prevent the release of IMS's arrest of the Barge until Captain Spellacy's claim is addressed by the Court.

We trust you will find the enclosed to be in order.

Yours very truly,

**DEBORAH L. J. HUTCHINGS, Q.C.**
DLJH/sb
Enclosures

cc: *By Courier / Electronic Transmission:* wcahill@coxandpalmer.com
William T. Cahill
Scotia Centre, Suite 1100
235 Water Street
St. John's, NL A1C 1B6

# Exhibit "I"

Date: 20221005

Docket: T-279-22

Citation: 2022 FC 1375

Ottawa, Ontario, October 5, 2022

**PRESENT:** The Honourable Mr. Justice Southcott

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.,**
**a body corporate**

**Plaintiff**

**and**

**CANADA FLUORSPAR (NL) INC., a body corporate**

**Defendants**
**(*In Personam*)**

**and**

**THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
***(In Rem)***

# CORRECTED ORDER AND REASONS

**(Corrected October 7, 2022, under Rule 397(2), to include the release from arrest omitted from the Order)**

This is Exhibit I referred to in the
Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 24th
day of October, 20 22.

Federal Court Cour fédérale

**Date: 20221005**

**Docket: T-279-22**

**Citation: 2022 FC 1375**

**Ottawa, Ontario, October 5, 2022**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.,**
**a body corporate**

**Plaintiff**

**and**

**CANADA FLUORSPAR (NL) INC., a body corporate**

**Defendants**
**(*In Personam*)**

**and**

**THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
***(In Rem)***

**<u>CORRECTED</u> ORDER AND REASONS**

**<u>(Corrected October 7, 2022, under Rule 397(2), to include the release from arrest omitted from the Order)</u>**

## I. **Overview**

[1] This motion arises in the context of the within action by the Plaintiff, Inaminka Marine Services Limited [IMS], *in personam* against Canada Fluorspar (NL) Inc. [CFI] and *in rem* against the Ship "Barge H-404" [the Barge]. In the action, IMS claims amounts owing for services alleged to have been provided to these Defendants. The Barge is under arrest in this action, and the Plaintiff's principal, Captain Richard Spellacy, has filed a Caveat against its release.

[2] In this motion, CFI invokes section 50(1) of the *Federal Courts Act*, RSC 1985, c F-7 [Act] to seek a stay of IMS's action and, under Rule 488 of the *Federal Courts Rules*, SOR/98-106 [Rules], seeks release of the Barge from arrest. The motion arises in the context of proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA] in the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency [the Bankruptcy Court] arising out of the insolvency of CFI, in which the Bankruptcy Court has issued a stay of proceedings against CFI. In the alternative, CFI moves to strike the *in rem* portion of IMS's action pursuant to Rule 221, on the basis that IMS's claims do not fall within the scope of section 22(2)(m) of the Act, and release the Barge from arrest pursuant to Rule 488.

[3] As explained in greater detail below, the motion for a stay is granted and the Barge is released from arrest, because CFI has satisfied the Court that, taking into account applicable jurisprudence and the particular circumstances of this matter, the Bankruptcy Court is a more

appropriate forum for adjudication of the Plaintiff's claim. It is therefore unnecessary for the Court to adjudicate CMI's motion for alternative relief.

## II. **Background**

[4] The *in personam* Defendant, CFI, is a corporation incorporated in Newfoundland and Labrador [NL]. It operates a fluorspar mine in St. Lawrence, NL. CFI is the owner of the Barge and employs the Barge to support the loading of cargo ships at the marine terminal at the site of its mine. While there was no evidence before the Court on this point, I understand the parties to agree that the Barge is a foreign vessel, registered in Panama.

[5] The Plaintiff, IMS, is also a corporation incorporated in NL. In this action, it claims for consultation and design services, related to a method and facilities for moving the Barge on and off the loading piers at CFI's marine terminal in response to inclement weather, the cost of which services it says remains owing by CFI.

[6] IMS commenced this action on February 16, 2022 and obtained a Warrant for the arrest of the Barge, which was executed that same day. The Barge was arrested where it was berthed at the Marbase (the former Marystown Shipyard) in Marystown, NL, and currently remains at the Marbase under arrest.

[7] Pursuant to an order dated February 22, 2022 [Interim Receivership Order], the Supreme Court of Newfoundland and Labrador General Division [SCNL] appointed Grant Thornton Limited [GT or Interim Receiver or Monitor] Interim Receiver of all of the property of CFI and

another company, Canada Fluorspar Inc. The Interim Receivership Order identifies such property [Property] to include all current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, except for the Excluded Property (as defined in the Interim Receivership Order). The Barge does not form part of the Excluded Property.

[8] The Interim Receivership Order provides that no proceedings shall be commenced or continued against or in respect of CFI, Canada Fluorspar Inc., or the Property without the consent of GT or leave of the SCNL. It also stays any proceedings currently underway against CFI, Canada Fluorspar Inc., or the Property at the time of the Interim Receivership Order, pending a further order of the SCNL.

[9] The Interim Receivership Order states that the SCNL requests the aid and recognition of any court having jurisdiction either within Canada or abroad to give effect to the order and assist GT, as Interim Receiver, in carrying out the order. It further requests that all other courts make orders and provide assistance to GT as may be necessary or desirable to give effect to the Interim Receivership Order.

[10] Subsequently, pursuant to an initial order dated March 11, 2022, which was amended and restated on March 18, 2022 [CCAA Order], the Bankruptcy Court appointed GT the Monitor for CFI, Canada Fluorspar Inc., and Newspar (a General Partnership), pursuant to the CCAA. To avoid confusion, I note that the Bankruptcy Court, which issued the CCAA Order, is the same

provincial superior court that issued the Interim Receivership Order, although styled differently for purposes of the CCAA proceeding.

[11] The CCAA Order provides that CFI remains in possession and control of its current and future assets, undertakings and property. It also stayed all proceedings against CFI or its property until July 10, 2022 [Stay Period]. Through a series of extensions, the Bankruptcy Court extended the Stay Period, which is currently effective until October 17, 2022. The CCAA Order further provides that either CFI or GT has the ability to apply to any court for the recognition of the CCAA Order and for assistance in carrying out the terms of the order.

[12] By order dated March 18, 2022, as subsequently revised [SISP Order], the Bankruptcy Court approved a Sale and Investment Solicitation Process [SISP] with respect to the assets of CFI. In the SISP Order, the Bankruptcy Court requests the aid in recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or elsewhere, to give effect to the SISP Order and to assist the applicants for the SISP Order (which include CFI acting through GT) and their respective agents in carrying out the terms of the SISP Order.

[13] On August 3, 2022, CFI filed its Notice of Motion in support of the motion now before the Court, seeking the following relief:

A. a stay of IMS's action against it and the Barge, pursuant to section 50(1) of the Act, and release of the Barge from arrest pursuant to Rule 488;

B. in the alternative, that this Court strike the *in rem* portion of IMS's action, pursuant to Rule 221, on the basis that IMS's claims do not fall within the scope of section 22(2)(m) of the Act, and release of the Barge from arrest pursuant to Rule 488;

C. in the further alternative, an extension of time for CFI to file its defence to IMS's action.

[14] On September 2, 2022, Captain Richard Spellacy, IMS's sole shareholder, officer and director, filed a Caveat against the release of the Barge from arrest. I understand from counsel's submissions that the Caveat was filed in support of a claim for master's wages.

[15] CFI subsequently served and filed its full motion record on or about September 20, 2022, and IMS filed its responding materials on September 26, 2022. The parties argued this motion on September 28, 2022. I understand from the parties that a motion to approve a proposed sale of CFI's assets under the SISP had been scheduled to be heard by the Bankruptcy Court on September 27, 2022, the day before the hearing of this motion. CFI's counsel advised at the outset of the hearing of the present motion that the motion before the Bankruptcy Court was being rescheduled and that a new hearing date had not yet been set. However, counsel confirmed that the approval to be sought from the Bankruptcy Court at that motion was in support of the closing of the proposed sale by October 7, 2022, or October 17, 2022 as an outside date.

## III. **Issues**

[16] This motion raises the following two principal issues for the Court's determination:

A. Whether the Court should exercise its discretion pursuant to section 50(1) of the Act to stay the within action commenced by IMS and, as a consequence, release the Barge from arrest; or

B. In the alternative, whether IMS's action should be struck pursuant to Rule 221, because the services alleged to be provided to CFI by IMS fall outside the scope of section 22(2)(m) of the Act and, as such, do not fall within the *in rem* jurisdiction of the Federal Court.

## IV. **Analysis**

### A. *Whether the Court should exercise its discretion pursuant to section 50(1) of the Act to stay the within action commenced by IMS and, as a consequence, release the Barge from arrest*

#### (1) General Principles

[17] In addressing this issue, it is helpful first to review general principles and supporting jurisprudence governing a motion of this nature in the context of an insolvency proceeding underway in a provincial superior court. In formulating the following explanation, I am borrowing liberally from my decision in *RMI Marine Limited v Scotia Tide (Ship)*, 2019 FC 114 [*RMI Marine*], which canvassed many of the same principles.

[18] Section 50 of the Act grants this Court the authority to stay a proceeding in any cause or matter on the ground that the claim is proceeding in another court or jurisdiction or where it is in the interests of justice to do so. The party seeking a stay is required to clearly establish the existence of a more appropriate forum (*Holt Cargo Systems Inc v ABC Containerline NV (Trustee of)*, 2001 SCC 90 [*Holt*] at para 89).

[19] As discussed in *RMI Marine*, the jurisprudential framework applicable to a motion of this sort was discussed in *Holt* and the companion decision in *Antwerp Bulkcarriers, NV (Re)*, 2001 SCC 91 [*Antwerp*]. *Holt* and *Antwerp* were decisions that arose in the context of the bankruptcy of a Belgian container line, which resulted in the arrest of one of its vessels, the "Brussel", at the Port of Halifax through an *in rem* action in the Federal Court.

[20] Following the arrest of the "Brussel", the shipowner was declared bankrupt by the Belgian bankruptcy court, and the trustees in bankruptcy obtained from the Superior Court of Québec an order recognizing the judgment of the Belgian court. The trustees subsequently obtained an order that the proceeds of sale of the vessel or the vessel itself be provided to the trustees for distribution through the Belgian bankruptcy [the Québec Superior Court Order]. This order was contrary to the ongoing procedural framework developed in the Federal Court for sale of the vessel and distribution of its proceeds. Relying in part on the Québec Superior Court Order, the trustees applied to the Federal Court for a stay of its proceedings and to have the proceeds of sale paid out to them. Justice MacKay of the Federal Court ruled against the trustees [the Federal Court Order].

[21] Both the Québec Superior Court Order and the Federal Court Order were appealed, and the Supreme Court of Canada ultimately considered the resulting appellate decisions.

[22] In Antwerp, which considered the appeal from the Québec Superior Court Order, the Supreme Court concluded (at paragraphs 37 and 40) that the Federal Court's maritime jurisdiction, once properly engaged by the commencement of the in rem action and the arrest of the ship, was not lost as a result of the subsequent bankruptcy of the shipowner. The Supreme Court also explained (at paragraphs 37 and 45 to 47) that the bankruptcy court had no power to deal with the vessel, which had already been captured by a competent order of the Federal Court. In essence, the Supreme Court found (at paragraphs 48 to 53) that the bankruptcy court's issuance of what amounted to an anti-suit injunction improperly attempted to restrict the Federal Court's ability to exercise its jurisdiction. The Supreme Court noted (at paragraphs 54 to 55) that it was open to the Federal Court judge to enter a stay if he considered it appropriate to do so, or to decline to accede to the request of the trustees as he did, and that the circumstances would have been the same had the bankruptcy occurred in Canada rather than in Belgium.

[23] In *Holt*, the Supreme Court considered the appeal from the Federal Court Order. The Supreme Court held (at paragraphs 41 to 44) that, pursuant to the applicable Canadian conflict of laws principles, the plaintiff, which had arrested the vessel in the Federal Court, was entitled to have its maritime lien status, conferred under the law of the United States where the plaintiff provided services to the vessel, recognized in the Federal Court proceeding.

[24] Consistent with the decision in Antwerp, the Supreme Court noted in *Holt* (at paragraphs 60 to 66) that the Federal Court did not lose jurisdiction as a result of orders issued by the Superior Court of Québec sitting in bankruptcy. The Supreme Court then considered whether the Federal Court should nevertheless have deferred to the Belgian bankruptcy co rt on the basis of international comity, concluding (at paragraphs 85 to 87) that international coordination was an important, but not necessarily a controlling, factor. The Federal Court was required to be mindful of the difficulties presented by international bankruptcies, including the desirability of minimizing the multiplicity of proceedings and potentially inconsistent decisions, as well as the need to do justice to the particular litigants before it. No single consideration was to be elevated to a controlling position in the exercise of the Federal Court's discretion whether to stay its own proceedings.

[25] Finally, in considering (at paragraphs 80 to 98) whether the Federal Court erred in the exercise of its discretion to deny the trustees' motion for a stay of proceedings, the Supreme Court noted that the principles on which the discretion should be exercised in this type of matter were authoritatively settled in Amchem Products Inc v British Columbia (Workers' Compensation Board), [1993] 1 SCR 897. That case explained that the relevant question was whether there was a more appropriate jurisdiction based on the relevant factors and that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff (pages 920 to 921). After noting the public policy considerations applicable in the context of an international bankruptcy, the Supreme Court described as follows (at paragraph 91 of *Holt*) the factors to be considered in making the discretionary decision:

> 91. The "natural forum" is the one to which the action has the most real and substantial connection (*Amchem*, at pp. 916 and

> 935). Relevant circumstances include not only issues of public policy (as in this case) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigating in one forum or the other, and the discouragement of forum shopping. In short, within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.

[26] The Supreme Court concluded that the Federal Court had considered the relevant factors in arriving at its decision. Justice MacKay had acknowledged the importance of comity and international coordination in a proper case, but he placed primary emphasis on the fact that he was dealing with an in rem action by secured creditors against the vessel which, at the time of the bankruptcy, the Federal Court had already arrested and, at the time of the interventions of the Canadian bankruptcy court, he had already ordered appraised and sold. The Supreme Court rejected the trustees' argument that the plaintiff was forum shopping by arresting the vessel in Canada and acknowledged that Justice MacKay had appropriately given weight to the juridical advantage afforded to the plaintiff in Canada through recognition of the secured status of its maritime lien.

[27] While there are factors that distinguish the "Brussel" litigation from the circumstances in the case at hand, *Holt* and Antwerp nevertheless provide in significant measure the framework that governs the exercise of discretion in considering CFI's motion for a stay under section 50 of the *Act.*

[28] *One obvious factual difference* is that the bankruptcy in the present case arises in a domestic context, not an international one. As noted in *RMI Marine*, this Court must nonetheless consider the effect of an order of a provincial superior court issued in the context of an

insolvency, which is an important, but not necessarily a controlling, factor (para 39). In that respect, guidance can also be taken from the decision in *Always Travel Inc v Air Canada*, 2003 FCT 707 [*Always Travel*], which also arose in the context of a CCAA proceeding in a provincial superior court.

[29] *Always Travel* involved a proposed class action in the Federal Court against a number of airlines, including Air Canada. At that time, Air Canada was the subject of an order from the Ontario Superior Court of Justice under the CCAA, which protected it against legal proceedings in the context of an intended restructuring. On that basis, Air Canada moved to have the Federal Court stay its proceedings.

[30] Much like the present case, the order of the Ontario Superior Court of Justice in *Always Travel* stayed all proceedings against Air Canada and expressly requested the aid and recognition of any Canadian court in carrying out the terms of the order (at para 8). Justice Hugessen of the Federal Court granted a stay of proceedings for three months, or until such earlier time as the stay by the Ontario Superior Court of Justice was lifted. In addressing the role of the Federal Court in considering a CCAA order from a provincial superior court, Justice Hugessen relied in part on the decisions in *Holt* and Antwerp in providing (at paragraphs 10 to 12) the following explanation:

> 10. Superior courts do not order each other about or make orders interfering with each other's process. Rather, it is essential that they should cooperate. Conflicts between courts, or other bodies having ultimate judicial power, may well have serious results, including perhaps even loss of liberty. In Canada, superior courts do not compete with one another. They accord to one another "full faith and credit," as was said in *Morguard Investments Ltd. v. De Savoye*, and repeated in the Brussel decisions. Justice Farley's order specifically requests that this Court, in comity, and more than that, in recognition of the fact that both courts are engaged in a single legal system in the

> administration of Canadian justice, should lend its aid to the order of the Ontario Superior Court of Justice staying proceedings.
>
> 11. It has been said to me this morning that I should not grant a stay order based on Justice Farley's orders first because I have no evidence before me and second because there has been no attempt to justify a stay in the terms of the classic three part test originally enunciated by the Supreme Court in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, and subsequently in *RJR MacDonald Inc. v. Canada (Attorney General)*. To that I say that this is not an ordinary stay and that a stay granted in comity does not need to meet the requirements of that test and does not need evidence; it is my view that the proper attitude of respectful cooperation which this Court should have and does have to judgments of the Ontario Superior Court of Justice will require that, as a matter of course, in virtually every case where an order is given by a provincial superior court in the exercise of its CCAA jurisdiction, and that order requests this Court's aid, this Court will give such aid on proper application being made.
>
> 12. That is not the end of the matter. If a party to proceedings in this Court thinks that a stay should not be granted in comity and in aid of a provincial superior court order, it is at liberty to oppose the stay or, if the stay is granted, apply to this Court to have it lifted. The plaintiffs would thus have been free to bring evidence today and make representations to me that for some reasons or other these proceedings ought not to be stayed, but matters did not develop in that way. Let me be quite clear. The burden is on a person seeking in this Court to avoid the consequences of this Court acting in aid of a provincial superior court exercising its jurisdiction under the CCAA. The burden is on that person to show this Court that it should not act in aid. Nothing that I say or do today forecloses the plaintiffs from making an application if they so wish. I say that simply because in the way in which these proceedings developed, it was agreed between counsel and the Court that we should deal with this matter today strictly on issues of law, matters of fact being left to another day, if necessary.

[31] I pause to note that the body of jurisprudence explained above is also canvassed in CFI's written representations in support of this motion, and IMS explained in its own written representations that it takes no issue with CFI's explanation of the basis upon which the Federal Court has determined when it is appropriate to impose a stay. However, at the hearing of this

motion, disagreement developed between counsel as to the significance of the above passage from *Always Travel*. CFI's counsel relies on this passage in support of a submission that, in responding to the motion, IMS bears the burden of proving that the Federal Court should not issue the requested stay in aid of the Bankruptcy Court. IMS disputes this position, arguing that, as the moving party, CFI must bear the burden.

[32] As found in *RMI Marine* (at para 42), I regard *Always Travel* as describing the proper attitude of respectful cooperation between courts, an attitude that is consistent with the guidance of the Supreme Court in *Holt* and *Antwerp* as to the importance of comity and cooperation. However, Always Travel should not be interpreted as detracting from the discretion to be exercised by the Federal Court in considering a motion to stay its proceedings or from the requirement to consider the other guidance and factors identified in *Holt*.

[33] As such, I accept IMS's position that CMI, as the moving party seeking a stay of a Federal Court proceeding, bears the burden to clearly establish the existence of a more appropriate forum (see *RMI Marine* at para 86, *Holt* at para 89). However, given the importance of comity and cooperation between courts, I also accept the reasoning in *Always Travel* that, particularly in a circumstance where a provincial superior court has expressly requested the aid of other courts in carrying out the terms of its order, it will typically be difficult for a responding party to resist such a request in the absence of compelling arguments in relation to the factors identified in *Holt*.

(2) Application of Principles

[34] Against that jurisprudential backdrop, I turn to consideration of the parties' arguments as to how the relevant principles should be applied in the case at hand.

[35] First, I note that this is clearly a case where a provincial superior court has issued requests for aid and recognition of its orders, as reflected in the orders canvassed earlier in these Reasons and, in particular, the SISP Order that governs the sale process in support of which CFI is seeking the stay. This is an important factor, complemented by public policy considerations associated with the purpose of the CCAA (see *RMI Marine* at para 86). As CFI submits, the CCAA is broad remedial legislation designed to facilitate a restructuring of debtor corporations in the interest of the company, its creditors and the public (see, *e.g., Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 18).

[36] CFI argues that the SISP, which is being supervised by the Bankruptcy Court, represents a means of achieving an orderly sale of CFI's assets for the general benefit of creditors and stakeholders. CFI submits that such a process cannot proceed efficiently or effectively in separate courts with multiple creditor actions and duplicative motions. I accept the merit of these submissions and afford them weight as relevant public policy considerations.

[37] On the other side of the ledger, IMS argues that it will be prejudiced if it is not permitted to pursue its claim to judgment and satisfaction through sale of the vessel under the Federal Court's *in rem* processes. In support of this position, IMS submits that, in addition to having rights *in rem* under section 22(2)(m) of the Act, it benefits from a maritime lien under section 139(2) of the *Marine Liability Act*, SC 2001, c 6 [MLA], which affords such status to claims that

arise in respect of goods, materials or services supplied to a foreign vessel (within the meaning of section 2 of the *Canada Shipping Act, 2001*, SC 2001, c 26). As previously noted, I understand that it is not disputed that the barge is not registered in Canada and is therefore a foreign vessel for purposes of section 139(2).

[38] IMS takes the position that it requires access to the Federal Court's jurisdiction and processes in order to benefit from the priority afforded by the maritime lien it claims. It also relies on the Federal Court's jurisdiction to use equitable principles of Canadian maritime law to elevate to the equivalent of maritime lien status a claim that may not otherwise benefit from a maritime lien. IMS refers to the explanation of these equitable principles in *Nanaimo Harbour Link Corp v Abakhan & Associates Inc*, 2007 BCSC 109 [*Nanaimo*], in which the Supreme Court of British Columbia [BCSC] considered an application by maritime claimants for an order under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA] that the statutory stay of proceedings conferred by the BIA did not apply to the claimants' Federal Court proceedings. The claimants asserted that their claims benefited from secured status as maritime liens or were entitled to equivalent status pursuant to equitable principles and that the Federal Court had jurisdiction to apply said principles.

[39] *Nanaimo* referred to these equitable principles at paragraphs 21 and 22, explaining that certain of the maritime claimants asserted that they were entitled to elevated status in the Federal Court proceedings as a result of their supply of labour and materials to the ship. The claimants argued that the value of the ship was resultantly enhanced such that it would be inequitable for the mortgagee to be enriched by that enhanced value without credit to the suppliers. Ultimately,

the BCSC granted the claimants' application, concluding that they should have the opportunity to seek maritime lien or equivalent status and that the ranking of priorities and the proof of maritime claims were matters for the Federal Court to determine pursuant to the principles of Canadian maritime law (at para 53).

[40] In the case at hand, IMS similarly argues that the services it provided to the Barge served to enhance its value and that this enhanced value will be realized in any sale of the Barge. As such, in the event it is not successful in arguing entitlement to maritime lien status under section 139(2) of the MLA, it will be seeking equivalent status through an equitable adjustment of priorities in accordance with Canadian maritime law principles.

[41] CFI disputes IMS's claimed entitlement to maritime lien status. Indeed, as it argued under the alternative issue presented in its motion, CFI takes the position that IMS does not qualify as an *in rem* necessaries claimant under section 22(2)(m) of the Act. However, the Court need not reach a conclusion on any of those disputes for the purposes of the present issue, which is whether to grant the requested stay. Importantly, CFI acknowledges that IMS has the right to assert its claim (including its claim for maritime lien or equivalent priority status) in the CCAA proceeding against the proceeds of sale that will result from the SISP. CFI also acknowledges that, as a superior court with inherent jurisdiction and concurrent jurisdiction over Canadian maritime law, the Bankruptcy Court would be in a position to adjudicate IMS's claims and associated arguments for priority.

[42] IMS argues that, as the Federal Court has experience with the adjudication of maritime claims and the application of the principles of maritime law it wishes to invoke, it should not be deprived of the opportunity to pursue its claim in this Court. I also understand it to express doubt as to its ability to invoke these maritime law principles in the CCAA proceeding before the Bankruptcy Court. However, IMS has provided no authority or compelling argument in support of this concern. I find no basis to conclude that the Bankruptcy Court lacks the jurisdiction to adjudicate IMS's claims or that the substantive principles of Canadian maritime law or the Bankruptcy Court's application of those principles would differ from what IMS would encounter before the Federal Court.

[43] There is no question that, if the requested stay were to deprive IMS of a juridical advantage that would be available to it in the Federal Court but not in the Bankruptcy Court, that would be a significant factor militating against granting the stay. Such a consideration was a significant factor underlying the reasoning in *Holt* (at paras 46-50). As explained earlier in these Reasons, the plaintiff in *Holt* enjoyed a juridical advantage before the Federal Court that would be in jeopardy if the Federal Court proceedings were stayed in deference to the Belgian bankruptcy court, because Belgian law would not recognize the plaintiff's maritime lien status under US law. In contrast, in the case at hand, there is no evident juridical advantage to IMS in the Federal Court that would not also be available before the Bankruptcy Court.

[44] Before leaving these arguments by IMS, I should also note that the outcome in *Nanaimo* turned significantly on the fact that the provincial superior court proceeding in that case was being conducted under the BIA. As the BCSC observed at paragraph 10, section 136(1) of the

BIA excludes secured creditors from the statute's scheme of distribution of the assets of a bankrupt party. Relying on that provision and its application in *Holt*, the BCSC assessed the applicant's claims for maritime lien or comparable status as secured claims entitled to be adjudicated outside the bankruptcy (*Nanaimo* at paras 10-19, 53). However, as CFI submits, *Nanaimo* is distinguishable from the case at hand, which involves a proceeding not under the BIA, but under the CCAA. Presumably because the objective of the CCAA is to facilitate the restructuring of insolvent companies rather than distributing their assets, the CCAA does not contain a provision comparable to section 136 of the BIA.

[45] I have also considered other arguments advanced by IMS in opposition to the requested stay. These include a submission that CFI comes to the Court without "clean hands" and therefore should not be afforded the relief it seeks. While IMS has not identified any authority supporting its position, I accept that there is potential for a lack of clean hands to be relevant to the Court's willingness to grant the sort of discretionary remedy represented by a stay under section 50(1) of the Act.

[46] In support of this argument, IMS takes issue with the fact that CFI did not file a Statement of Defence to IMS's Federal Court action, in the over seven months since the action was commenced, and then brought what IMS characterizes as a last minute stay motion, with little notice to IMS, in order to support the impending sale of CFI's assets. IMS also argues that, prior to late August 2022, the Monitor and CFI had not included IMS's counsel on the service list for motions in the CCAA proceeding. IMS submits that these circumstances have caused it

prejudice, including incurring legal costs to respond to this motion and irreparable harm that it will suffer if the Barge is released from arrest.

[47] On the subject of the stage to which this proceeding has progressed and the fact CFI has not filed a Defence, CFI relies on the stay of all other proceedings imposed by the provincial superior court orders. Of course, in accordance with the reasoning in *Always Travel*, CFI requires the discretionary order now sought from the Federal Court to implement that stay in the present proceeding. However, in these circumstances, I find no basis to conclude that its failure to file a Defence in this proceeding represents any sort of misconduct.

[48] Indeed, CFI argues that the fact this proceeding has not advanced beyond service of the Statement of Claim and arrest of the Barge militates in favour of granting the stay. This position is consistent with the reasoning in *Holt*, in which Justice MacKay's decision not to stay the Federal Court proceeding turned in part on the fact that proceeding has already advanced to issuance of an order for appraisement and sale of the "Brussel".

[49] Turning to the timing of the present motion, CMI filed its Notice of Motion on August 2, 2022. While it did not serve and file the remainder of its motion materials until Tuesday, September 20, 2022, the timing for the filing of IMS's responding materials on Monday, September 26, 2022 and the hearing of the motion on Wednesday, September 28, 2022, was set by the Court at a case management conference on September 22, 2022, following consultation with counsel. IMS has not advanced a compelling argument that the timing of this motion is

untoward or that it had inadequate time to prepare to respond. In my view, IMS has not established that CFI's approach to this litigation represents a lack of clean hand.

[50] Finally, returning to considerations of public policy, IMS submits that granting the requested stay could cause a loss of confidence on the part of the maritime industry that relies upon the Federal Court's *in rem* jurisdiction and processes. In my view, this argument must be considered in the context of the above analysis of IMS's arguments surrounding the loss of juridical advantage it alleges it would experience as result of the stay. As I have found no basis for a conclusion that IMS would be unable to assert its claims and priority arguments before the Bankruptcy Court through the CCAA process, I place little weight on IMS's public policy argument.

(3) Conclusion on Stay Motion

[51] Based on the above analysis, I am satisfied that CFI has clearly established that the CCAA proceeding before the Bankruptcy Court represents a more appropriate forum than the present proceeding for adjudication of claims against the Barge. I will therefore issue a stay of the present proceeding.

[52] At the hearing of this motion, CMI's counsel explained that it is anticipated that the stay in the CCAA proceeding, which currently expires on October 17, 2022, will be extended potentially to a date in February 2023 to afford time for completion of remaining processes under the CCAA. There is no evidence before the Court on an extension of the CCAA stay or its likely duration. However, I accept the logic of CMI's submission that, under the present circumstances,

the duration of the Federal Court stay should be concurrent with that under the CCAA. My Order will so provide. However, it will also reserve the Plaintiff's right to apply to have th stay of its action lifted at an earlier time in the event of any material change in circumstances.

(4) Release of the Barge from Arrest

[53] It flows from the decision to stay the Plaintiff's action, and the reasoning underlying that decision, that the Barge should be released from arrest to facilitate its sale along with other assets of CFI through the CCAA proceeding. I note IMS's position that, if the Court were to grant CFI's motion, it should order that CFI post bail for the release of the Barge from arrest. However, the reasoning explained above, underlying the decision to grant the stay, turns significantly on IMS's ability to assert its claim against the proceeds of sale of the Barge achieved through the CCAA process. As CFI has satisfied the Court that a stay is warranted, I do not consider it appropriate to also impose a requirement to post bail to achieve release of the Barge from arrest.

[54] Before leaving the subject of the Barge's release, I will briefly addr ss the significance of the Caveat filed by Captain Spellacy. During the hearing of this motion, disagreement developed between counsel surrounding the scope of the motion in relation to the Caveat. IMS's counsel objected to submissions by CFI's counsel related to the Caveat, taking the position that CFI's Notice of Motion was silent on the subject of the Caveat. CFI responded to the objection by pointing out that the Caveat was filed only on September 2, 2022, a month after the Notice of Motion was filed, but that CFI's subsequent written representations in support of the motion spoke to the Caveat and requested relief in relation thereto.

[55] Further exploration of the parties' positions on the objection clarified that IMS's concern was with the possibility that CFI was seeking to strike or dismiss the Caveat, through arguments akin to those advanced in relation to IMS's action under the second, alternative, issue in this motion. While the evidence upon which IMS relies in this motion was provided in an affidavit sworn by its principal, Captain Spellacy, IMS's counsel explained that this evidence did not speak to Captain Spellacy's personal claim in support of which the Caveat had been filed. Indeed, the Court has very little information related to that claim, other than that it has been described as seeking master's wages.

[56] However, IMS's counsel advised that she accepted that, as a matter of law, if the Court decided to stay IMS's action, then that stay would apply to any caveats filed in the action. CFI's counsel in turn clarified that it was not his intention to advance arguments, akin to those under the alternative issue, to strike the Caveat. Rather, CFI's arguments in relation to the Caveat are advanced solely under the first issue. CFI takes the position that the principles and analyses that support its motion for a stay of the Plaintiff's claim apply equally to the Caveat.

[57] As such, the parties appear to agree that a decision to stay the action includes application of that stay to the Caveat filed therein. The Caveat therefore does not represent an impediment to the Court ordering the Barge released from arrest. Regardless of such agreement, I cannot identify any basis to conclude that the Court's analysis, underlying its finding that the Bankruptcy Court is a preferable forum for adjudication of IMS's claim, would not also apply to the claim underlying the Caveat.

[58] Finally, I note that at the hearing I explored with CMI's counsel the concern raised by IMS's counsel that, once the Barge is released from arrest, it is not precluded from departing the jurisdiction. While the SISP Order contemplates the closing of the sale of CFI's assets, including the Barge, by early to mid October, the sale has not yet been approved. However, I accept CFI's submission that GT is pursuing the sale of the business as a going concern and that, as the parties agree, the Barge is a key asset in the operation of the business. I am satisfied that this is not a case where there is an obvious risk of the Barge fleeing the jurisdiction.

B. *In the alternative, whether IMS's action should be struck pursuant to Rule 221, because the services alleged to be provided to CFI by IMS fall outside the scope of section 22(2)(m) of the Act and, as such, do not fall within the in rem jurisdiction of the Federal Court*

[59] Given my decision to grant the stay requested under the first issue in this motion, and as the second issue is advanced in the alternative, the Court will not adjudicate the second issue.

## V. **Costs**

[60] The parties agree that cost should flow to the successful party in this motion. At the hearing, the Court afforded counsel the opportunity to attempt to agree on a lump sum costs figure. While no agreement resulted, CFI's counsel proposed a figure of $3500.00, and IMS's counsel did not make substantive submissions opposing this figure. As CFI's counsel notes, in the somewhat similar motion in *RMI Marine*, I awarded the successful party costs in the all-inclusive amount of $3500.00. I consider that amount appropriate in the case at hand, and my Order will so provide.

**CORRECTED ORDER IN T-279-22**

**THIS COURT ORDERS that:**

1. The Plaintiff's action is stayed, effective until October 17, 2022, or any later date to which the stay issued by the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency may be extended.

2. The Plaintiff shall have leave to apply to have the stay of its action lifted at an earlier time in the event of any material change in circumstances.

3. The Defendant Ship is released from arrest.

4. The Plaintiff shall pay the Defendant, Canada Fluorspar (NL) Inc., costs of this motion in the all-inclusive amount of $3500.00.

"Richard F. Southcott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-279-22 |
| **STYLE OF CAUSE:** | INAMINKA MARINE SERVICES LIMITED., v CANADA FLUORSPAR (NL) INC., and THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404" |
| **PLACE OF HEARING:** | HEARD VIA VIDEOCONFERENCE |
| **DATE OF HEARING:** | SEPTEMBER 28, 2022 |
| **ORDER AND REASONS:** | SOUTHCOTT J. |
| **DATED:** | OCTOBER 5, 2022 |

**APPEARANCES:**

| | |
|---|---|
| Deborah L.J. Hutchings | FOR THE PLAINTIFF |
| William T. Cahill & Allison Philpott | FOR THE DEFENDANTS |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| MacNab Fagan & Murphy<br>St. John's, Newfoundland | FOR THE PLAINTIFF |
| Cox & Palmer<br>St. John's, Newfoundland | FOR THE DEFENDANTS |

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# CORRECTIONS – Document ____

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| **File # / N$^{O}$ de dossier** | **T-279-22** | **Citation #** (if applicable)/ **N$^{O}$ de référence** (si nécessaire) | 2022 FC 1375 |
| **STYLE OF CAUSE / INTITULÉ** | **IN THE MATTER** NAMINKA MARINE SERVICES LIMITED., a body corporate v..CANADA FLUORSPAR (NL) INC., a body corporate and THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404" | | |
| **Document:** | **Order and Reasons** | | |
| **Document Type / Type de document** | Order and Reasons | | |
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| **Original text to be corrected / Texte original à corriger** | | | | | |

Corrections:

Please note corrections are in Page 1 Para 3 and page 25 para 3

# Exhibit "J"

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Our File: 207444

October 6, 2022

This is Exhibit J referred to in the Affidavit of Richard A. Spellacy Sworn or affirmed before me this 24th day of October, 20 22.

*Via email and mail*

To whom it may concern:

Dear Sir/Madam:

**RE: 2022 01G 0709**
**Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively, the "Companies")**
**Our Client: Grant Thornton Limited, Court-Appointed Monitor of the Companies**

With respect to the above-noted matter, please find enclosed the following, which has been filed with the Supreme Court of Newfoundland and Labrador:

1. Original Notice of Motion re: Approval and Reverse Vesting Order;
2. Affidavit of Phil Clarke;
3. Approval and Reverse Vesting Order;
4. Order regarding Monitor's Enhanced Powers;
5. Amended ARIO – Amendment #3; and
6. Memorandum of Fact and Law.

Please note that this matter is set down for 10:00 a.m. on October 12, 2022.

We trust this is in order.

Yours truly,

Geoffrey Spencer
Office Lead Partner

GS/ss
Encl.

(39555374_1)

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court-Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**");

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

This is Exhibit J referred to in the Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 24th
day of October, 2022.

## NOTICE OF MOTION

Grant Thornton Limited, as Court-Appointed Monitor of the Company (hereinafter the "**Applicant**") will make a motion before the presiding Judge in Bankruptcy and Insolvency on Wednesday, the 12th of October 2022 at 10:00 a.m., or so soon thereafter as the motion can be heard at the Courthouse, Duckworth Street, St. John's, Newfoundland and Labrador.

On the hearing of this Motion, the Applicant intends to apply for the following relief:

1. An order (the "**Approval and Reverse Vesting Order**"), pursuant to the CCAA *inter alia* :

   (i) approving the transactions (collectively the "**Transactions**") contemplated in the Subscription Agreement entered into between the Company as vendor, the successful bidder as purchaser (the "**Successful Bidder**") and Newco, a company to be incorporated ("**Newco**") dated the __ day of October, 2022 (the "**Subscription Agreement**"), and authorizing and directing the Company to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transactions; and

   (ii) granting a release in favour of the Company employees and advisors, the Monitor and its advisors, the DIP Lenders and its advisors and the Successful Bidder and its directors, officers and advisors as described in detail below;

   (iii) amending the Amended and Restated Interim Order (the "**ARIO**") dated the 18th of March, 2022, the Amendment #1 to the ARIO (the "**Amended ARIO**") dated the 10th day of June, 2022 and the Amendment #2 to the

ARIO (the "**2nd Amended ARIO**") dated the 30th day of August, 2022, issued pursuant to section 11 of the CCAA, in order to extend the stay of proceedings issued thereunder until the 28th day of February, 2023; and

(iv) directing that the Monitor's First Confidential Report and the Subscription Agreement be sealed with the Court and remain under seal until the Closing outlined in the Subscription Agreement.

2. An order (the "**Monitor's Power Expansion Order**") pursuant to the CCAA, enhancing the Monitor's powers as they relate to the ResidualCo (as defined below);

3. An order abridging the notice periods pursuant to Section 11 of the CCAA and the Rules of the Supreme Court, 1986, Rule 3.03(1), Rule 6.04(2) and Rule 6.06;

4. An order pursuant to Section 11 of the CCAA directing that the service on the service list set out in Schedule "A" hereto is sufficient for the purposes of this Application; and

5. Such further and other relief as this Honourable Court deems just and equitable.

**THE GROUNDS FOR THIS APPLICATION ARE AS FOLLOWS:**

**BACKGROUND**

6. As of February 21, 2022, the Company was insolvent and was unable to meet its debt obligations as they became due. As a result, PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver and manager of Bridging Finance Inc., and Bridging Income Fund LP ("**PWC**") applied for an interim receivership order pursuant to s.47(1) of the *Bankruptcy and Insolvency Act*, RSC 1985 c. B-3 (the "**BIA**") over substantially all the assets and undertaking of the Company, which order was issued by this Honourable Court on the 21st day of February, 2022 (the "**Interim Receivership Order**"). Pursuant to the Interim Receivership Order, Grant Thornton Limited ("**GTL**") was appointed as Interim Receiver of all the assets and undertaking of the Company, with the exception of those assets and undertakings that were carved out of the receivership (defined therein as the "**Excluded Property**").

7. On the 8th day of March 2022, GTL as Interim Receiver made an application to this Honourable Court declaring that the Company was a company to which the CCAA applied and requesting protection under the CCAA. As a result of that application, the Court granted an initial CCAA Order on the 11th day of March 2022 (the "**Initial CCAA Order**") and the Court subsequently granted the ARIO on the 18th day of March 2022. In both orders, GTL was appointed and confirmed as CCAA Monitor.

8. In the Initial CCAA Order, this Honourable Court authorized the Monitor, on behalf of the Company, to enter into a DIP Financing Agreement with the DIP Lenders referenced in the Initial CCAA Order (the "DIP Lenders").

9. Since the 18th day of March 2022, the Monitor has been running a SISP as contemplated in the order of this Honourable Court issued on the same day as the ARIO (the "**SISP Order**"). The activities of the Monitor in executing the SISP during this period are outlined generally in the Monitor's Third Report.

10. On the 31st day of May 2022, the Monitor made an application to this Honourable Court seeking an extension of the stay period until the 2nd day of September 2022 and amending the SISP procedures to extend the dates of the Phase 2 Bid Deadline and each step thereafter in order to correspond with the CCAA stay period (the "**Amended SISP Order**"). The extension was requested to allow the Monitor to arrange the completion of a National Instruments 43-101 Technical Report with the expectation that it would assist in increasing the purchase price for the Company's assets. The court granted these amendments by Order dated the 10th day of June 2022.

11. As outlined in the Monitor's Fifth Report, the Monitor received multiple bids on the Company's assets through the SISP process. The Monitor made a recommendation to the DIP Lenders as to its preferred choice with respect to the bids received. The DIP Lenders are in support of the Monitor's recommendation and the Monitor therefore notified the Successful Bidder on August 19, 2022.

12. On the 30th day of August 2022, this Honourable Court issued the 2nd Amended ARIO extending the CCAA stay period until the 17th day of October 2022 and amending the SISP procedures in order to allow time to (i) complete the SISP; (ii) enter into a definitive agreement with the Successful Bidder (the "Definitive Agreement"); and (iii) obtain court approval.

13. Following careful consideration of the available offers, the Monitor, in consultation with the Company, determined that it was in the best interests of the Company, its stakeholders and senior secured creditors to accept the bid of the Successful Bidder for the reasons more fully set out in the Affidavit of Phil Clarke, the Monitor's Fifth Report and the Monitor's First Confidential Report.

14. The proposed Definitive Agreement represents the culmination of approximately six (6) months of extensive solicitation efforts on the part of the Monitor and the Company.

15. The SISP was a thorough and broad canvassing of the world-wide market of parties interested in the Company's business and assets. The SISP generated a significant amount of interest in the Company, which resulted in material improvements to the consideration provided under the Transactions for the benefit of the Company's stakeholders and senior secured creditors.

16. Based on the Monitor's experience, the nature of the Company, the SISP, and the comparison of offers received, the Monitor is of the view that the Subscription Agreement and the Transactions contain commercially reasonable terms and will maximize the available recovery for the Company, its stakeholders and senior secured creditors. Additional reasons and support are included in the Monitor's First Confidential Report and the Monitor's Fifth Report.

**REVERSE VESTING STRUCTURE**

17. The Transactions contemplated in the Subscription Agreement have been structured as "reverse vesting" transactions whereby:

    (a) The Successful Bidder will become the sole shareholder of the Company; and

    (b) All excluded assets and excluded liabilities will be transferred or "vested out" to Newco, a company incorporated by the Monitor (the "**ResidualCo**").

18. The reverse vesting structure will obviate the need for the Company to transfer the permits, licenses, leases or amend the registrations associated with the Company's existing mineral claims, thereby reducing the costs and time associated with closing the Transactions, for the benefit of the Company's stakeholders and senior secured creditors.

19. A "reverse vesting" structure will not result in any material prejudice to the creditors of the Company, nor will it impair any of the creditors' rights that they would otherwise have under an asset sale transaction.

**THE RELEASE**

20. The Applicant is also seeking a court ordered release (the "**Release**") in favour of:

    (a) the employees, legal counsel and advisors of the Company and of ResidualCo;

(b) the Monitor and its legal counsel, and their respective present and former directors, officers, partners, employees and advisors;

(c) the DIP Lenders, its counsel, and their respective present and former directors, officers, partners, employees and advisors; and

(d) the Successful Bidder, its directors, officers, employees, legal counsel and advisors; (collectively, the **"Released Parties"**).

21. The Release covers any and all present and future claims against the Released Parties based upon any fact or matter of occurrence in respect of the Transactions or the Company, its assets, business or affairs or administration of the Company, except any claim for fraud or willful misconduct or any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

22. The Released Parties have contributed to the successful outcome in these CCAA Proceedings.

23. The Release is being sought, with the support of the Company, the Monitor, the DIP Lenders and the Successful Bidder, in order to achieve certainty and finality for the Released Parties in the most efficient and appropriate manner given the current circumstances.

24. The Company is unaware of any statutory liabilities in respect of the Released Parties and to date, no stakeholder of the Company has made the Company or the Monitor aware that they intend to assert a claim against any of the Released Parties in respect of any claims covered by the Release.

**Extension of the Stay Period**

25. The Stay period will currently expire on the 17th day of October 2022.

26. The Applicant is requesting the Stay Period be extended until the 28th day of February 2023.

27. The Stay Period will terminate in respect of the Company upon closing of the Transactions, however, the CCAA Proceedings and Stay Period will continue in respect of the ResidualCo following the completion of the Transactions.

28. Additional time is required to complete the Transactions contemplated under the Subscription Agreement and to seek court approval of the distribution of the sale proceeds resulting from the Transactions. The Applicant therefore seeks an extension of the Stay Period in order to provide the required stability during that time frame.

29. As set out in the cash flow projection, the Monitor expects that, with the funds to be advanced under the DIP Financing Agreement, it will have sufficient cash to fund its projected operating costs during the proposed stay extension period.

30. The Company and the Monitor have continued to act in good faith and with due diligence throughout these CCAA Proceedings.

**Monitor's Power Expansion**

31. The Monitor is seeking the issuance of the Monitor's Expanded Power Order to enhance the Monitor's powers as they relate to the ResidualCo, including:

    (a) to take any and all actions and steps, and execute all documents and writings, on behalf of, and in the name of the ResidualCo in order to facilitate the performance of its obligations, including as contemplated by the Subscription Agreement;

    (b) to exercise any powers which may be properly exercised by any board of directors of the ResidualCo; and, ultimately,

    (c) to assign the ResidualCo or cause the ResidualCo to be assigned into bankruptcy upon completion of the Transactions.

32. No person, other than the Monitor, will be appointed to act as an officer or director of the ResidualCo, making it logical and cost-effective to enhance the Monitor's powers in order to enable the Monitor to take additional steps for completion of the Transactions and other steps related to the wind-down of these CCAA Proceedings.

**Sealing Order**

33. The Applicant requests that a Court Order be granted sealing the Monitor's First Confidential Report and the Subscription Agreement and that it remain under seal until the

Closing outlined in the Subscription Agreement, to avoid any negative impact that could result from dissemination of the information contained therein. The report contains commercially sensitive information pertaining to the SISP and the offers for purchase of the mine and other confidential information in respect of the offers submitted to the Monitor and the agreement with the Successful Bidder. Publication of the information contained in the Monitor's First Confidential Report and Subscription Agreement would pose serious risk to the commercial interests of stakeholders and would irreparably harm the Monitor's efforts to maximize realizations from the Company's assets should the Transactions not close.

34. Any interested party may apply, on notice to the Applicant, to vary the terms of the Sealing Order or to unseal the Monitor's First Confidential Report and the Subscription Agreement.

**OTHER GROUNDS**

35. The provisions of the CCAA, including s. 11, s. 11.02 and s. 36 thereof, and the inherent and equitable jurisdiction of this Honourable Court;

36. The following documentary evidence will be used at the hearing of this Application;

    (a) The affidavit of Phil Clarke, sworn as of the 5th day of October, 2022;

    (b) The Monitor's Fifth Report;

    (c) The Monitor's First Confidential Report; and

    (d) Such further and other evidence as counsel may advise and this Honourable Court may permit;

37. Such further and other grounds as counsel may advise and this Honourable Court may permit.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**DATED** at St. John's, Newfoundland and Labrador, this 5th day of October 2022.

**MCINNES COOPER**

**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:** O'KEEFE & COMPANY
Solicitors for the Company
Whose address for service is:
84B Airport Road,
St. John's, NL
A1A 4Y3

Attn: Darren D. O'Keefe

**AND TO:** Service List attached hereto as **SCHEDULE "A"**

SCHEDULE "A"
SERVICE LIST

1. Canada Fluorspar Inc., Canada Fluorspar (NL) Inc., and Newspar
   1 Clarks Pond Road
   St. Lawrence, NL A0E 2V0

2. Grant Thornton as Interim Receiver
   Phil Clarke
   Sean MacNeil
   Nova Centre, North Tower, Suite 1000
   1675 Grafton Street
   Halifax, NS B3J 0E9
   Phil.Clarke@ca.gt.com
   Sean.MacNeil@ca.gt.com

3. Counsel for Canada Fluospar Inc., Canada Fluorspar (NL) Inc., and Newspar
   Darren O'Keefe
   O'Keefe & Company
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   St. John's, NL
   A1A 4Y3
   darren@okeefeandcompany.com

   Allison Philpott
   Cox & Palmer
   235 Water Street
   St. John's, NL A1C 1B6
   aphilpott@coxandpalmer.com

4. Counsel for Pricewaterhousecoopers Inc., on behalf of Bridging Finance Inc.
   Joe Thorne
   Stewart McKelvey
   P.O. Box 5038
   11th Floor, Cabot Place
   100 New Gower Street
   St. John's, NL A1C 5V3
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5. Graham Page
   Michael McTaggart
   Pricewaterhousecoopers Inc., on behalf of Bridging Finance Inc.

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6. Counsel for Golden Gate Capital
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7. Government of Newfoundland and Labrador
Department of Industry, Energy and Technology
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Jamie O'Dea
Micheal Day
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9. Brian Pettit
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10. Court Appointed Receiver for HSBC
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Kurt MacLeod

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13. Bank of Montreal
100 King St. West, 11th Floor
Toronto, ON M5X 1A1

14. Bank of Montreal Transport Finance
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2nd Floor, Mississauga, ON L4W 0A9

15. Komatsu International (Canada) Inc.
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judy.langlais@global.komatsu

16. Sonya Warren
Credit Manager
Hickman Leasing Limited
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swarren@hickmanmotors.ca

17. Ford Credit Canada Leasing, Division of Canadian Road Leasing Company
P.O. Box 2400
Edmonton, AB T5J 5C7
bbankrup@ford.com

18. Caterpillar Financial Service Limited
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sherry.pottie@cat.com

19. De Lage Landen Financial Services Canada Inc.
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20. Meridian Onecap Credit Corp.
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21. Counsel for Equipment SMS Inc.
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22. Mitsubishi HC Capital Canada Leasing, Inc.
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25. David L. Hounsell
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26. Dave Elliott
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27. Derek Pardy
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28. Lynn M. Korbak
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30. Dormody Engineering Incorporated
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35. Canada Revenue Agency
Sudbury Tax Centre
Post Office Box 20000, Station A
Sudbury ON P3A 5C1
c/o Maeve Baird, Counsel
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36. Lee E. Ballett
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37. Peter Kiewit Sons ULC
Attention: Director of Real Estate
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41. Aaron Morrow
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**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

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

**AND IN THE MATTER OF** an application of Grant Thornton Limited, as Court-Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**"); and

**AND IN THE MATTER OF** a Plan of Compromise or Arrangement of the Company;

## AFFIDAVIT OF PHIL CLARKE

I, Phil Clarke, CA, CPA, CIRP, LIT, of the City of Halifax, Nova Scotia, make oath and say as follows:

1. I am a Senior Vice President with Grant Thornton Limited ("GTL"), the Monitor in the within CCAA proceedings concerning CFI and am authorized to give this affidavit in support of the within application. The information set out in the within application is true to the best of my knowledge, information and belief.

2. As set out in the within application, GTL was appointed Interim Receiver of the Company pursuant to an Order of this Honourable Court dated the 21st of February 2022, attached hereto as **Exhibit "A"**.

3. As set out in the within application, GTL was further appointed as Monitor for CFI pursuant to an Amended and Restated Initial Order of this Honourable Court issued on the 18th of March 2022 attached hereto as **Exhibit "B"**.

4. As noted in the within application, on the 8th of March 2022, GTL applied to the Honourable Supreme Court, in its capacity as Interim Receiver, to have the Company placed into administration under the CCAA. That order was granted, as noted above, initially on the 11th of March 2022 and revised on the 18th of March 2022 (the Amended and Restated Initial Order being referred to as the "ARIO").

5. As noted in the within application, on the 31st of May 2022, GTL applied to the Honourable Supreme Court, in its capacity as Monitor, to extend the dates in the Sales Investment and Solicitation Process (the "SISP"), the SISP order and to extend the stay period until the 2nd day of September 2022. That order was granted, on the 10th of June 2022 (Amendment #1 ARIO being referred to as the "Amended ARIO").

6. As noted in the within application, on the 24th day of August, GTL applied to the Honourable Supreme Court, in its capacity as Monitor, to extend the SISP, the SISP order and to extend the stay period until the 17th day of October, 2022. That order was granted, on the 30th ay of August 2022 (Amendment #2 being referred to as the "Amended ARIO- #2").

**SISP**

7. Between the period of August 30th 2022, to present, GTL has undertaken the following work pursuant to the Amended ARIO - #2 and the SISP and Revised SISP that was approved by the Court by way of the SISP Order:

(a) Continued to protect and preserve the property and assets of CFI;

(b) Continue to pay all holding costs of the estate in the normal course of the estates administration;

(c) Continue to report to the DIP Lenders pursuant to the DIP Financing Agreement;

(d) Continue to review claims by creditors and other stakeholders and respond accordingly;

(e) Maintain the estates website (www.grantthornton.ca/cfi) and update as required in order to keep creditors and stakeholders updated on the status of the proceeding and the SISP;

(f) Respond to creditor and stakeholder queries in a timely fashion;

(g) Manage the SISP in accordance with the SISP Order and the Revised SISP Order, specifically:

(i) On March 20, 2022 the Monitor began circulating a solicitation letter and non-disclosure agreement ("**NDA**" initially to 63 potential bidders and later expanded to a total of 103 potential bidder;

(ii) The Monitor posted advertisements of the SISP in the National Post, The Globe & Mail, and the Evening Telegram on March 29, 2022. Furthermore, a press release was issued on April 11, 2022;

(iii) The Monitor in conjunction with legal counsel and the Company created an extensive virtual dataroom (the "**VDR**") utilizing a due diligence tracking tool. The tool was used to streamline the due diligence process by anticipating information requests, establish a structure and process to rapidly respond to questions, and help ensure the completeness of data. The Monitor hosted the VDR on Firmex which provided the Monitor with tracking data and notified all registered users on a daily basis when the new information was posted to the VDR;

(ix) Included in the Phase 1 non-binding offers were 3 parties who expressed interest in a stalking horse bid process. After consulting with the DIP Lenders and Company, the Monitor decided not to proceed with a stalking horse process as outlined by the interested parties as there was no clear incremental benefit to the creditors;

(x) In April 2022 as the Phase 2 Qualified Bidders continued their due diligence it became evidence to the Monitor that the Phase 2 Qualified Bidders were seeking a National Instruments 43-101 Report (**"43-101 Report"**) and that a binding offer would be conditional on the completion of the 43-101 Report

(xi) On May 9, 2022 the Monitor, on consultation with the DIP Lenders re-initiated the Company's ongoing engagement with its consultants to complete the 43-101 Report. The Monitor advised the Phase 2 Qualified Bidders of this action on May 25, 2022;

(xii) As the 43-101 Report was considered a key aspect of the due diligence process for Phase 2 Qualified Bidders, the Monitor, in consultation with the DIP Lenders and the Company, the Monitor made application and by Order of this Court dated June 10, 2022 extended the Phase 2 Bid deadline;

(xiii) The 43-101 Report was issued on June 15, 2022;

(xiv) The Monitor received a total of 4 binding offers from the Phase 2 Qualified Bidders (**"Phase 2 Bidders"**);

(xv) The Monitor, in consultation with the DIP Lenders and the Company extended the bid deadline to August 12, 2022 to allow the Phase 2 Bidders submit improved offers;

(iv) On March 24, 2022 the VDR "went live" for interested parties. Throughout the SISP a total of 29 parties signed NDA's and received access to the VDR;

(v) The Monitor in conjunction with the Company developed a Confidential Information Memorandum ("**CIM**") and that CIMN was posted on the VDR on April 1, 2022;

(vi) On April 13, 2022 the Monitor extended the date for submission of non-binding letters of intent from April 17, 2022 to April 20, 2022 to avoid a submission date on the Sunday of the Easter long weekend in Canada. That notice was provided to the Phase 1 Qualified Bidders and the Service List;

(vii) Throughout the SISP process, the Monitor contacted 103 parties covering all aspects of the fluorspar industry (customers of CFI, competitors, traders, other mining companies, etc.), industrial and chemical companies, private equity firms, and the broader mining industry. The entities contacted spanned the globe and included entities in Canada, the United States, Mexico, European Union, United Kingdom, South Africa, India, China and other countries in Asia;

(viii) The Monitor received a total of 13 non-binding letters of intent; and after reviewing with the bidders, and in consultation with the Company and the DIP Lenders, accepted a total of 11 parties into Phase 2 ("**Phase 2 Qualified Bidders**");

(xvi) On August 12, 2022 the Monitor received 3 revised binding offers;

(xvii) After consultation with the Company and the DIP Lenders, on August 18, 2022 the Monitor selected the Successful Bidder and the Binding Letter of Offer was signed on August 26, 2022;

(xviii) On August 24, 2022 the Monitor made application to further extend the SISP timelines, specifically to extend the deadline for the completion of Definitive Agreements to September 14, 2022, and the stay of proceedings to October 17, 2022, the date of the outside closing date in the SISP;

(xix) On September 26, 2022 the Monitor, in consultation with the Company and DIP Lenders further extended the deadline for Definitive Agreements; and

(xx) On September 30, 2022 the Monitor, in consultation with the DIP Lenders and the Company agreed on Definitive Agreements.

Further details regarding the Monitor's undertakings for the SISP process are described in the Monitor's Fifth Report to Court dated October 5, 2022 and the Monitor's First Confidential Report dated October 5, 2022. Capitalized terms used in paragraph 7 of this affidavit are as defined in the SISP Procedures, unless otherwise noted.

8. That in the course of my duties as Monitor, in running the SISP, I have had several conversations with a Successful Bidder and discussed my recommendation with the DIP Lenders who support the proposed transaction.

9. On August 26, 2022 the Monitor and the Successful Bidder entered into a binding letter of intent with respect to the purchase of the shares of Canada Fluorspar Inc., and the Company (the "Binding LOI"). A copy of the Binding LOI is attached as **Exhibit "P"** to the Confidential Report.

**SALE AND REVERSE VESTING ORDER**

10. On September 30, 2022, after having conducted a six (6) month strategic review process and running a SISP, the Monitor determined that the best path to maximize value for stakeholders and preserve the Company as a going-concern was to enter into a subscription agreement with the Successful Bidder, wherein 1000 common shares in the capital of the Company (the **"Purchased Shares"**), on the terms and conditions set out in the Subscription Agreement, with the existing equity interest in the Company being cancelled on Closing such that the Successful Bidder would be the sole shareholder of the Company. The Subscription Agreement is attached hereto as **Exhibit "S"** to the Confidential Report.

11. The transaction contemplated by the Subscription Agreement represents a positive outcome for the Company, the stakeholders and the senior secured creditors. The benefits of the transaction include the following;

(a) Based on the Purchase Price payable under the Subscription Agreement, the DIP Financing will be repaid in full to the DIP Lenders;

(b) An additional payment to the senior secured creditors pursuant to their security will be made;

(c) The completion of the transaction contemplated in the Subscription Agreement will allow for the Company to continue its operations as a going concern.

12. The Transactions contemplated in the Subscription Agreement have been structured to form a "reverse vesting" transaction. In essence, instead of providing for a traditional asset sale transaction where all purchased assets are purchased and transferred to the purchaser on a "free and clear" basis and all excluded assets and excluded liabilities remain with the debtor company, the Transactions provide for a share transaction whereby, essentially:

(a) The Successful Bidder will subscribe for and purchase new shares of the Company who will, in turn, cancel and terminate all of its existing shares, so that the Successful Bidder may become the sole shareholder of Company;

(b) All excluded assets and excluded liabilities will be transferred and "vested out" to ResidualCo, a company to be incorporated in advance of Closing, so to allow the Successful Bidder to indirectly acquire the Company's business and assets on a "free and clear" basis as well.

13. The Subscription Agreement was structured in this manner as the Company maintains approximately 64 material permits and licenses that are required to maintain its mining operations and that allow the Company to perform exploration work on various parts of the property (collectively, the "**Permits and Licenses**"). Under a traditional asset sale transaction structure, some of these Permits and Licenses may be difficult to transfer to a purchaser and, to the extent that such transfer possible, the steps required to proceed with such transfer may likely result in additional delays and costs. The "reverse vesting" structure will allow the Company to maintain all of its Permits and Licenses, without requiring any additional steps to transfer them to Successful Bidder.

14. The "reverse vesting" structure will also allow the Company to maintain the mineral claims which are Retained Assets (as defined in the Subscription Agreement), without needing to amend the various registrations filed in respect thereof in order to reflect a new owner, which will also reduce the costs and speed in relation with the Transactions.

15. That in my view, as Monitor, completing the Transactions under a "reverse vesting" structure will not result in any material prejudice or impairment of any of Company's creditors rights that they would otherwise have under an asset sale transaction or a plan of arrangement.

16. A plan of arrangement would require the support of CFI's senior secured creditors who are already taking a substantial loss on their security and who would be better off exercising their security to culminate a sale of CFI than supporting a plan that would divert funds away from their security. The Monitor understands that the additional time and cost would negatively impact the Successful Bidders proposed timelines to restart operations and therefore create additional closing risk.

17. The reverse vesting structure will enable the Proposed Transaction to be completed efficiently and expeditiously minimizing risks, costs and delays of having to transfer Permits and Licenses.

18. The purchase price of the proposed transaction is not sufficient to repay the secured creditors, therefore the majority of creditors, whose claims will be included in the Excluded Liabilities in the Proposed Transaction, will receive no recovery. There is no apparent prejudice to these creditors as there would be no recovery for them had the transaction been structured as a traditional asset sale.

19. The DIP Lenders, who are the senior secured creditors, support the structure of the Proposed Transaction.

20. The Monitor is supportive of the Proposed Transaction.

**RELEASE**

21. As set forth in the draft Approval and Reverse Vesting Order, the Company also seeks the issuance of a court-ordered release (the "**Release**") in favour of;

(a) the present and former employees, legal counsel and advisors of the Company and of ResidualCo;

(b) the Monitor and its legal counsel, and their respective present and former directors, officers, partners, employees and advisors;

(c) The DIP Lenders and its legal counsel, and their respective present and former directors, officers, partners, employees and advisors; and

(d) the Successful Bidder, its directors, officers, employees, legal counsel and advisors,

(collectively, the "**Released Parties**").

22. The Release covers any and all present and future claims against the Released Parties based upon any fact, matter of occurrence in respect of the Transactions or the Company, its assets, business or affairs or administration of the Company, except any claim for fraud or willful misconduct or any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

23. That in my view as Monitor, the Release sought is appropriate, given the significant and material contributions of the Released Parties in connection with the Transactions which implemented, as previously discussed, will allow for the payment or satisfaction of DIP Financing, and will allow the Company to continue its operations as a going concern.

24. As Monitor, I am also unaware of any statutory liabilities in respect of the Released Parties and to date, no stakeholder of the Company has made the Company or the Monitor aware that they intend to assert a claim any of the Released Parties in respect of any claims covered by the Release.

25. That in my view as Monitor, the Release in the Approval and Reverse Vesting Order is an essential component to the Transactions.

**EXTENSION TO STAY**

26. Under the Amended ARIO- #2, the Stay Period will expire on October 17, 2022. Additional time is required to complete the transactions contemplated under the Subscription Agreement, if approved by the Court, or to determine the appropriate next steps if the Court declines to approve same. If the Transactions are approved, the Monitor will require additional time to deal with the Purchase Price and the distribution of same as well as application to the court on a distribution order. An extension of the Stay Period is necessary to provide the stability required during that time.

27. The Subscription Agreement provides for a "Closing Date" of October 7, 2022, which will need to be extended to allow time to complete the Transactions contemplated in the Subscription Agreement, including incorporated ResidualCo and dealing with the distribution of funds. Accordingly, a request that the Stay Period be extended until February 28, 2023 is being made. It should also be noted that the Stay Period will terminate in respect of the Company upon closing of the Transactions, however, the CCAA Proceedings and Stay Period will continue in respect of ResidualCo which are contemplated to be added as Applicants in the CCAA Proceedings under the Approval and Reverse Vesting Order.

28. The Monitor has acted in good faith in these CCAA Proceedings by pursuing the SISP in accordance with the SISP Procedures approved by the Court, and dealing with the Successful Bidder to complete the Share Subscription and that the extension of the Stay Period, in addition to being appropriate in the circumstances, will not unduly prejudice any of its creditors. The extension of the Stay Period will permit the Company to close the transaction with Successful Bidder contemplated by the Subscription Agreement for the benefit its stakeholders and senior secured creditors. In addition it will allow the Monitor time to complete the distribution application for approval by the Court, and distribute the funds.

29. The Revised Cashflow shows that the Monitor has sufficient cash to allow for the extension without an increase to the DIP, or any additional borrowing. The revised Cashflow is attached as **Exhibit "C"**.

**ENHANCED MONITOR'S POWERS**

30. The Monitor is seeking to enhance it powers namely to allow the Monitor to:

(a) take any and all actions and steps, and execute all documents and writings, on behalf of, and in the name of the ResidualCo in order to facilitate the performance of their obligations, including as contemplated by the Subscription Agreement;

(b) exercise any powers which may be properly exercised by any board of directors of the ResidualCo; and, ultimately,

(c) assign the ResidualCo or cause the ResidualCo to be assigned into bankruptcy upon completion Transactions

31. As previously discussed, as part set out in the Subscription Agreement, the Company will incorporate the ResidualCo for the purpose of transferring to them the Excluded Assets and the Excluded Liabilities. However, no person will be appointed to act as director or officer of the ResidualCo.

32. As such, the most logical and cost-effective solution is to enhance the Monitor's powers to allow it to act on behalf of the ResidualCo and take on its behalf any actions and steps which may be necessary to ensure the completion of the Transactions in accordance with the Subscription Agreement and, thereafter, assign or cause the assignment of the ResidualCo into bankruptcy in order to complete this matter.

33. I make this affidavit in support of the within application and for no other purpose.

SWORN BEFORE ME on this 6th day of October 2022 in the City of Halifax in the Province of Nova Scotia

Phil Clarke

STEPHEN KINGSTON
A Barrister of the Supreme
Court of Nova Scotia

2022 01G 0709

This is Exhibit "A" referred to in the Affidavit of Phil Clarke, sworn to before me on October 6, 2022.

A Barrister of the Supreme Court
of Nova Scotia

STEPHEN KINGSTON
A Barrister of the Supreme
Court of Nova Scotia

SCHEDULE "I"

2022 01G 0709
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

**BETWEEN:**

**PRICEWATERHOUSECOOPERS INC. in its capacity as court-appointed receiver and manager of BRIDGING FINANCE INC. and BRIDGING INCOME FUND LP**

**APPLICANT**

**AND:**

**CANADA FLUORSPAR (NL) INC. and CANADA FLUORSPAR INC.**

**RESPONDENTS**

## INTERIM RECEIVERSHIP ORDER

**BEFORE THE HONOURABLE CHIEF JUSTICE RAYMOND P. WHALEN:**

**UPON** The application of PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and Bridging Income Fund LP (formerly Sprott Bridging Income Fund LP) (the "**Applicant**"), for appointment of an interim receiver in respect of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. (collectively, the "**Debtor**");

**AND UPON READING** the Originating Application and the affidavit of Graham Page sworn February 19, 2022, and the consent of Grant Thornton Limited to act as interim receiver (in such capacity, the "**Interim Receiver**") of the Debtor;

**AND UPON HEARING** counsel for the Applicant any other counsel or other interested parties present;

Filed Feb 22, 22

R.W.

**IT IS HEREBY ORDERED THAT:**

SERVICE

1. The time for service of the notice of application and the material filed herein for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today and any further service thereof is hereby dispensed.

APPOINTMENT

2. Pursuant to section 47(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "*BIA*") Grant Thornton Limited is hereby appointed Interim Receiver, without security, of all of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, save and except for the Excluded Property (the "**Property**").

3. For greater certainty, the Interim Receiver will not take possession of the Property except to the extent necessary to carry out its obligations hereunder.

DEFINED TERMS

4. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in **Schedule "A"**.

INTERIM RECEIVER'S POWERS

5. The Interim Receiver is not authorized or permitted to operate or conduct the business of the Debtor; provided, however, that the Receiver is hereby empowered and authorized, but not obligated, to take such steps as are necessary (or cause the Debtor to take such steps as are necessary) to protect, preserve, and secure the Property.

6. The Interim Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Interim Receiver is hereby expressly empowered and authorized to do any of the following where the Interim Receiver considers it necessary or desirable:

(a) to exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, protect, and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, preserve and protect the assets of the Debtor, including the power to incur any obligations in the ordinary course of business, and the powers to enter into any agreements, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

(d) to retain or hire any employees on behalf of the Debtor for any period of time on substantially the same terms and conditions as those existing between such employees and the Debtor, if applicable, prior to the appointment of the Interim Receiver;

(e) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Interim

Receiver's powers and duties, including without limitation those conferred by this Order;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor. For greater certainty, this provision shall not apply to the Excluded Property;

(g) to settle, extend or compromise any indebtedness owing to or by the Debtor;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Interim Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Interim Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to report to, meet with and discuss with such affected Persons (as defined below) as the Interim Receiver deems appropriate all matters relating to the Property and the interim receivership, and to share information, subject to such terms as to confidentiality as the Interim Receiver deems advisable;

(k) to register a copy of this Order and any other orders in respect of the Property against title to any of the Property, and when submitted by the Interim Receiver for registration this Order shall be immediately registered by the Registrar of Deeds

for the Province of Newfoundland and Labrador or any other similar government authority, notwithstanding Section 7 of the *Registration of Deeds Act*, 2009, SNL 2009, c R-10.01, or the provisions of any other similar legislation in any other province or territory, and notwithstanding that the appeal period in respect of this Order has not elapsed and the Registrar of deeds shall accept all Affidavits of Corporate Signing Authority submitted by the Interim Receiver in its capacity as Interim Receiver of the Debtor and not in its personal capacity;

(l) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Interim Receiver, in the name of the Debtor;

(m) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(n) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have;

(o) to commence proceedings for the Debtor pursuant to the *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act*; and

(p) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Interim Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons, including the Debtor, and without interference from any other Person (as defined below).

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE INTERIM RECEIVER

7. (i) The Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Interim Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Interim Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependent on maintaining possession) to the Interim Receiver upon the Interim Receiver's request.

8. All Persons shall forthwith advise the Interim Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records (and all transaction related thereof), and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Interim Receiver or permit the Interim Receiver to make, retain and take away copies thereof and grant to the Interim Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph or in paragraphs 7 and 9 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Interim Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

9. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Interim Receiver for the purpose of allowing the Interim Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Interim Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Interim Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Interim Receiver with all such assistance in gaining immediate access to the information in the Records as the Interim Receiver may in its discretion require including providing the Interim Receiver with instructions on the use of any computer or other system and providing the Interim Receiver with any and all access codes, account names, and account numbers that may be required to gain access to the Information.

NO PROCEEDINGS AGAINST THE INTERIM RECEIVER

10. Without leave of the Court no action lies against the interim receiver with respect to any report made under, or any action taken pursuant to *BIA*.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

11. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Interim Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing

agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph; and (ii) affect a Regulatory Body's investigation in respect of the debtor or an action, suit or proceeding that is taken in respect of the debtor by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "**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.

NO EXERCISE OF RIGHTS OR REMEDIES

12. All rights and remedies of any Person, whether judicial or extra-judicial, statutory or non-statutory (including, without limitation, set-off rights) against or in respect of the Debtor or the Interim Receiver or affecting the Property are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided, however, that nothing in this Order shall:

    (a) empower the Debtor to carry on any business that the Debtor is not lawfully entitled to carry on;

    (b) prevent the filing of any registration to preserve or perfect a security interest;

    (c) prevent the registration of a claim for lien; or

    (d) exempt the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment.

13. Nothing in this Order shall prevent any party from taking an action against the Applicant where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such

party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Interim Receiver at the first available opportunity.

14. Nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Debtor with respect to the Excluded Property.

NO INTERFERENCE WITH THE INTERIM RECEIVER

15. No Person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, except with the written consent of the Debtor and the Interim Receiver, or leave of this Court.

CONTINUATION OF SERVICES

16. All persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Debtor, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Debtor

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Debtor or exercising any other remedy provided under such agreements or arrangements. The Debtor shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain

names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Debtor in accordance with the payment practices of the Debtor, or such other practices as may be agreed upon by the supplier or service provider and each of the Debtor and the Interim Receiver, or as may be ordered by this Court.

INTERIM RECEIVER TO HOLD FUNDS

17. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Interim Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, but excluding the Excluded Property, shall be deposited into one or more new accounts to be opened by the Interim Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Interim Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

EMPLOYEES

18. Subject to employees' rights to terminate their employment, all employees of the Debtor shall remain the employees of the Debtor until such time as the Interim Receiver, on the Debtor's behalf, may terminate the employment of such employees.

19. Despite anything in federal or provincial law, if the Interim Receiver, in that position, carries on the business of the Debtor or continues the employment of a debtor's employees, the interim receiver is not by reason of that fact personally liable in respect of a liability,

including one as a successor employer, that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees and that exists before the interim receiver is appointed or that is calculated by reference to a period before the appointment.

LIMITATION ON ENVIRONMENTAL LIABILITIES

20. Nothing herein contained shall require the Interim Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination (collectively, the "Environmental Legislation"), provided however that nothing herein shall exempt the Interim Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Interim Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

21. The Interim Receiver shall not be liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Interim Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Interim Receiver's appointment; or

(ii) after the Interim Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Interim Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Interim Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring the Interim Receiver to remedy any environmental condition or environmental damage affecting the Property, the Interim Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Interim Receiver, if the order is in effect when the Interim Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Interim Receiver:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Interim Receiver, if the order is in effect when the Interim Receiver is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Interim Receiver to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Interim Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

LIMITATION ON THE INTERIM RECEIVER'S LIABILITY

22. Except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of this Order the Interim Receiver shall incur no liability or obligation that exceeds an amount for which it may obtain full indemnity from the Property provided that the interim receiver shall act honestly and in good faith and deal with the Property in a commercially reasonable manner. Nothing in this Order shall derogate from any

limitation on liability or other protection afforded to the Interim Receiver under any applicable law.

INTERIM RECEIVER'S ACCOUNTS

23. The Interim Receiver and counsel to the Interim Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges.

24. The Interim Receiver and counsel to the Interim Receiver shall be entitled to the benefits of and are hereby granted a charge (the "**Interim Receiver's Charge**") on the Property, which charge shall not exceed an aggregate amount of $250,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Interim Receiver and such counsel, both before and after the making of this Order in respect of these proceedings, and the Interim Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person but subject to sections 14.06(7), 81.4(4) and 81.6(2) of the BIA.

25. The Interim Receiver and its legal counsel shall pass their accounts from time to time.

26. Prior to the passing of its accounts, the Interim Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Interim Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE INTERIM RECEIVERSHIP

27. Subject to prior approval of the Applicant, the Interim Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $2,000,000 (or such greater amount as this Court may by further order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Interim Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Interim Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Interim Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) of the BIA.

28. Neither the Interim Receiver's Borrowings Charge nor any other security granted by the Interim Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

29. The Interim Receiver is at liberty and authorized to issue certificates substantially in the form annexed as **Schedule "B"** hereto (the "**Interim Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

30. The monies from time to time borrowed by the Interim Receiver pursuant to this Order or any further order of this Court and any and all Interim Receiver's Certificates evidencing the same or any part thereof shall rank on a pari passu basis, unless otherwise agreed to by the holders of any prior issued Interim Receiver's Certificates.

31. The Interim Receiver shall be allowed to repay any amounts borrowed by way of Interim Receiver's Certificates out of the Property or any proceeds, including any proceeds from the sale of any assets without further approval of this Court.

ALLOCATION

32. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Interim Receiver's Charge and the Interim Receiver's Borrowings Charge amongst the various assets comprising the Property.

GENERAL

33. For greater certainty, neither the Interim Receiver's Charge nor the Interim Receiver's Borrowing Charge shall apply or attach to the Excluded Property.

34. The Interim Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

35. Unless otherwise ordered by this Court, the Interim Receiver will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Interim Receiver's reports shall be filed by the registry notwithstanding that they do not include an original signature.

36. Nothing in this Order shall prevent the Interim Receiver from acting as a receiver, a receiver and manager, a trustee in bankruptcy, or a monitor of the Debtor.

37. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction to give effect to this Order and to assist the Interim Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby

respectfully requested to make such orders and to provide such assistance to the Interim Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Interim Receiver in any foreign proceeding, or to assist the Interim Receiver and its agents in carrying out the terms of this Order.

38. The Interim Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Interim Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

39. The Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis, including legal costs on a solicitor-client full indemnity basis, to be paid by the Interim Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

40. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Interim Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

FILING

41. The Interim Receiver shall establish and maintain a website in respect of these proceedings at www.grantthornton.ca/cfi (the **"Interim Receiver's Website"**) and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publicly available; and

(b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Interim Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

42. Service of this Order shall be deemed good and sufficient by:

a. serving the same on:

(i) the persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order; and

b. posting a copy of this Order on the Interim Receiver's Website.

and service on any other person is hereby dispensed with.

43. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 21 day of February, 2022.

COURT OFFICER

SCHEDULE "A"

**Defined Terms**

"**Excluded Property**" means: (i) any and all Receivables and / or Financed Receivables, as such terms are defined pursuant to a Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc. dated May 25, 2018, as amended, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favour of HSBC.

"**HSBC**" means HSBC Bank Canada.

SCHEDULE "B"

**Interim Receiver Certificate**

Certificate No.

Amount $

This is to certify that Grant Thornton Limited, the interim receiver (the "**Interim Receiver**") of the assets, undertakings, and properties of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Debtors**") acquired for, or used in relation to, a business carried on by the Debtors, including all proceeds thereof (collectively, the "**Property**") appointed by order of the Supreme Court of Newfoundland and Labrador (the "**Court**") dated the day of February, 2022 (the "**Order**") made in an action having court file number 2022 01G 0709, has received as such Interim Receiver from the holder of this certificate (the "**Lender**") the principal sum of $ , being part of the total principal sum of $ which the Interim Receiver is authorized to borrow under and pursuant to the Order.

The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [*monthly/semi-annually/annually/other*] not in advance on the day of each month after the date hereof at a rate per annum equal to the rate of per cent above the prime commercial lending rate of from time to time.

Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Interim Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Interim Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at .

Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Interim Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

The charge securing this certificate shall operate so as to permit the Interim Receiver to deal with the Property (as defined in the Order) as authorized by the Order and as authorized by any further or other order of the Court.

The Interim Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

[*signature page to follow*]

Dated the day of , 2022.

Grant Thornton Limited, solely in its capacity as Interim Receiver of the Property, and not in its personal capacity

Per:

_____

Name:
Title:

2022 01G 0709

This is Exhibit "B" referred to in the Affidavit of Phil Clarke, sworn to before me on October 6, 2022.

A Barrister of the Supreme Court
of Nova Scotia

STEPHEN KINGSTON
A Barrister of the Supreme
Court of Nova Scotia

2022 01G 0709

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

**AMENDED AND RESTATED INITIAL ORDER**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION,** made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING, the report of GTL as Monitor dated the 15th day of March, 2022;**

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

**SERVICE**

Filed March 21, 22

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

   (b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

   (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect

of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

**RESTRUCTURING**

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

(a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

(b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

(c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer (or resiliation), the landlord may show the affected leased premises to prospective tenants

during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

**NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY**

14. **THIS COURT ORDERS** that until and including the 10th day of July, 2022 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

## NO INTERFERENCE WITH RIGHTS

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

## CONTINUATION OF SERVICES

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

## NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to

advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

## APPOINTMENT OF MONITOR

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

    (d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

    (e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to

the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

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(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the

**"Administration Charge"**) on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

## ENHANCEMENT OF MONITOR'S POWERS

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other

data storage media containing any such information ("**Records**") of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

## LIMITATION ON THE MONITOR'S LIABILITY

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

## DIP FINANCING

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the "**DIP Financing Agreement**") dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as

made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

(a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

(b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

(c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

## SERVICE AND NOTICE

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

## GENERAL

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

COURT OFFICER

Schedule "A"

Defined Terms

**"Excluded Inventory"** means inventory representing a value in the amount of USD2,500,000

**"Excluded Property"** means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

**"HSBC"** means HSBC Bank Canada; and

**"RFA"** means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.

2022 01G 0709

This is Exhibit "C" referred to in the Affidavit of Phil Clarke, sworn to before me on October 6, 2022.

A Barrister of the Supreme Court of Nova Scotia

STEPHEN KINGSTON
A Barrister of the Supreme Court of Nova Scotia

**Canada Fluorspar Inc. (CFI)**
**Cash Flow Projection (CCAA - Care and Maintenance - Sale and Investor Solicitation Process)**
**For the Period of Mar 7, 2022 to February 26, 2022**
**(in 000s CAD)**

| Week No. | Notes | Actual | 31 | 32 | 33 | 34 | 35 | 36 | 37 | 38 | 39 | 40 | 41 | 42 | 43 | 44 | 45 | 46 | 47 | 48 | 49 | 50 | 51 | 52 | 53 | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Week Start | | 07-Mar-22 | 19-Sep-22 | 26-Sep-22 | 03-Oct-22 | 10-Oct-22 | 17-Oct-22 | 24-Oct-22 | 31-Oct-22 | 07-Nov-22 | 14-Nov-22 | 21-Nov-22 | 28-Nov-22 | 05-Dec-22 | 12-Dec-22 | 19-Dec-22 | 26-Dec-22 | 02-Jan-23 | 09-Jan-23 | 16-Jan-23 | 23-Jan-23 | 30-Jan-23 | 06-Feb-23 | 13-Feb-23 | 20-Feb-23 | |
| Week Ending | | 18-Sep-22 | 25-Sep-22 | 02-Oct-22 | 09-Oct-22 | 16-Oct-22 | 23-Oct-22 | 30-Oct-22 | 06-Nov-22 | 13-Nov-22 | 20-Nov-22 | 27-Nov-22 | 04-Dec-22 | 11-Dec-22 | 18-Dec-22 | 25-Dec-22 | 01-Jan-23 | 08-Jan-23 | 15-Jan-23 | 22-Jan-23 | 29-Jan-23 | 05-Feb-23 | 12-Feb-23 | 19-Feb-23 | 26-Feb-23 | |
| **Cash Inflows** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Collection of Receivables | A | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| Other - Sale of Inventory | B | 5,637 | 100 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 5,737 |
| Other - Sale of Equipment | C | 175 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 175 |
| Other | | 178 | - | - | - | 1,500 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 1,678 |
| **Total Cash Inflows** | | 5,989 | 100 | - | - | 1,500 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 7,589 |
| **Cash Outflows** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Payroll | | 2,277 | - | 185 | - | 185 | - | 185 | 55 | 185 | - | 185 | 96 | - | - | - | - | - | - | - | - | - | - | - | - | 3,354 |
| Maintenance Costs | | 111 | 8 | 8 | 8 | 8 | 8 | 8 | 8 | 8 | 8 | 8 | 8 | - | - | - | - | - | - | - | - | - | - | - | - | 199 |
| Fuel | | 174 | 15 | 35 | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 35 | - | - | - | - | - | - | - | - | - | - | - | - | 379 |
| Freight | | 5 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | - | - | - | - | - | - | - | - | - | - | - | - | 16 |
| Utilities | | 382 | 18 | 18 | 18 | 18 | 20 | 20 | 20 | 22 | 22 | 22 | 22 | - | - | - | - | - | - | - | - | - | - | - | - | 602 |
| Insurance | | 520 | - | 1 | 85 | 10 | - | - | 1 | 85 | 10 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 713 |
| Materials/Supplies | | 26 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | - | - | - | - | - | - | - | - | - | - | - | - | 37 |
| Professional Fees - Restructuring | | 1,505 | 75 | 75 | 75 | 75 | 75 | 75 | 75 | 75 | 75 | 75 | 50 | 25 | 20 | 20 | - | 35 | 25 | 15 | 15 | 5 | - | 5 | 10 | 2,480 |
| Other/Miscellaneous | | 20 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 1 | | | | | | | | | | | | | 51 |
| Inventory Sale Costs | B | 517 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 517 |
| HSBC Inventory Sale Agreement | B | 2,732 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 2,732 |
| Telephone/Communications | | 80 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | - | - | - | - | - | - | - | - | - | - | - | - | 135 |
| Environmental | | 113 | 10 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | - | - | - | - | - | - | - | - | - | - | - | - | 173 |
| Logistics/Warehousing | | 3 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 3 |
| Contingency | | - | 10 | - | 10 | - | 10 | - | 10 | - | 10 | - | 10 | - | - | - | - | - | - | - | - | - | - | - | - | 60 |
| Equipment Lease Payments/Buyouts | | 198 | 4 | 2 | 4 | 2 | 4 | 2 | 4 | 2 | 4 | 2 | 2 | - | - | - | - | - | - | - | - | - | - | - | - | 229 |
| Barge | | 31 | 6 | - | - | - | - | 6 | - | - | - | 6 | - | - | - | - | - | - | - | - | - | - | - | - | - | 49 |
| Mining Leases / Licenses | | 131 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 131 |
| SLR/AGP - NI 43-101 Mining Report | | 372 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 372 |
| **Total Cash Outflows** | | 9,196 | 158 | 337 | 232 | 326 | 149 | 324 | 205 | 405 | 161 | 326 | 236 | 25 | 20 | 20 | - | 35 | 25 | 15 | 15 | 5 | - | 5 | 10 | 12,230 |
| **Net Cash Flow** | | (3,207) | (58) | (337) | (232) | 1,174 | (149) | (324) | (205) | (405) | (161) | (326) | (236) | (25) | (20) | (20) | - | (35) | (25) | (15) | (15) | (5) | - | (5) | (10) | (4,641) |
| **Cash Balance** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Opening Cash Balance | | 321 | 1,814 | 1,756 | 1,419 | 1,187 | 2,361 | 2,212 | 1,888 | 1,683 | 1,278 | 1,117 | 791 | 479 | 369 | 349 | 329 | 329 | 294 | 269 | 254 | 239 | 234 | 234 | 229 | 321 |
| DIP Financing - Bridging Finance (Receiver) | | 1,450 | | | | | | | | | | | | | | | | | | | | | | | | 1,450 |
| DIP Financing - Prov. of Newfoundland | | 3,250 | | | | | | | | | | | | | | | | | | | | | | | | 3,250 |
| Priority Charges | | - | - | - | - | - | - | - | - | - | - | - | (76) | (85) | - | - | - | - | - | - | - | - | - | - | - | (161) |
| Net Cash Flow | | (3,207) | (58) | (337) | (232) | 1,174 | (149) | (324) | (205) | (405) | (161) | (326) | (236) | (25) | (20) | (20) | - | (35) | (25) | (15) | (15) | (5) | - | (5) | (10) | (4,641) |
| **Closing Cash Balance** | | 1,814 | 1,756 | 1,419 | 1,187 | 2,361 | 2,212 | 1,888 | 1,683 | 1,278 | 1,117 | 791 | 479 | 369 | 349 | 329 | 329 | 294 | 269 | 254 | 239 | 234 | 234 | 229 | 219 | 219 |

**Notes:**

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**");

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

## APPROVAL AND REVERSE VESTING ORDER

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar ("**GTL**" or the "**Monitor**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an order, *inter alia*: (a) approving the Subscription Agreement (the "**Subscription Agreement**") entered into between the Company, as vendor, the successful bidder, as purchaser (the "**Successful Bidder**") and Newco, a company to be incorporated ("**Newco**"), dated the __ day of September, 2022, a copy of which was attached as Exhibit "S" to the Monitors First Confidential Report (as defined below), as well as the Transactions, as defined in the Subscription Agreement (the "**Transactions**"); (b) adding Newco (hereinafter referred to as "**ResidualCo**") as applicant to these proceedings (the "**CCAA Proceedings**"); (c) vesting out of the Company all Excluded Assets and Excluded Liabilities and discharging Encumbrances against the Company and against the Remaining Leases and Licences and Retained Assets; (d) authorizing and directing the Monitor, with the assistance of the Company to complete the Reorganization; (e) authorizing and directing the Monitor, with the assistance of the Company to issue the Purchased Shares, and vesting in the Successful Bidder all right, title and interest in and to the Purchased Shares, free and clear of any Encumbrances (as defined below;) and (f) amending the 2nd Amended ARIO to extend the stay of proceedings until the 28th day of February 2023;

**ON READING** the application of the Monitor, including the affidavit of Phil Clarke sworn October 5 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the Monitor's First Confidential Report (the "**Confidential Report**"), the Fifth Report (the "**Fifth Report**") of the Monitor, and on

being advised that the senior secured creditors who are likely to be affected by this Order herein were given notice;

**UPON HEARING** the submissions of counsel for the Monitor, counsel for the Company, counsel for the Successful Bidder, other counsel as they may appear, no one else appearing for any party although duly served as outlined in the affidavit of service dated October 5, 2022;

**SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

**DEFINITIONS**

2. **THIS COURT ORDERS** that, unless otherwise indicated or defined herein, capitalized terms used in this Order shall have the meanings given to them in the Subscription Agreement, the Initial Order, the ARIO or the Clarke Affidavit.

**STAY PERIOD**

3. **THIS COURT ORDERS** that the Stay Period, as defined in the Initial Order granted by this Court on 11th day of March 2022 (as amended and restated on the 18th day of March 2022, and as may further be amended and/or restated, from time to time, the "**Initial Order**"), the Amended ARIO- Amendment #1 dated the 10th day of June, 2022 and the Amended ARIO- Amendment #2 dated the 30th day of August 2022 is hereby extended until February 28, 2023.

**APPROVAL AND VESTING**

4. **THIS COURT ORDERS AND DECLARES** that the Subscription Agreement and the Transactions are hereby approved and the execution of the Subscription Agreement by the Monitor, on behalf of the Company, is hereby authorized and approved, with such minor amendments as the Company and/or Successful Bidder may deem necessary or otherwise agree to, with the approval of the Monitor. The Monitor, with the assistance of the Company, is hereby authorized and directed to perform its obligations under the Subscription Agreement and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transactions, including the filing of the completion of Reorganization,

the issuance of the Purchased Shares to the Successful Bidder, and any such additional documents contemplated in the Subscription Agreement.

5. **THIS COURT ORDERS AND DECLARES** that notwithstanding any provision hereof, the closing of the Transactions shall be deemed to occur in the manner, order and sequence set out in the Subscription Agreement, with such alterations, changes or amendments as may be agreed to by the Company and Successful Bidder, with the consent of the Monitor, provided that such alterations, changes or amendments do not materially alter or impact the Transactions or the consideration which the Company and/or its applicable stakeholders will benefit from as part of the Transactions.

6. **THIS COURT ORDERS AND DECLARES** that this Order shall constitute the only authorization required by the Monitor and the Company to proceed with the Transactions and that no shareholder or other approval shall be required in connection therewith.

7(A). **THIS COURT ORDERS AND DECLARES** that, at the time of the delivery of the Monitor's certificate (the "**Monitor's Certificate**") to the Company and the Successful Bidder (the "**Effective Time**"), substantially in the form attached as Schedule "A" hereto, the following shall occur and shall be deemed to have occurred at the Effective Time, all in accordance with the Subscription Agreement and the steps contemplated thereunder:

(a) the Company shall be released, from all amounts and obligations owing by the Company under: (i) the Bridging Loans, including the principal amount of indebtedness outstanding thereunder and interest accrued thereon as of the Closing Date, plus any other fees owing by the Borrower under the Bridging Loans or any other ancillary agreement or document thereto; (ii) the PNL Loan, including the principal amount of indebtedness outstanding thereunder and interest accrued thereon as of the Closing Date, plus any other fees owing by the Borrower under the PNL Loan or any other ancillary agreement or document thereto, and (iii) the DIP Financing Agreement including the principal amount of indebtedness outstanding thereunder and interest accrued thereon as of the Closing Date, plus any other fees owing by the Borrower under the DIP Financing Agreement.

(b) the Company shall be deemed to have transferred to ResidualCo the Excluded Assets and the Excluded Liabilities in consideration of the Subscription Cash;

(c) all existing shares as well as any agreement, contract, plan, indenture, deed, certificate, subscription rights, conversion rights, pre-emptive rights, options (including stock option or share purchase or equivalent plans), or other documents or instruments governing and/or having been created or granted in connection with the share capital of the Company, except the Purchased Shares shall be deemed terminated and cancelled for no consideration; and

(d) all of the right, title and interest in and to the Purchased Shares issued by the Company to the Successful Bidder shall vest absolutely in the Successful Bidder, and the Retained Assets will be retained by the Company, in each case free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens (maritime or otherwise), executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order or any other Order of the Court; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Newfoundland and Labrador), or any other personal property registry system or pursuant to the *Registration of Deeds Act,* 2009 (Newfoundland and Labrador) or the *Mineral Act* (Newfoundland and Labrador) (all of which are collectively referred to as the "**Encumbrances**"), and, for greater certainty, all of the Encumbrances affecting or relating to the Purchased Shares and/or the Retained Assets are hereby expunged and discharged as against the Purchased Shares and Retained Assets, as applicable.

7(B). **THIS COURT ORDERS AND DIRECTS** for greater certainty, and without limiting the generality of the foregoing that nothing contained herein shall be deemed to be a release of any obligation of the Company in relation to:

(i) the Remaining Licenses and Leases and obligations arising (i) under any applicable legislation, including without limitation, the *Mineral Act* (Newfoundland and Labrador) or the *Mining Act* (Newfoundland and Labrador); or (ii) pursuant to the terms and conditions contained therein;

(ii) any financial assurance provided by the Company in relation to any rehabilitation and closure plan; or

(iii) any environmental liabilities arising either before or after the Closing Date.

8. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof in connection with the Transactions.

9. **THIS COURT ORDERS** that the Monitor may rely on written notice from the Company and the Successful Bidder regarding the satisfaction of the Purchase Price and satisfaction or waiver of conditions to closing under the Subscription Agreement and shall have no liability with respect to delivery of the Monitor's Certificate.

10. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, from and after the delivery of the Monitor's Certificate, all Claims and Encumbrances shall attach to the Purchase Price, with the same priority as they had with respect to the Retained Assets immediately prior to the sale, as if the Excluded Liabilities had not been transferred to ResidualCo, as applicable, and remained liabilities of the Company immediately prior to the foregoing transfer.

11. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada Personal Information Protection and Electronic Documents Act, the Company or the Monitor, as the case may be, is authorized, permitted and directed to, at the Effective Time, disclose to the Successful Bidder all human resources and payroll information in the Company records pertaining to past and current employees of the Company. The Successful Bidder shall maintain and cause the Company, after Closing to maintain and protect the privacy of such information in accordance with applicable law and shall be entitled to use the personal information provided to it in a manner which is in all materials respects identical to the prior use of such information by the Company prior to Closing

12. **THIS COURT ORDERS AND DECLARES** that, at the Effective Time and without limiting the provisions of paragraph 6 hereof, the Company, the Monitor and the Successful Bidder shall be deemed released from any and all claims, liabilities (direct, indirect, absolute or contingent) or obligations with respect to any Taxes (including penalties and interest thereon) of, or that relate to, the Company, including without limiting the generality of the foregoing all taxes that could be

assessed against the Company or the Successful Bidder (including its affiliates and any predecessor corporations) pursuant to section 160 of the *Income Tax Act* (Canada), or any provincial equivalent, in connection with the Company (provided, as it relates to the Company, such release shall not apply to (i) transaction taxes, or (ii) Taxes in respect of the business and operations conducted by the Company after the Effective Time).

13. **THIS COURT ORDERS** that except to the extent expressly contemplated by the Subscription Agreement, all Contracts to which the Company is a party upon delivery of the Monitor's Certificate will be and remain in full force and effect upon and following delivery of the Monitor's Certificate and no individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") who is a party to any such arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand under or in respect of any such arrangement and no automatic termination will have any validity or effect, by reason of:

(a) any event that occurred on or prior to the delivery of the Monitor's Certificate and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of the Company);

(b) any monetary defaults in relation to the Contracts incurred on or prior to the delivery of the Monitor's Certificate;

(c) the insolvency of the Company or the fact that the Company sought or obtained relief under the CCAA;

(d) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the Subscription Agreement, the Transactions or the provisions of this Order, or any other Order of the Court in these proceedings; or

(e) any change of control of the Company arising from the implementation of the Subscription Agreement, the Transaction or the provisions of this Order.

14. **THIS COURT ORDERS**, for greater certainty, that: (a) nothing in paragraph 13 hereof shall waive, compromise or discharge any obligations of the Company in respect of any Retained

Liabilities, and (b) the designation of any Claim as an Retained Liability is without prejudice to the Company's right to dispute the existence, validity or quantum of any such Retained Liability, and (c) nothing in this Order or the Subscription Agreement shall affect or waive the Company's rights and defences, both legal and equitable, with respect to any Retained Liability, including, but not limited to, all rights with respect to entitlements to set-offs or recoupments against such Retained Liability.

15. **THIS COURT ORDERS** that from and after the Effective Time, all Persons shall be deemed to have waived any and all defaults of the Company then existing or previously committed by the Company, or caused by the Company, directly or indirectly, or non-compliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition or obligation, expressed or implied, in any Contract, existing between such Person and the Company arising directly or indirectly from the filing by the Company under the CCAA and the implementation of the Transactions, including without limitation any of the matters or events listed in paragraph 13 hereof, and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under a Contract shall be deemed to have been rescinded and of no further force or effect, provided that nothing herein shall be deemed to excuse the Company or the Purchaser from performing its obligations under the Subscription Agreement or be a waiver of defaults by the Company under the Subscription Agreement and the related documents.

16. **THIS COURT ORDERS** that from and after the Effective Time, any and all Persons shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and including without limitation, administrative hearings and orders, declarations and assessment, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against the Company or the Retained Assets relating in any way to or in respect of any Excluded Assets or Excluded Liabilities and any other claims, obligations and other matters which are waived, released, expunged or discharged pursuant to this Order.

17. **THIS COURT ORDERS** that, from and after the Effective Time:

(a) the nature of the Retained Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Transactions or this Order;

(b) the nature of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to ResidualCo;

(c) any Person that prior to the Effective Time had a valid right or claim against the Company under or in respect of any Excluded Liability (each an "**Excluded Liability Claim**") shall no longer have such right or claim against the Company but will have an equivalent Excluded Liability Claim against ResidualCo, as applicable, in respect of the Excluded Liability from and after the Effective Time in its place and stead, and nothing in this Order limits, lessens or extinguishes the Excluded Liability Claim of any Person as against ResidualCo as applicable; and

(d) the Excluded Liability Claim of any Person against ResidualCo following the Effective Time shall have the same rights, priority and entitlement as such Excluded Liability Claim had against the Company prior to the Effective Time.

18. **THIS COURT ORDERS AND DECLARES** that:

(a) as of the Effective Time, the Company shall cease to be an applicant in these CCAA Proceedings and the Company shall be deemed to be released from the purview of the Initial Order and all other Orders of this Court granted these CCAA Proceedings, save and except for this Order the provisions of which (as they relate to the Company) shall continue to apply in all respects;

(b) as of the date of this Order, ResidualCo shall be a company to which the CCAA applies, and ResidualCo shall be added as an applicant in these CCAA Proceedings and all references in any Order of this Court in respect of these CCAA Proceedings to (i) an "*Applicant*" shall refer to and include ResidualCo, *mutatis mutandis*, (ii) "*Property*", as defined in the Initial Order, shall include the current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, of ResidualCo (including the Purchase Price) (collectively, the "**ResidualCo Property**"), and, for greater certainty, each of the Charges (as defined in the Initial Order) shall constitute a charge on the ResidualCo Property.

19. **THIS COURT ORDERS** that for greater certainty, nothing in this Order, including the release of the Company from the purview of these CCAA Proceedings pursuant to paragraph 18(a) hereof and the addition of ResidualCo as applicant in these CCAA Proceedings shall affect, vary, derogate from, limit or amend, and GTL shall continue to have the benefit of, any and all rights and approvals and protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order, this Order, any other Orders in these CCAA Proceedings or otherwise, including all approvals, protections and stays of proceedings in favour of GTL in its capacity as Monitor, all of which are expressly continued and confirmed.

20. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these CCAA Proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the BIA in respect of the Company or ResidualCo and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Company or ResidualCo;

the Subscription Agreement, the implementation of the Transactions (including without limitation the transfer and vesting of the Excluded Assets and Excluded Liabilities in and to ResidualCo, and the issuance of the Purchased Shares to the Successful Bidder) and any payments by the Successful Bidder authorized herein or pursuant to the Subscription Agreement shall be binding on any trustee in bankruptcy that may be appointed in respect of the Company or ResidualCo, and shall not be void or voidable by creditors of the Company or ResidualCo, as applicable, nor shall they constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the CCAA, the BIA or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

**RELEASES**

21. (A) **THIS COURT ORDERS** that effective upon the delivery of the Monitor's Certificate to the Company and the Successful Bidder, (i) the employees, legal counsel and advisors of the Company and of ResidualCo, (ii) the Monitor and its legal counsel, and their respective present and former directors, officers, partners, employees and advisors, (iii) the Successful Bidder, its directors, officers, employees, legal counsel and advisors (iv) the DIP Lenders, its counsel, and

their respective present and former directors, officers, partners, employees and advisors (the Persons listed in (i), (ii) (iii), (iv) being collectively, the "**Released Parties**") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims whatsoever (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, offer, investment proposal, dealing, or other fact, matter, occurrence or thing existing or taking place prior to the delivery of the Monitor's Certificate or completed pursuant to the terms of this Order and/or in connection with the Transaction in respect of the Company or its assets, business or affairs, prior dealings with the Company (wherever or however conducted or governed), or the administration and/or management of the Company or these proceedings (collectively, the "**Released Claims**"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, and are not vested nor transferred to ResidualCo or to any other entity and are extinguished, provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim for fraud or wilful misconduct or any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

21. (B) **THIS COURT ORDERS** that nothing in this Order waives, discharges or in any way releases any person, including the Released Parties, from any responsibility or obligation, including any Encumbrance, that was, is or may be owed to or enforceable by the Province of Newfoundland and Labrador or any Ministry or agency thereof (collectively, "**Newfoundland and Labrador Governmental Authorities**"), that is not a "claim" as defined in section 2(1) of the CCAA, including from any environmental Liability that was, is or may be owed to or enforceable by any Newfoundland and Labrador Governmental Authority that is not a "claim" as defined in section 2(1) of the CCAA, and nothing in this order in any way bars, estops, stays or enjoins any and all steps or proceedings by any Newfoundland and Labrador Governmental Authorities or any servant, agent or employee thereof in respect thereof; it being understood that nothing in this paragraph 20(B) shall impact the protections in favour of the Monitor pursuant to paragraph 25 hereof.

**THE MONITOR**

22. **THIS COURT ORDERS** that the Fifth Report, the Confidential Report and the activities of the Monitor set out in the Fifth Report and Confidential Report, are hereby approved, provided however, that only the Monitor, in its personal capacity and only with respect to its own liability, shall be entitled to rely upon or utilize in any way such approval.

23. **THIS COURT ORDERS** that the Monitor, its employees and representatives shall not be deemed directors of ResidualCo, de facto or otherwise, and shall incur no liability as a result of acting in accordance with this Order, other than any liability arising out of or in connection with the gross negligence or wilful misconduct of the Monitor.

24. **THIS COURT ORDERS** that no action lies against the Monitor by reason of this Order or the performance of any act authorized by this Order, except by leave of the Court following a motion brought on not less than fifteen (15) days' notice to the Monitor and its legal counsel. The entities related or affiliated with the Monitor or belonging to the same group as the Monitor (including, without limitation, any agents, employees, legal counsel or other advisors retained or employed by the Monitor) shall benefit from the protection granted to the Monitor under the present paragraph.

25. **THIS COURT ORDERS** that the Monitor shall not, as a result of this Order or any matter contemplated hereby: (i) be deemed to have taken part in the management or supervision of the management of the Company or ResidualCo, or to have taken or maintained possession or control of the business or property of any of the Company or ResidualCo, or any part thereof; or (ii) be deemed to be in Possession (as defined in the Initial Order) of any property of the Company or ResidualCo within the meaning of any applicable Environmental Legislation (as defined in the Initial Order) or otherwise.

**SEAL ORDER**

26. **THIS COURT ORDERS** that the Confidential Report and the Subscription Agreement shall be sealed with the Court until such time as the transaction is closed pursuant to the Closing as outlined in the Subscription Agreement.

**GENERAL**

27. **THIS COURT ORDERS** that, following the Effective Time, the Successful Bidder shall be authorized to take all steps as may be necessary to effect the discharge of the Claims and Encumbrances as against the Purchased Shares and the Retained Assets.

28. **THIS COURT ORDERS** that, following the Effective Time, the title of these proceedings is hereby changed to:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF [NEWCO]

29. **THIS COURT DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada.

30. **THIS COURT DECLARES** that the Monitor and the Company shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States or elsewhere, for orders which aid and complement this Order. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to the Company and the Monitor as may be deemed necessary or appropriate for that purpose.

31. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Company, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Company and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Company, the Monitor and their respective agents in carrying out the terms of this Order.

32. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Newfoundland and Labrador Time on the date hereof, provided that the transaction steps set out in paragraph 7 (A) hereof shall be deemed to have occurred sequentially, one after the other, in the order set out in paragraph 7 (A) hereof.

## SCHEDULE A

## Form of Certificate of Monitor

**(see attached)**

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**");

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

**MONITOR'S CERTIFICATE**

**RECITAL**

A. Pursuant to an Initial Order of the Newfoundland and Labrador Supreme Court, in Bankruptcy and Insolvency dated the 11th day of March 2022 (the "**Initial Order**"), which was amended and restated on the 18th day of March 2022 (the "**ARIO**"), the Amended ARIO-Amendment #1 dated the 10th day of June, 2022 and the Amended ARIO- Amendment #2 dated the 30th day of August 2022, the Company was granted creditor-protection pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**") and Grant Thornton Limited was appointed as court-appointed monitor of the Company.

B. Pursuant to an Order of this Honourable Court dated October__, 2022 (the "**Approval and Reverse Vesting Order**"), the Court approved the Subscription Agreement (the "**Subscription Agreement**") entered into by and between the Company, as vendor, the Successful Bidder, as purchaser (the "**Successful Bidder**") and Newco, a company to be incorporated ("**Newco**"), as well as the Transactions as defined in the Subscription Agreement, which *inter alia*, provided for: (a) the approval of the Subscription Agreement and the Transactions contemplated thereunder (b) adding Newco ("**ResidualCo** ") as applicant to these proceedings; (c) vesting out of the Company all Excluded Assets and Excluded Liabilities and discharging Encumbrances against the Company and the Remaining Licences and Leases and Retained Assets; (d) authorizing and directing the Monitor, with the assistance of the Company to complete the Reorganization; and (e) authorizing and directing the Monitor, with the assistance of Company to issue the

Purchased Shares, and vesting in the Successful Bidder all right, title and interest in and to the Purchased Shares, free and clear of any Encumbrances

C. Unless otherwise indicated herein, all terms and herein have the meanings set out in the Approval and Reverse Vesting Order.

**THE MONITOR CERTIFIES** that it was advised by the Company and the Successful Bidder that:

1. The Successful Bidder has satisfied the Purchase Price (as defined in the Subscription Agreement) in accordance with the Subscription Agreement;

2. The conditions to Closing as set out in the Subscription Agreement have been satisfied or waived by the Company and the Successful Bidder; and

3. This Certificate was delivered by the Monitor at_____**[TIME]** on_____**[DATE].**

**Grant Thornton Limited, in its capacity as Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar, and not in its personal capacity**

Per: _____

Name:

Title:

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**");

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

**ORDER**

**(Monitor's Enhanced Powers)**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar ("**GTL**" or the "**Monitor**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order, among other things, expanding the Monitor's powers.

**ON READING** the application of the Monitor, including the affidavit of Phil Clarke sworn October 5, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the Monitor's First Confidential Report (the "**Confidential Report**"), the Fifth Report (the "**Fifth Report**") of the Monitor, and on being advised that the senior secured creditors who are likely to be affected by this Order herein were given notice.

**UPON HEARING** the submissions of counsel for the Monitor, counsel for the Company, counsel for the Successful Bidder, other counsel as they may appear, no one else appearing for any party although duly served as outlined in the affidavit of service dated October 5, 2022

**SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

**DEFINED TERMS**

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the Clarke Affidavit or the Amended and Restated Initial Order dated the 18th day of March 2022, the Amended ARIO- Amendment #1 dated the 10th day of June, 2022 and the Amended ARIO- Amendment #2 dated the 30th day of August, as applicable (as may be further amended, restated, or otherwise modified, collectively the **"ARIO"**).

**MONITOR'S ENHANCED POWERS**

3. **THIS COURT ORDERS** that, in addition to the powers and duties of the Monitor set out in the ARIO or any other Order of this Court granted in these CCAA proceedings, and without altering in any way the obligations of Newco, a company to be incorporated (hereinafter referred to as " **ResidualCo**"), as a result of these proceedings, effective upon ResidualCo being added as an applicant in these CCAA proceedings pursuant to the Approval and Reverse Vesting Order of this Court of even date herewith, the Monitor be and is hereby authorized and empowered, but not required, to:

(a) cause ResidualCo to take any and all actions and steps, and execute all agreements, documents and writings, on behalf of, and in the name of, ResidualCo, contemplated to be taken or executed by ResidualCo pursuant to or in connection with the Subscription Agreement or the transactions contemplated thereby (or as otherwise may be considered necessary or desirable in connection therewith) or any Order of this Court;

(b) cause ResidualCo to take any and all actions and steps, and execute all agreements, documents and writings, on behalf of, and in the name of, ResidualCo in order to facilitate the performance of any of its obligations, including, without limitation, as contemplated by the Subscription Agreement or any Order of this Court;

(c) cause ResidualCo to exercise any rights of ResidualCo under or in connection with the Subscription Agreement or any agreement or other document related thereto;

(d) exercise any powers which may be properly exercised by any board of directors of ResidualCo;

(e) cause ResidualCo to retain the services of any person as an employee, consultant or other similar capacity, all under the supervision and direction of the Monitor and on the terms as agreed with the Monitor;

(f) open one or more new accounts in the name of the Monitor for and on behalf of ResidualCo (the **"ResidualCo Accounts"**) into which all funds, monies, cheques, instruments and other forms of payment payable to ResidualCo may be deposited from and after the making of this Order from any source whatsoever and to operate and control, as applicable, on behalf of ResidualCo, the ResidualCo Accounts in such manner as the Monitor, in its sole discretion, deems necessary or appropriate to assist with the exercise of the Monitor's powers and duties, including paying the fees and expenses of the Monitor, counsel to the Monitor and counsel to the Company in accordance with the terms of the Initial Order;

(g) cause ResidualCo to perform such other functions or duties as the Monitor considers necessary or desirable in order to facilitate or assist the winding-down of ResidualCo, the distribution of the proceeds of ResidualCo's Property, or any other related activities, including in connection with bringing these CCAA proceedings to an end;

(h) engage, deal, communicate, negotiate, agree and settle with any creditor or other stakeholder of ResidualCo (including any governmental authority) in the name of or on behalf of ResidualCo;

(i) claim or cause ResidualCo to claim any and all insurance refunds or tax refunds to which ResidualCo is entitled;

(j) assign ResidualCo, or cause ResidualCo to be assigned, into bankruptcy, and the Monitor shall hereby be entitled but not obligated to act as a trustee of ResidualCo in any such bankruptcy;

(k) cause the dissolution or winding-up of ResidualCo;

(l) act as an authorized representative of ResidualCo in respect of dealings with the Canada Revenue Agency (the **"CRA"**), and the Monitor shall hereby be entitled to execute any appointment or authorization form on behalf of ResidualCo that the

CRA may require in order to confirm the Monitor's appointment as an authorized representative of ResidualCo for such purposes; and

(m) apply to this Court for advice and directions or any further orders necessary or advisable to carry out its powers and obligations under this Order or any other Order granted by this Court, including for advice and directions with respect to any matter.

4. **THIS COURT ORDERS** that, notwithstanding anything contained in this Order, the Monitor is not and shall not be or be deemed to be, a director, officer or employee of ResidualCo.

5. **THIS COURT ORDERS** that, without limiting the provisions of the ARIO, ResidualCo shall remain in possession and control of its Property and the Monitor shall not take, or be deemed to have taken, possession or control of such Property, or any part thereof.

6. **THIS COURT ORDERS** that the Monitor shall not be liable for any employee-related liabilities of ResidualCo, including any successor employer liabilities as provided for in Section 11.8(1) of the CCAA, other than amounts the Monitor may specifically agree in writing to pay. Nothing in this Order shall, in and of itself, cause the Monitor to be liable for any employee related liabilities of ResidualCo, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts.

7. **THIS COURT ORDERS** that, in addition to the rights and protections afforded to the Monitor under the CCAA or as an officer of this Court, the Monitor and its legal counsel shall continue to have the benefit of all of the indemnities, charges, protections and priorities as set out in the ARIO and any other Order of this Court and all such indemnities, charges, protections and priorities shall apply and extend to the Monitor in carrying out of the provisions of this Order and exercising any powers granted to it hereunder. Without limiting the generality of the foregoing: (i) in exercising any powers granted to it hereunder, the Monitor shall not be deemed to have taken or maintained possession or control of the Business or Property of ResidualCo, or any part thereof; and (ii) the Monitor shall incur no liability or obligation as a result of exercising any powers granted to it hereunder, save and except for any gross negligence or wilful misconduct on its part.

8. **THIS COURT ORDERS** that nothing in this Order shall constitute or be deemed to constitute the Monitor as receiver, assignee, liquidator, administrator, receiver-manager, agent of the creditors or legal representative of ResidualCo within the meaning of any relevant legislation

and that any distributions to creditors of ResidualCo by the Monitor will be deemed to have been made by ResidualCo.

9. **THIS COURT ORDERS** that the powers and authority granted to the Monitor by virtue of this Order shall, if exercised in any case, be paramount to the power and authority of ResidualCo with respect to such matters and, in the event of a conflict between the terms of this Order and those of the ARIO or any other Order of this Court, the provisions of this Order shall govern.

**GENERAL**

10. **THIS COURT ORDERS** that, for the avoidance of doubt, all of the powers, rights and protections of the Monitor specified herein shall be construed so as to refer to powers, rights and protections in respect of ResidualCo.

11. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist ResidualCo, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to ResidualCo and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist ResidualCo and the Monitor and their respective agents in carrying out the terms of this Order.

12. **THIS COURT ORDERS** that ResidualCo and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

13. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Newfoundland Time on the date of this Order.

**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER – AMENDMENT #3**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON READING** the affidavits of Phil Clarke sworn the 30th day of May, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and of Melissa Spearns sworn on the 26th day of May, 2022 (the "**Spearns Affidavit**") and the Exhibits thereto, and the Monitors First Second and Third Reports;

**ON READING** the affidavit of Phil Clarke sworn the 24th day of August, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and the Monitor's Fourth Report;

**ON READING** the affidavit of Phil Clarke sworn the 5th day of October 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the Monitor's First Confidential Report and the Monitor's Fifth Report;

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

## SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner

consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

(b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

**RESTRUCTURING**

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

    (a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

    (b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

    (c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

    All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any

such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

## NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including the 28th day of February, 2023 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

## NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except

the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

**NO INTERFERENCE WITH RIGHTS**

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

**CONTINUATION OF SERVICES**

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

## NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

## APPOINTMENT OF MONITOR

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

(d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

(e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

**ENHANCEMENT OF MONITOR'S POWERS**

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information ("**Records**") of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

**LIMITATION ON THE MONITOR'S LIABILITY**

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act,* R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

**DIP FINANCING**

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the "**DIP Financing Agreement**") dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership

Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall

subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to

be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

(a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

(b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

(c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at

undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

## SERVICE AND NOTICE

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

## GENERAL

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

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Schedule "A"

Defined Terms

"**Excluded Inventory**" means inventory representing a value in the amount of USD2,500,000

"**Excluded Property**" means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

"**HSBC**" means HSBC Bank Canada; and

"**RFA**" means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**");

**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 0709 |
| Date of Filing of Document: | October __,2022 |
| Name of Party Filing or Person: | Grant Thornton Limited, in its capacity as Court-Appointed Monitor (the "**Applicant**") of the Company |
| Application to which Document being filed relates: | Interlocutory Application (Inter Partes) filed by the Applicant seeking, *inter alia*, approval of a Reverse Vesting Order |
| Statement of Purpose in filing: | Memorandum in support of the Application |
| Court Sub-File Number, if any | N/A |

## FACTS

1. As of February 21, 2022, the Company was insolvent and was unable to meet its debt obligations as they became due. As a result, PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver and manager of Bridging Finance Inc., and Bridging Income Fund LP ("**PWC**") applied for an interim receivership order pursuant to s. 47(1) of the *Bankruptcy and Insolvency Act*, RSC 1985 c. B-3 (the "**BIA**") over substantially all the assets and undertaking of the Company, which order was issued by this Honourable Court on the 21st day of February, 2022 (the "**Interim Receivership Order**"). Pursuant to the Interim Receivership Order, Grant Thornton Limited ("GTL") was appointed as Interim Receiver of all the assets and undertaking of the Company, with the exception of those assets and undertakings that were carved out of the receivership (defined therein as the "**Excluded Property**").

2. On the 8th day of March 2022, GTL as Interim Receiver made an application to this Honourable Court declaring that the Company was a company to which the CCAA applied and requesting protection under the CCAA. As a result of that application, the Court granted an initial CCAA Order on the 11th day of March 2022 (the "**Initial CCAA Order**"), and the Court subsequently granted the Amended and Restated Initial Order (the "**ARIO**"). In both orders GTL was appointed and confirmed as CCAA Monitor.

3. In the Initial CCAA Order, this Honourable Court authorized the Monitor, on behalf of the Company, to enter into a DIP Financing Agreement with the DIP Lenders referenced in the Initial CCAA Order (the "**DIP Lenders**").

4. Since the 18th day of March 2022, the Monitor has been running a SISP as contemplated in the order of this Honourable Court issued on the same day as the ARIO (the "**SISP Order**").

5. On the 31st day of May 2022, the Monitor made an application to this Honourable Court seeking an extension of the stay period until the 2nd day of September 2022 and amending the SISP procedures to extend the dates of the Phase 2 Bid Deadline and each date thereafter in order to correspond with the CCAA stay period (the "**Amended SISP Order**"). The extension was requested to allow the Monitor to arrange the completion of a National Instruments 43-101 Technical Report with the expectation that it would assist in increasing

the purchase price for the Company's assets. The court granted these amendments by Order dated the 10th day of June, 2022.

6. As outlined in the Monitor's Fifth Report, the Monitor received multiple bids on the Company's assets through the SISP process. The Monitor made a recommendation to the DIP Lenders as to its preferred choice with respect to the bids received. The DIP Lenders were in support of the Monitors recommendation and the Monitor therefore notified the Successful Bidder on August 19, 2022.

7. Following careful consideration of the available offers, the Monitor, in consultation with the Company, determined that it was in the best interests of the Company, its stakeholders and senior secured creditors, to accept the bid of the Successful Bidder for the reasons set out in the Affidavit of Phil Clarke, the Monitor's Fifth Report and the Monitor's First Confidential Report.

8. On the 30th day of August 2022, this Honourable Court issued the 2nd Amended ARIO extending the CCAA stay period until the 17th day of October 2022 and amended the SISP procedures in order to allow time to (i) complete the SISP; (ii) enter into a definitive agreement with the Successful Bidder; and (iii) obtain court approval.

9. The proposed Subscription Agreement with the Successful Bidder (the "**Subscription Agreement**") and the Transactions, as defined in the Subscription Agreement (the "**Transactions**") represent the culmination of approximately six (6) months of extensive efforts on the part of the Monitor and the Company.

10. The SISP was a thorough and broad canvassing of the world-wide market of parties interested in the Company's business and assets. The SISP generated a significant amount of interest in the Company, which resulted in material improvements to the consideration provided under the Transactions for the benefit of the Company's stakeholders and senior secured creditors.

11. Based on the Monitor's experience, the nature of the Company, the SISP, and the comparison of offers received, as set out in the Monitor's First Confidential Report, the Monitor is of the view that the Subscription Agreement and the Transactions contain commercially reasonable terms and will maximize the available recovery for the Company, its stakeholders and senior secured creditors.

12. The Subscription Agreement contemplates a reverse vesting structure whereby;

    (a) The Successful Bidder will subscribe for and purchase new shares of the Company, which will, in turn, cancel and terminate all of the existing shares, so that the Successful Bidder will become the sole shareholder of the Company; and

    (b) All Excluded Assets and Excluded Liabilities (as defined in the Subscription Agreement) will be transferred and "vested out" to a corporation to be incorporated by the Company (the "**ResidualCo**") in advance of closing, in order to allow the Successful Bidder to acquire the Company's business and remaining assets on a "free and clear" basis.

13. The reverse vesting structure will avoid the need for the Company to transfer the permits, licenses, leases or amend the registrations associated with the Company's existing mineral claims, thereby reducing the costs and time associated with closing the Transactions, for the benefit of the Company's stakeholders and senior secured creditors.

14. As set out in the Clarke Affidavit, the Monitor's Fifth Report and Monitor's First Confidential Report, the Monitor is seeking enhanced powers in relation to ResidualCo in order to enable the Monitor to take additional steps for completion of the Transactions and other steps related to the wind-down of these CCAA Proceedings.

15. The Monitor is also seeking a court ordered release (the "**Release**") in favour of:

    (a) the employees, legal counsel and advisors of the Company and of ResidualCo;

    (b) the Monitor and its legal counsel, and their respective present and former directors, officers, partners, employees and advisors;

    (c) the DIP Lenders, its counsel, and their respective present and former directors, officers, partners, employees and advisors; and

    (d) the Successful Bidder, its directors, officers, employees, legal counsel and advisors (collectively, the **"Released Parties"**).

16. As set out in the Clarke Affidavit, the Monitor's Fifth Report and the Monitor's First Confidential Report, the Monitor believes that the Release is in the best interest of the Company in order to complete the Subscription Agreement and the Transactions.

17. The Applicant is requesting the Stay Period be extended until the 28th day of February, 2023.

18. The Monitor believes that the extension to the stay of proceedings would be in the best interests of the Company and its stakeholders, including the senior secured creditors, and that it would not materially prejudice any stakeholder or creditor, but allow for the completion of the sale to the Successful Bidder, the completion of the Subscription Agreement and Transactions, as well as provide time for the Monitor to deal with the creditors and distribution of funds.

19. The senior secured creditors and the DIP Lenders have consented to the extension of the stay of proceedings under section 11 of the CCAA.

20. Finally, the Monitor requests that a Court Order be granted sealing the Monitor's First Confidential Report and the Subscription Agreement and that it remain under seal until the Closing as outlined in the Subscription Agreement, to avoid any negative impact that could result from the dissemination of the information contained therein. The report contains commercially sensitive information pertaining to the SISP and the offers for purchase of the mine and other confidential information in respect of the offers submitted to the Monitor and the agreement with the Successful Bidder. Publication of the information contained in the Monitor's First Confidential Report and Subscription Agreement would pose serious risk to the commercial interests of stakeholders and would irreparably harm the Monitor's efforts to maximize realizations from the Company's assets should the Transactions not close.

**ISSUES:**

21. The issues before this Court are as follows:

    1. Whether the Subscription Agreement and the Transactions should be approved by way of a Reverse Vesting Order;

    2. Whether the requested release in favour of the Released Parties should be granted;

    3. Whether the requested extension of the stay of proceedings should be granted;

4. Whether the Monitor should be granted enhanced powers with respect to ResidualCo; and

5. Whether a sealing order should be granted with respect to the Monitor's First Confidential Report and the Subscription Agreement.

## LAW AND ARGUMENT

### Whether the Subscription Agreement and the Transactions should be approved

22. The Applicant is requesting that the Subscription Agreement with the Successful Bidder, and the Transactions contemplated therein, be approved by way of a Reverse Vesting Order ("**RVO**").

23. Section 11 of the CCAA provides the court with a broad discretion to make any orders it considers appropriate in the circumstances.

> 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.

**Reference:** CCAA s., 11 [TAB 1]

24. Section 36 of the CCAA sets out the applicable legal test for obtaining court approval of a sale outside the ordinary course of business during a CCAA proceeding. This legal test is also applicable in the context of a reverse vesting transaction. In particular, section 36 (3) outlines certain factors that the Court shall consider when deciding whether to approve a sale:

> **Factors to be considered**
>
> 36 (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (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;

(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.

**Reference:** CCAA s., 36 (3) [TAB 2]

25. In *Harte Gold Corp (Re),* 2022 ONSC 653, the Ontario Superior Court of Justice stated that the jurisdiction to grant an RVO is derived from section 11 of the CCAA and that the framework in section 36 (3) should apply to RVO transactions.

> [37] I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, Callidus, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.

**Reference:** *Harte Gold Corp (Re),* 2022 ONSC 653 at paragraph 37 [TAB 3]

26. In addition, the court provided a list of questions that the Monitor must be prepared to answer when requesting an RVO.

> [38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in

addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? And

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

**Reference:** *Harte Gold Corp (Re),* 2022 ONSC 653 at paragraph 38 [TAB 3]

27. The Applicant submits that this court has the discretion to approve the RVO under section 11 of the CCAA. Moreover, the Subscription Agreement and the Transactions satisfy the statutory criteria under section 36 (3) of the CCAA for approval of a sale, including a sale by way of an RVO:

(a) **The solicitation process was reasonable**: The Subscription Agreement, and the Transactions contemplated therein, are the culmination of approximately six (6) months of extensive solicitation efforts on the part of both the Monitor and the Company as part of the SISP, which process was approved by this Court pursuant to the SISP Order. As noted above, the Monitor canvassed the world-wide market of parties interested in the Company's business and assets. This allowed the Monitor to receive bids from a number of interested parties. The competitive process resulted in the final bid submitted by the Successful Bidder. Since the acceptance of the bid by the Successful Bidder, the Monitor, with the cooperation of the Company, has worked diligently to deliver the Subscription Agreement.

(b) **The Monitor approved the solicitation process**: GTL, as Monitor, was actively involved in the SISP. As the Company has no existing directors or officers, the Monitor, with the cooperation of the Company, sought court approval for the SISP and ran the SISP in compliance with the SISP Order.

(c) **The Monitor filed reports**: The Monitor has filed its First, Second, Third and Fourth Reports with this Honourable Court. All reports have made reference to the progress of the SISP at various stages throughout the process. As outlined in the

Monitor's Fifth Report, filed with this Honourable Court, the Monitor believes that the sale of shares to a preferred bidder under the RVO would be more beneficial to the creditors than a sale of assets under a sale or disposition in bankruptcy. The Monitor supports the sale pursuant to the Subscription Agreement and is requesting the approval of this Honourable Court.

(d) **Stakeholders were consulted during the sale process:** The Monitor has consistently and frequently consulted with the senior secured creditors of the Company, being the DIP Lenders, throughout the entire SISP process. The Monitor obtained the consent of the DIP Lenders prior to each change to the SISP, and to each milestone and prior to the approval of the Successful Bidder. The Monitor continues to consult the DIP Lenders in relation to the Transactions.

(e) **The effect on creditors:** The Monitor has consulted with the DIP Lenders regarding the Subscription Agreement and the Purchase Price (as defined in the Subscription Agreement). The DIP Lenders have agreed to the proposed sale. The Monitor submits that the unsecured creditors will remain unaffected regardless of the Transactions. Further, the Monitor submits that none of the creditors will be in a worse position if the RVO is granted.

(f) **Consideration received for the assets:** The Purchase Price payable pursuant to the Subscription Agreement is fair and reasonable as outlined in the Monitor's Fifth Report. The assets were extensively marketed as part of the SISP and the Successful Bidder was the highest bid received through that process. In addition, the sale to the Successful Bidder by way of the RVO will continue the operations of the Company as a going concern.

28. With respect to the questions outlined by the Superior Court of Justice in *Harte Gold Corp (Re)*, 2022 ONSC 653, the Applicant responds as follows:

(a) **Necessity of the RVO**: The RVO is necessary in this instance as it will allow for the Successful Bidder to operate the Company as a going concern and use the Retained Assets of the Company, including the mineral leases and licences, without delay or additional costs to the Company.

(b) **Economic Result:** The economic result of the Transactions provides a better result than any other form of transaction under a bankruptcy, as it allows the Company to continue on as a going concern. In addition, the Transactions provide for the repayment of the DIP Financing as well as payment to the senior secured creditors.

(c) **Is any Stakeholder worse off:** No creditor is worse off as a result of the RVO. The unsecured creditors remain unaffected regardless of the sale process.

(d) **Consideration paid:** The consideration outlined in the Subscription Agreement for the sale of the Company shares is the highest price offered to the Monitor through the SISP, which canvassed the worldwide market. The Monitor believes that the price received is fair and reasonable taking into account the assets, including the mineral leases and licences.

29. In *Quest University Canada (Re),* 2020 BSCS 1883, the British Columbia Supreme Court extensively reviewed the case law related to a court's authority to grant a reverse vesting order under the CCAA. Following the review of the case law, it found that the CCAA provided sufficient authority to grant the reverse vesting order which was consistent "with the remedial purposes of the CCAA" and consistent with the Supreme Court of Canada's ruling on a CCAA court's jurisdiction in Callidus. The issue in each case is not whether the court has sufficient jurisdiction but whether the relief is "appropriate" in the circumstances and that stakeholders are treated as fairly and reasonably as the circumstances permit:

> [155] I find further support for Quest's position in the recent comments of the Court in Callidus. The Court was there addressing a different issue – whether a CCAA judge has jurisdiction under s. 11 to bar a creditor from voting where the creditor is "acting for an improper purpose" – but the Court's comments on the exercise of jurisdiction under the CCAA ring true in relation to the RVO structure:
>
> > [49] The discretionary authority conferred by the CCAA, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the CCAA, which we have explained above (see Century Services, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).
>
> **Reference:** *Quest University Canada (Re),* 2020 BSCS 1883 at paragraph 155 [TAB 4]

30. The Applicant submits that the order is appropriate in these circumstances given the nature of the operation of the mine and structure of the current deal with the Successful Bidder. Granting the RVO will avoid additional costs and unnecessary delay to the Company, the stakeholders, the senior secured creditors and the Successful Bidder. The Monitor has acted in good faith and has exercised due diligence throughout the SISP process by (i) keeping all creditors informed,(ii) having numerous discussions with the senior secured creditors and DIP Lenders regarding phase 1 and phase 2 bidders, (iii) obtaining consent of the senior secured creditors and DIP Lenders prior to making any changes to the SISP and prior to choosing the Successful Bidder and (iv) obtaining the highest price for the assets as a result of its marketing efforts under the SISP.

31. Appropriate use of an RVO was further discussed in *Quest University Canada (Re)*, 2020 BSCS 1883, wherein the court noted that RVOs are often used when the purchased assets include licenses that are either difficult to transfer to the purchaser and/or more valuable if maintained within the existing corporate entity:

> [160] Many of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable "assets" that could not be transferred.

**Reference:** *Quest University Canada (Re)*, 2020 BSCS 1883 at paragraph 160 [TAB 4]

32. In this case, the Subscription Agreement is structured as a reverse vesting transaction in order to maintain sixty four (64) material permits and licenses that are required for the Company's mining operations, including mineral licenses, mine lease rentals, surface lease rentals, crown land leases, water use licenses and operation permits, all of which are integral to the operation of the Company (collectively, the "**Permits and Licenses**"). A traditional asset sale transaction structure would require having to seek the consent to assignment from contract counterparties and a transfer of such Permits and Licenses by government departments resulting in inevitable delay and additional costs in completing the Transactions, to the detriment of the Company's stakeholders. Additionally, amendments to various mineral claim registrations would create additional costs associated with the Transactions.

33. The reverse vesting aspect of the Transactions will not prejudice or impair any rights of the Company's creditors as compared to an asset sale transaction, and certain elements

of the Transactions were structured to preserve rights that creditors would otherwise have had in an asset sale transaction. Accordingly, the Applicant submits that approving the Transactions as a reverse vesting transaction is appropriate in the circumstances and consistent with the underlying objectives of the CCAA.

**Whether the requested Release in favour of the Released Parties should be granted**

34. The proposed Release covers any and all present and future claims against the Released Parties except any claim for fraud or willful misconduct or any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

35. Releases for the Monitor and other advisors to debtor companies are a common feature of CCAA plans. The absence of a CCAA plan, however, does not deprive the court of the jurisdiction to approve releases for these parties. Section 5.1(1) of the CCAA, for example, which deals with releases relating to directors, is drafted permissively. It does not limit the jurisdiction of the Court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances. Section 5.1(1) of the CCAA states as follows:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

**Reference:** CCAA s. 5.1(1) [TAB 5]

36. CCAA courts have, on multiple occasions, approved releases in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of, among other parties, directors, officers, monitors, counsel, employees, shareholders and advisors. In *Green Relief Inc. (Re)*, 2020 ONSC 6837, the Ontario Superior Court of Justice granted such a release and provided a non-exhaustive list of factors to be considered:

> 27 In Lydian International Limited (Re), 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:
>
> (a) Whether the claims to be released are rationally connected to the purpose of the plan;
>
> (b) Whether the plan can succeed without the releases;
>
> (c) Whether the parties being released contributed to the plan;

(d) Whether the releases benefit the debtors as well as the creditors generally;

(e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) Whether the releases are fair, reasonable and not overly-broad.

28 As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: Target Canada Co., Re, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.

**Reference:** *Green Relief Inc. (Re)*, 2020 ONSC 6837 at paragraphs 27-28 [TAB 6]

37. Several cases throughout Canada have granted similar releases relying on the factors outlined above. In *Harte Gold Corp (Re)*, the Ontario Superior Court of Justice stated as follows:

[78] Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

[79] CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

[80] I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of the following factors taken from *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

**Reference:** *Harte Gold Corp (Re)*, 2022 ONSC 653 at paragraph 78-80 [TAB 3]

38. Additionally, in the recent case of *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828, the Quebec court considered contested releases in the context of an RVO:

128 It is now commonplace for third-party releases, in favor of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction. In fact, similar releases have been approved by this Court in recent cases involving RVO transactions, including in *Nemaska Lithium*.

129 This being said, the courts should not grant releases blindly and systematically.

130 In *Harte Gold Corp.*, the Court approved releases in favor of various parties that included the purchaser and its directors and officers and considered the criteria ordinarily canvassed with respect to third-party releases provided for under a plan, as articulated in *Lydian International Limited (Re)* and elsewhere. They are the following:

a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) Whether the plan could succeed without the releases;

d) Whether the parties being released were contributing to the plan; and

e) Whether the release benefitted the debtors as well as the creditors generally.

131 In the present file, IQ's and Orion's participation was obviously instrumental to the restructuring of BlackRock's business. Considering the SISP and the opportunity given to BlackRock's stakeholders to participate in the process, it is reasonable for IQ and Orion to now start with a clean slate and not to be under the threat of potential claims as they will be leading BlackRock's efforts with Project Volt. The release will provide more certainty and finality.

132 The release is thus reasonably connected and justified as part of the Proposed Transaction, and it is to the benefit of BlackRock and its stakeholders generally as it will allow BlackRock to emerge as a solvent entity and be in the best possible position to, hopefully, secure financing for Project Volt. They are also fair and reasonable in the present circumstances.

**Reference:** *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828 at paragraph 128-132 [TAB 7]

39. The Applicant submits that the Release sought is reasonable and appropriate in the circumstances and should be granted for the following reasons:

(a) **Whether the claims to be released are rationally connected to the purpose of the restructuring**: The claims to be released are rationally connected to the Company's restructuring. The Release will have the effect of reducing claims against the Released Parties, which in turn will reduce indemnification claims by the Released Parties against the Administration Charge (as defined in the Initial Order). The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

(b) **Whether the releasees contributed to the restructuring**: The Released Parties made significant contributions to the Company's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the Monitor, in consultation with the Company and its legal counsel, and the support and assistance from the DIP Lenders and its legal counsel, were instrumental to the conduct of the SISP and the continued operations of the Company during the CCAA Proceedings. With a proposed sale that will maintain the Company as a going concern and permit repayment of the DIP Financing and payment to the senior secured creditors, these CCAA Proceedings have had a successful outcome for the benefit of the Company's stakeholders. The Released Parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of the Release.

(c) **Whether the Release is fair, reasonable and not overly broad**: The Release is fair and reasonable. The Monitor is unaware of any claims against the advisors related to their provision of services to the Company, or any claims against the Successful Bidder or DIP Lenders as it relates to its conduct with respect to the Company or these CCAA Proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow in the circumstances as the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct.

(d) **Whether the restructuring could succeed without the Release**: The Release is being sought, with the support of the Successful Bidder and the DIP Lenders, as it will bring certainty and finality for the Released Parties. Additionally, the Company and the Successful Bidder both believe that the Release is an essential component to the Transactions.

(e) **Whether the Release benefits the Company as well as the creditors generally:** The Release benefits the Company as well as the Company's creditors and other stakeholders by reducing the potential for the Released Parties to seek indemnification from the Company, thus minimizing further claims against the Company.

(f) **Creditors' knowledge of the nature and effect of the Release:** All creditors on the Service List were served with materials relating to this motion. The proposed Release was contained in the draft approval and reverse vesting order that was attached to the within Application, which provided stakeholders with ample notice and time to raise concerns with the Company or the Monitor. To date, no creditor has objected to the Release.

40. For the reasons noted above, the Applicant submits that the Release should be granted.

**Whether the requested extension of the stay of proceedings should be granted**

41. The current stay period expires on the 17th day of October, 2022. The Applicant is now requesting a stay until the 28th day of February, 2023.

42. Section 11.02(2) of the CCAA provides that a court has the discretion to grant a requested stay of proceedings on any terms that it may impose:

> 11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (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.

**Reference:** CCAA s., 11.02(2) [TAB 8]

43. The requested stay is necessary as it will allow the Monitor time to complete the Transactions contemplated by the Subscription Agreement as well as seek court approval for the distribution of funds. The Monitor has received the consent of the DIP Lenders regarding the proposed extension of the stay.

44. Section 11.02 (3) of the CCAA outlines when a court should make an order to extend a stay:

> (3) The court shall not make the order unless

> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

**Reference:** CCAA s., 11.02(3) [TAB 9]

45. The Applicant submits that the request is appropriate in these circumstances as it will allow for the necessary time needed to complete the Transactions contemplated by the Subscription Agreement as well as the time needed to obtain court approval for the distribution of funds.

46. In *Harte Gold Corp (Re)*, 2022 ONSC 653, the Ontario Supreme Court of Justice discussed the test for extending a stay of proceedings under s. 11.02 of the *CCAA*.

> The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.
>
> Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.
>
> No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.
>
> For these reasons the stay is extended to March 29, 2022

**Reference:** *Harte Gold Corp (Re)*, 2022 ONSC 653 at paragraphs 87-90 [TAB 3]

47. As outlined above, the Applicant has been acting in good faith and with due diligence throughout this process but will require additional time to complete the Transactions contemplated by the Subscription Agreement.

48. No creditors will suffer prejudice as a result of the extension. In fact, the senior secured creditors and DIP Lenders have all consented to the extension. Finally, as outlined in the updated Cash Flow, the Company will have sufficient liquidity to continue operations in

the care and maintenance mode in order to complete the SISP and the proposed Transactions if the extension is approved.

**Whether the Monitor should be granted enhanced powers with respect to ResidualCo**

49. The CCAA provides the Court with broad discretion in respect of the Monitor's functions in a particular CCAA proceeding.

50. Section 23(1) (k) of the CCAA provides that the Monitor can;

> **(k)** carry out any other functions in relation to the company that the court may direct.

**Reference:** CCAA s., 23 (1) (k) [TAB 10]

51. In addition, as noted above, section 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

52. In *Harte Gold Corp (Re)*, 2022 ONSC 653, the Court granted the expansion of monitor powers in relation to an RVO involving newcos:

> [91] The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.
>
> [92] 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 paragraphs 91-92 [TAB 3]

53. The Applicant submits that the present case is similar to *Harte Gold Corp (Re)*, in relation to the necessity for the expansion of monitor powers. The expanded powers are necessary in order for the Monitor to complete the Transactions with the Successful Bidder pursuant to the Subscription Agreement, including the necessity to vest out the Excluded Assets

and Excluded Liabilities to ResidualCo. Moreover, no creditor will be prejudiced by the requested expansion of the Monitor's powers.

**Whether a sealing order should be granted with respect to the Monitor's First Confidential Report and the Subscription Agreement.**

54. The Applicant requests a Court Order be granted sealing the Monitor's First Confidential Report and the Subscription Agreement and that it remain under seal until the Closing as outlined in the Subscription Agreement, to avoid any negative impact that could result from dissemination of the information contained in the Monitor's First Confidential Report and Subscription Agreement. The report and agreement contain commercially sensitive information pertaining to the valuation of the mine, bids, terms of the proposed sale and certain confidential information in respect of the offers submitted to the Applicant. Publication of the information contained in the Monitor's First Confidential Report and the Subscription Agreement would pose serious risks to the commercial interests of stakeholders and would irreparably harm the Applicant's efforts to maximize realizations should the sale not close.

55. This Honourable Court has recognized that sealing orders in respect of commercially sensitive information are appropriate in respect of information related to the sale or proposed sale of assets;

> "I also granted an order sealing the Receiver's First Report until the transaction contemplated in the application is completed or upon further order of the Court. As a court of inherent jurisdiction, this Court has authority to seal part or all of a court record (Barnes, Re, 2016 NLTD(G) 106 (N.L. T.D.)). The receiver submits that this is an appropriate case for me to exercise my discretion in accordance with generally accepted insolvency practice to grant a sealing order over the Receiver's First Report and its appendices, until completion of the sale contemplated by this application.
>
> ....
>
> Because the proposed sale of the Subject Property has not been approved, the receiver is rightly concerned that the sensitive information contained in the Receiver's First Report could adversely affect the sale of these assets to another party."

**Reference:** *Sports Villas Resort, Inc. (Re)* 2020 CarswellNfld 188 at paras 7-9 (NLSC) [Tab 11]

56. The Applicant submits that the rationale employed by this court in *Sports Villas Resort, Inc. (Re)*, is equally applicable to the present situation and that it is appropriate for the court to grant the requested Sealing Order.

**Conclusion**

57. The Applicant respectfully requests that this Honourable Court grant the 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 5th day of October, 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. 11
2. *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. c-36, as amended, s. 36 (3)
3. *Harte Gold Corp (Re)*, 2022 ONSC 653
4. *Quest University Canada (Re),* 2020 BSCS 1883
5. *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. c-36, as amended, s. 5.1(1)
6. *Green Relief Inc. (Re)*, 2020 ONSC 6837
7. *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828
8. *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. c-36, as amended, s. 11.02(2)
9. Companies' Creditors Arrangement Act, R.S.C. 1985, C. c-36, as amended, s. 11.02(3)
10. *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. c-36, as amended, s. 23 (1) (k)
11. *Sports Villas Resort, Inc. (Re)* 2020 CarswellNfld 188

# Exhibit "K"

2022 01G 0709

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN BANKRUPTCY AND INSOLVENCY

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

**AND IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**"); and

**AND IN THE MATTER OF** a Plan of Compromise or Arrangement of the Company;

This is Exhibit K referred to in the Affidavit of Richard A. Spellacy Sworn or affirmed before me this 24th day of October, 2022.

**FIFTH REPORT OF GRANT THORNTON LIMITED,**

**IN ITS CAPACITY AS MONITOR**

**UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36**

**OF CANADA FLUORSPAR (NL) INC. AND CANADA FLUORSPAR INC. AND NEWSPAR.**

**October 6, 2022**

Grant Thornton

**Grant Thornton Limited,**
**Court Appointed Monitor**

Suite 300 - 15 International Place
St. John's, NL A1A 0L4

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## APPENDICES

**A** – Amended and Restated Initial Order dated March 21, 2022

**B** - Amended and Restated Initial Order – Amendment #1 and Revised SISP and WEPP Order dated June 10, 2022

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**V** – Retained Liabilities

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**AA** – Monitor's Statement of Receipts and Disbursements to September 20, 2022

**BB** - Cash Flow Projection to February 26, 2023

## INTRODUCTION

1. On February 21, 2022, upon the application of PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and Bridging Income Fund LP (collectively referred to as "**Bridging**"), Grant Thornton Limited ("**GTL**") was appointed as Interim Receiver (the "**Interim Receiver**") of all the current and future assets, undertakings and properties (the "**Property**") of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. by Order of the Supreme Court of Newfoundland and Labrador (the "**Court**").

2. The Interim Receivership Order authorized the Interim Receiver, among other things, to:

   (a) receive, preserve, protect and maintain control over the Property;

   (b) to retain or hire any employees on behalf of the Company;

   (c) to report to, meet with and discuss with such Affected Persons (as defined in the Interim Receivership Order) as the Interim Receiver deems appropriate;

   (d) to utilize monies on hand or borrowed by the Interim Receiver to fund payments of employee payroll obligations, rent, insurance, utilities, and other obligations determined by the Interim Receiver to be integral to the preservation of the Property;

   (e) to commence proceedings for the Company pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**") or the *Companies' Creditors Arrangement Act* ("**CCAA**"); and

   (f) to report to the Court and the creditors of CFI regarding the status of the business and financial affairs of CFI, including its assets, liabilities, accounts payable and other matters deemed relevant by the Interim Receiver.

3. On March 8, 2022, the Interim Receiver made application to commence proceedings pursuant to the CCAA and the Court issued an Initial Order on March 11, 2022. Grant Thornton Limited was appointed Monitor ("**Monitor**").

4. The Initial Order imposed a stay of proceeding against Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively referred to as the "**Company**" or "**CFI**").

5. The Initial Order granted an initial stay of proceedings and authorized the Monitor, among other things, to:

(a) Preserve and protect the Business and Property of CFI excluding certain property in favour of HSBC Bank of Canada ("**HSBC**");

(b) Providing the Monitor with certain enhanced powers;

(c) Approving the debtor in possession financing to allow CFI to continue to operate in the ordinary course pending the comeback hearing; and

(d) Setting down the comeback hearing for March 18, 2022 at 10am NL Time.

6. On March 18, 2022 (Court order is dated March 21, 2021), the Court issued an Amended and Restated Initial Order ("**ARIO**") which affirmed the terms of the Initial Order and authorized the Monitor, among other things:

(a) Authority to file, if deemed appropriate, a plan of compromise and arrangement on behalf of the Company;

(b) Authority to implement operational changes and pursue restructuring opportunities on behalf the Company;

(c) Authority under s. 32 of the CCAA to disclaim or rescind agreements for real property;

(d) Granted an extension of the stay of proceedings to July 10, 2022;

(e) Empowered to run a Sales and Investment Solicitation Process ("**SISP**"), with the terms being outlined in the SISP Process on behalf of the Company and approved by the Court via a SISP Order;

(f) Provided enhanced powers within the CCAA due to the directors of the Company resigning and there being no officers;

(g) Authorized an increase to the DIP Financing Agreement to borrow on behalf of the Company in accordance with the DIP Financing Agreement.

7. A copy of the ARIO is attached hereto as **Appendix "A"**.

8. On June 10, 2022, the Monitor made application to the Court to extend the stay of proceedings and extend the SISP process. The Court issued an Order regarding the SISP, an extension of the stay of proceedings and authorized the Monitor, among other things:

(a) Approved of the Monitor's activities to the date of the Third Report of the Monitor of May 30, 2022;

(b) Granted an extension of the stay of proceedings to September 2, 2022;

(c) Granted and declared that pursuant to section 5(5) of the *Wage Earners Protection Act* ("**WEPPA**") the Company's former employees meet the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 and are individuals to whom the WEPPA applies as of March 18, 2022;

(d) Granted approval of amendments to the SISP Order; and

(e) Granted approval of amendments to the ARIO Order.

9. A copy of the Order regarding the Amended and Restated Initial Order – Amendment #1 and Revised SISP and WEPP Order dated June 10, 2022 is attached hereto as **Appendix "B"**.

10. On August 24, 2022, the Monitor made application to the Court for, amongst other things, an extension of the stay of proceedings and to extend the SISP process. The purpose of the second extension was to provide additional time for the Monitor to finalize the Definitive Agreements as required by the SISP Order. The Court issued an Order that, among other things:

(a) Approved the Monitor's activities to the date of the Fourth Report of the Monitor of August 24, 2022;

(b) Granted approval of amendments to the SISP Order;

(c) Granted approval of amendments to the ARIO Order; and,

(d) Granted an extension of the stay of proceedings to October 17, 2022;

11. A copy of the Order regarding the Amended and Restated Initial Order – Amendment #2 dated August 30, 2022 is attached hereto as **Appendix "C"**.

12. The preceding reports of Grant Thornton Limited as Interim Receiver and Monitor, and all other information in respect of the interim receivership, and all other information in respect to the CCAA proceeding, are posted on the Interim Receiver's and Monitor's website at www.GrantThornton.ca/CFI. Readers are encouraged to read the following reports of Grant Thornton Limited, the materials filed with the court in relation to the applications, and the orders of the Court to provide additional information:

Reports to the Court

a) First Report of Grant Thornton Limited in its capacity as Interim Receiver and Proposed Monitor dated March 8, 2022

b) Second Report of Grant Thornton Limited in its capacity as Monitor dated March 15, 2022

c) Third Report of Grant Thornton Limited in its capacity as Monitor dated May 30, 2022

d) Fourth Report of Grant Thornton Limited in its capacity as Monitor dated August 24, 2022

e) First Confidential Report of Grant Thornton Limited in its capacity as Monitor dated October 5, 2022

Court Orders

a) Interim Receivership Order dated February 21, 2022, including reasons for judgement

b) CCAA Initial Order dated March 11, 2022, including reasons for judgement

c) ARIO dated March 21, 2022, including reasons for judgement

d) Order approving the SISP dated March 21, 2022

e) Order approving the Revised SISP, Amended and Restated Initial Order – Amendment #1, and WEPP eligibility dated June 10, 2022

f) Order approving the Amended and Restated Initial Order – Amendment #2 dated August 30, 2022

13. On March 25, 2022, on application by HSBC Bank Canada, the Court appointed Deloitte Restructuring Inc. ("**Deloitte**") as receiver over the accounts receivable of the Company. Stakeholders wishing additional information on that proceeding are encouraged to contact Deloitte.

14. This is the Fifth Report of the Monitor.

## PURPOSE OF THE REPORT

15. The purpose of this report (the "**Fifth Report**") is to inform the Court of the following:

    (a) The activities of the Monitor since August 24, 2022, the date of the Fourth Report;

    (b) Advise the Court that the Monitor has finalized the Definitive Agreements with the Successful Bidder pursuant to the SISP and that the transaction contemplated in the Offer by the Successful Bidder is supported by Bridging and the Province of Newfoundland and Labrador ("**PNL**"), the senior secured creditors;

    (c) Seeking the following Orders:

        (i) Approving this Fifth Report, the activities of the Monitor and its counsel;

        (ii) Approving of the First Confidential Report of the Monitor ("**First Confidential Report**");

        (iii) Approving the Proposed Transaction as disclosed in the First Confidential Report;

        (iv) Granting a Sealing Order of the First Confidential Report; and

        (v) Granting an extension to the stay of proceedings to February 28, 2023.

## TERMS OF REFERENCE

16. In preparing this Fifth Report, the Monitor has relied upon unaudited financial information, certain Company's records, financial information and projections, and discussions with the Management of the Company, and its legal advisors. While the Monitor reviewed various documents provided by the Company and its legal advisors (including, among other things, unaudited internal financial statements and financial projections) and believes that the information therein provides a fair summary of the transactions as reflected in the documents, such work does not constitute an audit or verification of such information for accuracy, completeness or compliance with Generally Accepted Accounting Principles ("**GAAP**") or International Financial Reporting Standards ("**IFRS**"). Accordingly, the Monitor expresses no opinion or other form of assurance pursuant to GAAP or IFRS with respect to such information.

17. Some of the information used in preparing this Fifth Report consists of financial projections, including the Cash Flow Forecast. The Monitor cautions that these forecasts

are based upon assumptions about future events and conditions that are not ascertainable. The Company's actual results may vary from the Cash Flow Forecast, even if the Hypothetical and Probable Assumptions (defined herein) contained therein materialize, and the variations could be significant. The Monitor's review of the future oriented information used to prepare this Fifth Report did not constitute an audit of such information under Generally Accepted Auditing Standards, GAAP or IFRS.

18. In the course of its mandate, the Monitor has assumed the integrity and truthfulness of the information and explanations presented to it by the Company, its Management and other stakeholders, within the context in which such information was presented. To date, nothing has come to the Monitor's attention that would cause it to question the reasonableness of these assumptions, or accuracy of the information. The Monitor has requested that Management bring to its attention any significant matters which were not addressed in the course of the Monitor's specific inquiries. Accordingly, this Fifth Report is based solely on the information (financial or otherwise) made available to the Monitor by the Company and its Management.

19. This Fifth Report has been prepared for the use of this Court and the Company's stakeholders as general information relating to the Company and to assist the Court in determining whether to grant the relief sought by the Company. Accordingly, the reader is cautioned that this Report may not be appropriate for any other purpose. The Monitor will not assume responsibility or liability for losses incurred by the reader as a result of the circulation, publication, reproduction or use of this Fifth Report contrary to the provisions of this paragraph.

20. All references to dollars are in Canadian currency unless otherwise noted.

## BUSINESS, PROPERTY, AND CARE AND MAINTENANCE

21. Since its appointment, the Monitor, has continued to preserve and protect the Company's business and property and has completed the transition into care and maintenance mode. The maintenance and care of the business and property is ongoing and there is/are no significant issue(s) to note.

22. The Monitor has:

    a) Security – Maintained the existing Company security processes and procedures, and developed and continues to maintain enhanced

physical security protocols for the mine sites and IT security enhancements;

b) Insurance – Maintained the Company's insurance policies which remain in full force and effect, with the exception of Directors and Officers Liability Insurance (there are no directors or officers), and insurance over finished good inventory in transit (the mine is in care and maintenance mode and no further sales of inventory are contemplated);

c) Utilities and services – Arranged for the continued provision of services from utilities and other vendors, including new payment processes and credit terms (if applicable). The Monitor has paid for all services rendered to date in the normal course;

d) Employees – continues to retain a core group of employees sufficient to maintain the mine, its assets and other properties in care and maintenance mode, support the SISP process, and maintain a core of key employees to allow for the possibility of a restart of operations for a purchaser should the SISP process transaction close;

e) Operations – In conjunction with Company management, participate in twice daily operation updates and planning, and weekly updates and planning processes as part of the care and maintenance program. The weekly operational report is shared with the Bridging and the Province of Newfoundland and Labrador (together the "**DIP Lenders**");

f) Inventory of certain assets – Monitor has worked to complete an inventory of capital assets, leases, supply agreements, etc. in support of its estate communication processes, the SISP, and for use by other stakeholders in the process;

g) Statutory Filing – Monitor has continued to communicate with, file all statutory reports, and make all required payments with/to Canada Revenue Agency, Service Canada (for the WEPP Program), Workplace NL, Department of Industry Energy and Technology

("**DIET**"), Department of Fisheries and Oceans, and Environment Canada;

h) DIP Lenders – Monitor has continued to report to the DIP Lenders in accordance with the DIP Financing Agreement without issue; and

i) Reporting to Creditors and Other Stakeholders – Monitor has continued to respond to creditor and stakeholder queries, attend meetings with various creditors and stakeholders, and has continued to maintain the estates website by posting updated information as it becomes available.

**CREDITORS**

23. The Monitor has, and continues, to engage with all significant creditors and stakeholders in the CCAA proceeding by responding to queries when possible in a timely and factual manner:

a) Secured Creditors – Bridging and the Province of Newfoundland and Labrador ("**PNL**") – The Monitor has provided regular updates to Bridging and PNL on operational and the financial matters in the estate pursuant to the DIP Loan agreement. In addition, the Monitor has responded to all queries to the satisfaction of Bridging and PNL.

b) HSBC Bank of Canada ("**HSBC**") – The CCAA proceeding has carved out the Company's accounts receivable and those assets are being dealt with by Deloitte. The Monitor has cooperated with Deloitte in furtherance of its mandate, and Deloitte has cooperated with the Monitor in furtherance of its mandate.

c) Unsecured – The Monitor continues to manage an email address to engage with stakeholders in the proceeding (canadafluorspar@ca.gt.com). That address is monitored, and queries responded too. In addition, the Monitor has created a website for stakeholders on this proceeding at www.grantthornton.ca/cfi. This website is updated regularly.

d) Employees – The Monitor has created a section on the estate's website dedicated to employees and posts responses to employee related questions, and other updates. In addition, the CFI Human Resource Manager was retained by the Monitor and responds to employee related queries.

e) Town of St. Lawrence – The Monitor has provided regular updates to the Town of St. Lawrence.

f) Equipment leases – The Monitor has engaged with the various leasing companies for equipement and has made satisfactory arrangements with the majority of them. Further details are:

i. The Monitor continues to maintain lease payments to 7 lease agreements detailed in the Fourth Report:

(i) Lease agreement with Navstar Capital (Bank of Montreal) for the purchase of a 2020 International truck and a 2020 Tremcar 1000LT Tank;

(ii) Lease agreement with Meridian OneCap Credit Corp. for the purchase of a 2019 Takeuchi Mini Excavator;

(iii) Lease agreement with DLL for the purchase of two 2021 Takeuchi TL8CRWH Track Loaders;

(iv) Lease agreement with DLL for the rental of a MX3051, two MX3071 and a MX4071 printer; and

(v) Lease agreements with Ford Credit Canada Leasing for a 2020 Ford F150 and a 2020 Ford F250.

ii. The Monitor has also been in communication with Komatsu International (Canada) Inc. ("**Komatsu**"), beneficiary of 13 lease agreements for various equipment with the Company. Komatsu has agreed to suspend future payments on these lease agreements through the SISP.

iii. Caterpillar Financial Services Limited ("**Caterpillar**"), beneficiary of 3 lease agreements for various equipment with the Company, has

continued to agree to suspend future payments on these lease agreements through the SISP.

iv. The Monitor has not been made aware of any creditor seeking to dispute any disclaimers and has not received any notice that any of the lessors intend to dispute the disclaimer.

v. Supply Agreements – The Company had entered into various supply agreements with customers for the sale of acid grade fluorspar, and certain supply agreements with vendors. It is the Monitors view that claims, if any, can be dealt with in any claims process should one be ordered by the Court.

vi. The Proposed Transaction outlines the Successful Bidder's intention with the remaining lease and supply agreements up to the date of Closing contemplated to be October 17, 2022, or if elected by the Successful Bidder and holdings costs paid to the Monitor in advance, a date later than October 17, 2022, but no later than November 30, 2022.

**THIRD PARTY ASSETS**

24. The Monitordeveloped a process to receive and evaluate claims from stakeholders for the return of property owned by third parties using Form 74 of the *Bankruptcy and Insolvency Act*. The Monitor has received and accepted, or partially accepted claims for reclamation of property owned by:

a) Air Liquide Canada Inc.;

b) T R Excavating Inc.;

c) Blue Water Newfoundland Ltd.;

d) GFL Environment Inc.;

e) Modspace Financial Services, Canada;

f) General Auto and Industrial (operating as NAPA Auto Parts 6305) ("**NAPA**");

g) SMS Equipment Inc.; and

h) RJG Construction Ltd.

25. The assets subject to these claims have been returned to their owners. Details are noted in the Monitor's previous reports.

26. Since the date of the Fourth Report, the Monitor has received accepted claims for reclamation of property owned by the St. Lawrence Area Trails Association ("**SLATA**") and an additional claim from NAPA. Details are noted as follows:

a) A claim from SLATA for various items donated to the association including steel beams, solar panels, retired coast guard towers and various items to be used in a yard sale. All items were being stored on site at CFI. The Monitor accepted this claim in full. SLATA will be retrieving the items from CFI by no later than October 7, 2022. A copy of the release letter is attached hereto at **Appendix "D"**; and

b) An additional claim was received from NAPA for totes containing diesel emission fuel and wind shield washer fluid. The Monitor accepted this claim in full. NAPA has retrieved the empty totes onsite and has agreed to leave the totes with fluid remaining onsite until they are empty. A copy of the release letter is attached hereto as **Appendix "E"**.

27. The Monitor has arranged for Weir Minerals Canada Inc. to leave their consignment inventory, mostly parts for various pumps, on site pending the outcome of the closing of the SISP process. A copy of the release letter is attached hereto as **Appendix "F"**. This will not impact the Proposed Transaction as this asset is included with the Excluded Assets.

28. The Monitor has arranged for NAPA to leave their consignment inventory, mostly parts for light and heavy-duty vehicles, on site pending the outcome of the closing of the SISP process. A copy of this release letter is attached hereto as **Appendix "G"**. This will not impact the Proposed Transaction as this asset is included with the Excluded Assets.

29. The Monitor to date has not received a property claim from Atlantic Explosives Limited ("**AEL**"). The Monitor has issued a letter to AEL dated September 8, 2022, acknowledging AEL's ownership of two above ground magazines. Attached hereto as **Appendix "H"**, is a copy of the letter. This will not impact the Proposed Transaction as this asset is included with the Excluded Assets.

30. The Monitor to date has not received a property claim from Brenco High Voltage Solutions ("**Brenco**"). The Monitor has issued a letter to Brenco dated September 8, 2022, acknowledging Brenco's ownership of several light poles, a utility trailer and a line truck. Attached hereto as **Appendix "I"**, is a copy of the letter. This will not impact the Proposed Transaction as this asset is included with the Excluded Assets.

**EMPLOYEES**

31. As of the date of this Fifth Report, there are 36 employees employed with the Company.

32. One employee has resigned since the date of the Fourth Report. The CFI Management team has expressed that any risk posed by the employee's resignation will be mitigated through a transition of duties to remaining employees.

33. Based on advice provided by CFI management team, and the results of ongoing monitoring and regulatory oversight, the Monitor considers the current work force level of 36 is what is required to continue to preserve and protect the business and assets of the Company in a care and maintenance mode. No further reductions are anticipated; however, the Monitor will continue to evaluate this need, and the circumstances of the business and its assets, and retain and employ those parties whose experience and skill sets are required to continue to preserve and protect the business and assets for the benefit of the stakeholders.

34. On June 10, 2022, this Court approved an Order concerning the WEPP eligibility of terminated employees.

35. Since the date of this Order, the Monitor has filed with Service Canada all Trustee Information Forms ("**TIF**") for employees who have filed a proof of claim with the Monitor.

36. In total, 227 eligible employees have submitted a proof of claim with the Monitor. The Monitor has filed the required TIF's with Service Canada for these employees.

37. As of the date of this report, 8 eligible employees have not submitted a proof of claim with the Monitor. The Monitor will file the TIF with Service Canada for these employees when a proof of claim form has been submitted.

## NOTICES AND STATUTORY REPORTING

38. The Monitor has reported to the Court in the Second Report on the CCAA statutory notices. The Monitor continues to update the estate's website at www.GrantThornton.ca/CFI providing estate stakeholders updates when available.

39. The Monitor, together with CFI management continues to work to update, and file, all statutory filings, reports and payments with the Canada Revenue Agency ("**CRA**"), Workplace NL, Service Canada (for the WEPP Program), Department of Industry Energy and Technology ("**DIET**"), Department of Fisheries and Oceans, Natural Resources Canada, and Environment Canada.

40. CRA completed a payroll trust examination for Canadian employees covering the prefiling pay period in the calendar year 2022. The Monitor has been advised by CRA that there are no issues, and that no property claim will be forthcoming.

41. CRA issued a letter to the Monitor dated June 1, 2022, indicating a proposed change to the GST/HST return for the audit period of March 1, 2022, to March 11, 2022, ("**HST Assessment**"). On receipt of this letter, the Monitor requested and was granted an extension to July 18, 2022, to respond. On July 18, 2022, the Monitor formally responded to the letter concerning the HST Assessment. Since the date of the Fourth Report, The Monitor has received a response from CRA dismissing the Monitor's response to the audit. A copy of this letter from CRA is attached hereto as **Appendix "J"**. The Monitor intends to appeal this assessment. This will not impact the Proposed Transaction as this liability is included with the Excluded Liabilities.

42. On June 8, 2022, CFI's received notice from CRA of a tax audit of the Part XIII, Regulation 105 and Regulation 102, of Account 89811 4087 RC0001 for the years 2016 to 2020. The Monitor, with assistance from CFI's management, have compiled the documents requested by CRA. The documents will be submitted to CRA prior to Closing. A copy of the CRA audit notice is attached hereto as **Appendix "K"**.

43. The Monitor has estimated that the deem trust claim related to withholding taxes to be $76,438.26. The unsecured portion of the withholding tax is estimated to be approximately $31,000. This ongoing audit should not impact the Proposed Transaction. The deemed trust amount has been withheld from the net proceeds from the inventory sales and represents a priority charge on the assets of CFI. It can be addressed at distribution. The

unsecured portion is a liability included with the Excluded Liabilities. This should not impact the Proposed Transaction

44. On August 16, 2022, the Monitor was notified by AEL of an explosives inspection to be held at CFI by Natural Resources Canada, Explosives Regulatory Division. CFI received minor review notes including painting the magazine and using the fob system when accessing the magazines. These changes have been addressed by CFI employees since the date of the Fourth Report.

## SALES AND INVESTMENT SOLICITICATION PROCESS ("SISP")

45. The Monitor has prepared a First Monitors Confidential Report disclosing financial details, commercial terms, and identities of the SISP participants and the Successful Bidder. The Monitor is requesting a sealing order over this information until the earlier of closing of the Proposed Transaction or further order of the Court.

46. On March 15, 2022, the Court granted the SISP Order which approved of a sales process pursuant to which the Monitor, whilst working in conjunction with the Company and the DIP Lenders, would solicit interest in, and opportunities for: (i) one or more sales or partial sales of all, substantially all, or certain portions of the Company; and/or (ii) for an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the business and affairs of the Company as a going concern or a sale (or partial sale) of all, substantially all, or certain aspects of the Company's business, or combination thereof (the "**Opportunity**"). A copy of this order is attached hereto as **Appendix "L"**.

47. In accordance with the milestones set out in the SISP Order, on March 20, 2022, the Monitor began circulating a solicitation letter (the "**Teaser Letter**") and a non-disclosure agreement (the "**NDA**") initially to 73 potential bidders which later expanded to a total of 103 potential bidders. The interested party list was developed using information provided by Bridging (leveraging information gathered through that insolvency proceeding), parties that reached out to the Monitor, industry research provided by various stakeholders, Company information and the Monitor's and other advisor contacts in the legal and accounting industry for their potential network. A copy of the Teaser Letter is attached hereto as **Appendix "M"**.

48. Pursuant to paragraph 6 of the SISP, the Monitor also posted advertisements of the SISP in the National Post, The Globe & Mail and the Evening Telegram on March 29, 2022.

Furthermore, a press release was issued on April 11, 2022, a copy of each is attached hereto as **Appendix "N"**.

49. The Monitor posted the Teaser letter, NDA, Solicitation Letter, SISP Procedures, ARIO, and the SISP order to the estate's website at www.grantthornton.ca/cfi by March 21, 2022.

50. The Monitor in conjunction with legal counsel and the Company worked towards creating an extensive virtual data room (the "**VDR**") utilizing a due diligence tracking tool. The due diligence tracking tool was used to streamline the due diligence process by anticipating information requests, providing a structure to rapidly respond to questions, and help ensure the completeness of the data on the VDR. The Monitor hosted the VDR on Firmex which, amongst other things, provided the Monitor with standard tracking data and notified all registered users on a daily basis when new information was posted to the VDR.

51. The Monitor, in conjunction with the Company, established an internal process to track and respond to questions received by interested parties and update the VDR as appropriate.

52. Midday on March 24, 2022, the Monitor opened the VDR to 'go live' for those interested parties who returned to the Monitor a properly executed NDA. Interested parties returned their NDAs at varying times. Throughout the SISP a total of 29 parties signed NDA's and received access to the VDR.

53. To assist interested parties on understanding the Opportunity, the Monitor in conjunction with the Company developed a Confidential Information Memorandum (the "**CIM**") and uploaded it to the VDR on April 1, 2022.

54. The original SISP Procedures contemplated that non-binding LOI's ("**LOIs**") were to be due Sunday April 17, 2022, which happened to fall on the Sunday of the Easter long weekend in Canada. Therefore, in consultation with the DIP Lenders and the Company, the deadline was extended to Wednesday April 20, 2022, at 5:00 PM Newfoundland Standard Time. The Monitor advised the Phase 1 Qualified Bidders and the Service List of the extension, on April 13, 2022. A copy of that notice is attached hereto as **Appendix "O"**.

55. Throughout the SISP process, the Monitor contacted 103 parties that covered parties in the fluorspar mining industry, fluorspar consumers, customers of CFI, industrial and chemical companies, private equity entities, fluorspar traders, and mining companies.

These entities were located globally, covering parties in Canada, the United States, Mexico, Europe, United Kingdom, South Africa, India, China, and other countries in Asia.

56. The Monitor is confident that it has successfully canvassed the investment opportunity to parties within the fluorspar industry, and other possible interested parties located globally.

57. The Monitor received a total of 13 non-binding LOIs, in various structures and ranges. In consultation with the DIP Lenders and after follow-up calls with each of the Phase 1 Qualified Bidders who submitted LOIs, the Monitor accepted a total of 11 parties into Phase 2 (the "**Phase 2 Qualified Bidders**").

58. Included in the Phase 1 non-binding offers were 3 parties who expressed interest in pursuing a stalking horse bid process. The Monitor undertook a review of the stalking horse proposals and consulted with the DIP Lenders. The Monitor decided not to proceed with a stalking horse process as outlined by the interested parties given there was no clear incremental benefit to creditors in that process over the existing SISP after the Monitor considered the Phase 1 Qualified Bidders.

59. In April 2022 as the Phase 2 Qualified Bidders continued their due diligence, it became evident to the Monitor that the Phase 2 Qualified Bidders were seeking out a National Instruments 43-101 Standards of Disclosure for Mineral Projects report (the "**43-101 Report**") and/or that a binding offer would be conditional on the completion of the 43-101 Report.

60. As a result, on May 9, 2022, the Monitor in consultation with the DIP Lenders and the Company, re-initiated the Company's ongoing engagement with AGP Mining Consultants Inc. and SLR Consulting to complete the 43-101 Report that was started prior to the Grant Thornton Limited's appointment as Interim Receiver on February 21, 2022.

61. As the 43-101 Report was considered a key aspect of the due diligence process for the Phase 2 Qualified Bidders, the Monitor, in consultation with the DIP Lenders, the Company and by Order of this Court dated June 10, 2022, extended the Phase 2 Bid Deadline to July 22, 2022. A copy of the SISP Extension Order is attached hereto as **Appendix "B"**.

62. On May 25, 2022, the Monitor advised the Phase 2 Qualified Bidders that it was undertaking the completion of the 43-101 Report and of a tentative extension to the Phase 2 Bid Deadline extension. A copy of notice sent to the Phase 2 Qualified Bidders is attached hereto as **Appendix "P".**

63. The 43-101 Report was completed and issued on June 15, 2022.

64. On June 10, 2022 the Court approved the Monitors request to extend the Phase 2 Bid Deadline and subsequent SISP steps. A copy of that Order is attached hereto as **Appendix "Q"**.

65. On June 13, 2022, the Monitor formally notified the Phase 2 Qualified Bidders of the Phase 2 Bid Deadline extension. A copy of that notice to Phase 2 Qualified Bidders is attached hereto as **Appendix "R"**.

66. Considering the issuance of the 43-101 Report and the results of the same, the Monitor in consultation with the DIP Lenders and the Company, reached out to 8 parties on June 24, 2022, who actively engaged in the Phase 1 process and who the Monitor felt would reconsider engaging in the Opportunity given the results of the 43-101 Report. The Monitor further advised these parties of the Phase 2 Bid Deadline Extension. Despite the Monitor's best efforts to re-engage these parties, none came forward with a binding offer.

67. The Monitor received a total of 4 binding offers from the Phase 2 Qualified Bidders (the "**Phase 2 Bidders**").

68. Because the quantity and value of the binding offers received by the Phase 2 Qualified Bidders were materially less than the non-binding LOI's received in Phase 1, the Monitor coordinated calls with the Phase 2 Qualified Bidders to understand why they did not submit an offer and, for those who did, why there were significant reductions from the LOIs. The Monitor was advised that several factors contributed to the reduction or lack of an offer, which arose from the 43-101 Report, Phase 2 Bidder due diligence and site visits. Further information regarding the issues are disclosed in the Monitor's First Confidential Report.

69. In consultation with the DIP Lenders and the Company, the Monitor commenced three actions:

    a) Extended the Phase 2 Bid Deadline to August 12, 2022, to allow for the Phase 2 Bidders to submit improved offers. The notice issued to Phase 2 Bidders and the Service List is attached hereto as **Appendix "S"**;

    b) Engaged three liquidators to provide proposals to compare liquidating offers to the Binding Offers, and;

c) Reached out to certain Phase 1 and Phase 2 participants for a final time, advising of the extension and the DIP Lenders' consideration to accept liquidation offers.

70. On August 12, 2022, the Monitor received 6 binding offers.

71. In light of the final offers and in consultation with the DIP Lenders and the Company, on August 18, 2022, the Monitor selected the Successful Bidder and accepted their binding letter of offer.

72. The Successful Bidder offer is the best offer for the creditors and stakeholders in that:

a) the Monitor understands that the Successful Bidder intends to restart operations and therefore avoids a liquidation. Although unsecured creditors will not recover any money under the Successful Bidder offer, a restarted operation presents an opportunity to future business. A restarted operation will also preserve a number of jobs although the Monitor understands at a level less than prior to the insolvency, and achieves the objectives of the CCAA by preserving value as a functioning business greater than in a bankruptcy or liquidation;

b) the Successful Bidder offer did not require the Province of Newfoundland and Labrador to advance any further funds or provide any additional environmental indemnity;

c) the Successful Bidder provided for the repayment of the DIP on closing; and

d) the Successful Bidder offer is materially greater than any other binding offer, however, is insufficient to repay the senior secured creditors. The senior secured creditors will suffer a substantial shortfall.

73. Furthermore, considering the other offers the Monitor received, and in consultation with the Company and the DIP Lenders, the Monitor did not deem it necessary for there to be an Auction prior to selecting the Successful Bidder.

74. On August 24, 2022, the Monitor made application to further extend the SISP timelines, specifically to extend the deadline for completion of the definitive documentation to

September 14, 2022, the deadline for filing an Approval Motion in respect of the Successful Bid, and the Closing Date ad Outside date. On August 30, 2022 the Court approved the extended SISP timelines, and also extended the stay of proceedings to October 17, 2022, to match the outside date of closing. A copy of that order is attached hereto as **Appendix "T"**.

On September 26, 2022 the Monitor further extended the SISP timelines specifically to extend the deadline for the completion of the definitive agreements. A copy of that notice which was sent to the service list is attached hereto as **Appendix "U"**.

75. The Monitor has disclosed details of the SISP and any revisions to the SISP on its website at GrantThornton.ca/CFI.

76. Details regarding the SISP are commercially sensitive at this time as the Monitor and the Successful Bidder work towards Closing the Proposed Transaction, if this Court would approve of the Proposed Transaction. The Monitor is of the view that sealing the First Confidential Report will not prejudice any stakeholder and will protect the interests of all stakeholders of the CFI estate if in the unlikely event the Proposed Transaction does not close.

**PROPOSED TRANSACTION**

77. The Proposed Transaction contemplated by the Successful Bidder is a Reverse Vesting Order. The proposed Transaction contemplate the vesting out of all liabilities except the Retained Liabilities as outlined in **Appendix "V"**., and the retention of all assets with the exception of the Excluded Assets as outlined in **Appendix "W"**. The Excluded Liabilities and Excluded Assets are to be vested out to a ResidualCo, at which time the Monitor intends to seek a distribution order.

78. The consideration being provide is insufficient to pay out the secured creditors. The secured creditors will, if the transaction closes, suffered a substantial loss.

79. The effect of the proposed transaction on the stakeholders are as follows:

    a) Senior Secured Creditors – The senior secured creditors, should the Proposed Transaction close, suffer a substantial loss;

b) Unsecured Creditors – The Proposed Transaction contemplates vesting out all the liabilities of CFI except for the Retained Liabilities. The result being that the unsecured creditor will not recover anything;

c) CRA – The Monitor has withheld funds sufficient to cover any deemed trust claim. In addition any deem trust claim can be dealt with on distribution; and

d) Other creditors with possible priority claims – these creditor will have an opportunity to advance a priority claim through the application for distribution process.

80. The Successful Bidder's offer is the best offer for the creditors and stakeholders in that:

a) The Monitor understands that the Successful Bidder intends to restart operations and therefore avoids a liquidation. Although unsecured creditors will not recover any money under the Proposed Transaction, a restarted operation present an opportunity for future business. A restarted operation will also preserve a number of jobs although the Monitor understands at a level less than prior to insolvency, and achieves the objectives of the CCAA by preserving value as a functioning business greater than in a bankruptcy or liquidation;

b) The Successful Bidder's offer does not require PNL to advance any further funds or provide any additional environmental indemnity;

c) Provides for the repaying of the DIP on closing; and

d) Provides consideration on closing that is materially greater than any other binding offer received.

81. While the structure of the Proposed Transaction is unique, in so much as the Proposed Transaction involves the vesting out of certain of the CFI liabilities and excluded assets to ResidualCo, the structure has been previously used in CCAA proceedings, including recently to affect the transfer of mineral and mining licenses held by insolvent mining companies in the Harte Gold Corp. CCAA proceeding.

82. Furthermore, the Company has 64 material permits and licenses that are required to maintain its mining operation, including: mineral licenses, mine lease rentals, surface

lease rentals, crown lands lease, water use licenses and operational permits, all that are integral to the operations of the Company (collectively, the "**Permits and Licenses**").

83. Under a traditional asset sales transaction structure, most of these Permits and Licenses may be difficult to transfer to a third-party purchaser and, to the extent that such transfer would be possible, the steps required to affect such transfer would likely result in significant additional delays and costs which would be detrimental to the Successful Bidder, employees, suppliers, and possibly regulatory bodies.

84. Similarly, a plan of arrangement would require the support of CFI's senior secured creditors, who are already taking a substantial loss on their security and who would be better off exercising their security to culminate a sale of CFI than supporting a plan that would divert funds away from their security. The Monitor understands that the additional time and cost to run a plan would impact the Successful Bidder's proposed timelines to restart operations and therefore create additional closing risk.

85. The reverse vesting structure will enable the Proposed Transaction to be completed efficiently and expeditiously, without exposure to risks, costs, and delays of having to seek the transfer of the Permit and Licenses.

86. Furthermore, while there are many creditors whose claim will be included in the Excluded Liabilities under the Proposed Transaction who will therefore receive no recovery, there is no apparent prejudice to those creditors as there would have been no recovery for them had the transaction been structured as a traditional asset sale. It is the Monitor's view that no stakeholder is any worse off under the RVO structure than they would have been under another viable structure.

87. In addition, the DIP Lenders, who are also the senior secured creditors, support the structure of the Proposed Transaction. Accordingly, the Monitor is of the view that, with respect to the Proposed Transaction, there are significant benefits that are reasonable, justified, and appropriate in the circumstances to the reverse vesting structure as compared to a traditional asset sale structure or a plan of arrangement. The RVO structure provides an economic result at least as favourable as any other viable alternative and reduces costs to the estate as an RVO can be finalized much more efficiently than a traditional asset sale or plan of arrangement.

88. The Proposed Transaction provides for the following:

a) The Successful Bidder is required to top up the deposit. As at the date of this report the Successful Bidder has NOT completed this task. The Monitor is filing the approval relying on the Successful Bidders representation that the funds are enroute and will be with the Monitor prior to the hearing to approve the Proposed Transaction; and

b) The Successful Bidder can elect to extend the proposed closing date to a date no later than November 30, 2022 provide they provide, in advance, the holding costs for the requested extension.

**LEGAL PROCEEDINGS**

89. Other than the CCAA proceeding, the estate is involved in one other active legal proceeding:

a) As previously reported, Inaminka Marine Services Limited has the CFI barge under arrest in Marystown. Details on the arrest were provided in the Monitor's Third Report. The Monitor is vigorously defending the claim.

b) On September 2, 2022, the principal of IMSL, Mr. Spellacy also filed a claim for unpaid master's wages and filed a caveat release with the Federal Court on the matter. A copy of that filing is attached hereto as **Appendix "X"**. The Monitor is vigorously defending this claim.

c) The Monitor filed an emergency application to have the various orders, and the stay of proceedings, recognized by the Federal Court. The Federal Court scheduled a hearing on September 28 and committed to a decision by October 7, 2022.

d) On October 5, 2022 the Federal Court provided its decision and stayed the IMSL actions to October 17, 2022 or any later date determined by order of this Court. A copy of that decision is attached hereto as **Appendix "Y"**.

90. The Monitor has consented to the filing of various statements of claim by lien holders in order to perfect their lien claims. The lien claims will be dealt with in a claims process should one be sought out by the Applicant and further approved by the Court.

## ACTIVITIES OF THE MONITOR - OTHER

91. The Monitor has continued to complete the following:

a) The Monitor has continued to fully fund payroll for the remaining employees to Ceridian Canada Ltd. ("**Ceridian**") and has paid all outstanding wages. Ceridian has remitted all applicable source deductions to the Crown on behalf of the Monitor; and

b) The Monitor has paid all regulatory costs owed to the Mineral Lands Division of the Province of Newfoundland and Labrador under the Mineral Act RSNL 1990, c. M-12 relating to mineral licenses, mine and surface leases, water-use licenses and water monitoring charges.

c) The Monitor, with assistance from CFI Management, has filed all outstanding tax and GST/HST returns for Canada Fluorspar Inc., Canada Fluorspar (NL) Inc. and Newspar.

## MATERIAL ADVERSE CHANGE

92. The Monitor is not aware of any issue or condition that could be considered a Material Adverse Change pursuant to s.23(1)(d), or the DIP Financing Agreement.

93. The Monitor continues to be of the opinion that s.23(1)(h) does NOT apply and it would be more beneficial to the Company's creditors to continue with the SISP within the CCAA proceeding.

## CASH FLOW UPDATE AND REVISED FORECAST

94. The Monitor has prepared an analysis of budget to actual as of September 18, 2022. This is attached hereto as **Appendix "Z"**. Overall, the Monitor is tracking ahead of budget by $259,000 on a net basis, being ahead of forecast on the cash inflows by $6,000 and ahead of forecast on expenses by $253,000. In addition, the Monitor has attached hereto as **Appendix "AA"** a statement of receipts and disbursements to September 20, 2022.

95. The Monitor has prepared a revised cash flow forecast, attached hereto as **Appendix "BB"** (the "**Revised Cash Flow Forecast**") as a result of the Monitor's proposed extension to the SISP. The Cash Flow Forecast covers the period from September 19, 2022 to February 26, 2023 (the "**Revised Cash Flow Period**");

96. The Cash Flow Forecast has been prepared by the Monitor using probable and hypothetical assumptions set out therein (the "**Probable and Hypothetical Assumptions**");

97. The requirement of s. 23(1)(b) of the CCAA states that the Monitor is to review the Revised Cash Flow Forecast for reasonableness. As the Directors of the Company have resigned, the Monitor has prepared the Revised Cash Flow Forecast based on the actual expenses incurred since the date of the Interim Receivership and Initial Order. The Monitor is of the opinion that the Revised Cash Flow is reasonable in all material respects:

(a) The Probable and Hypothetical Assumptions are consistent with the purpose of the Revised Cash Flow Projection;

(b) As at the date of this Fifth Report, the Probable and Hypothetical Assumptions developed by the Monitor are suitably supported and consistent with the Company's plans and provide a reasonable basis for the Revised Cash Flow Forecast;

(c) The Revised Cash Flow Forecast reflects the Probable and Hypothetical Assumptions.

98. The Company's cash position, held in trust with the Monitor, as of September 20, 2022 is $2,665,554.84. The Company is forecasting future cash receipt of $1,500,000 representing a payment to the Monitor on account of holding costs from the Successful Bidder, and $3,034,000 in future disbursements from the date of this report through to February 26, 2023. This disbursement includes $76,000 to cover the unremitted withholding taxes payable, and an estimated $85,000 WEPP priority claim from Service Canada.

## GENERAL COMMENTS ON THE CASHFLOW

99. In addition, the Monitor makes the following general comments on the Revised Cash Flow Forecast:

(a) Disbursements appear to be consistent with the level of operations since the date of the Initial Order;

(b) The Revised Cash Flow Forecast includes the encumbering of estimated priority claims by the Canada Revenue Agency and Employment and Social Development Canada relating to WEPPA. The Monitor understands a portion of those claims would have priority over the secured creditors in relation to the Company's current assets;

(c) Disbursements include forecast payments to the Company's legal counsel and financial advisors, and the Monitor and its legal counsel.

100. The Monitor has the funds in place to support the requested extension of the Revised SISP and stay of proceedings.

101. The Successful Bidder has an option to extend the closing of the Proposed Transaction to no later than November 30, 2022, provide they pay the Monitor, in advance, the estimated holding costs for the extension. The Cash Flow Forecast assumes the Successful Bidder will avail of this extension and pay the Monitor $1,500,000 being the estimated holding costs to November 30, 2022.

**RECOMMENDATION**

102. For the reasons set out in this Fifth Report, the Monitor respectfully recommends that this Court:

(a) Approve the activities of the Monitor and its legal council to the date of this Fifth Report;

(b) Approve the recommendation of the Monitor in the First Confidential Report.

(c) Approving the Proposed Transaction as disclosed in the First Confidential Report;

(d) Granting a Sealing Order of the First Confidential Report

(e) Grant an extension to the stay of proceedings to February 28, 2023.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 6th day of October 2022.

**GRANT THORNTON LIMITED,**
**SOLELY IN ITS CAPACITY AS MONITOR**
**OF THE COMPANY, AND NOT IN ITS PERSONAL CAPACITY**

Per: _____

Phil Clarke, CPA, CA, CIRP, LIT

Senior Vice-President

# Exhibit “L-1”

## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Monday, October 24, 2022 4:27 PM
**To:** Deborah Hutchings
**Subject:** FW: 0082EP-Barge Second Visit Daily Progress Report RevB
**Attachments:** 0082EP-DPR0002_RevB-Daily Progress Report-Nov 26, 2021.pdf

Photos ofside shell damage

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Sunday, December 5, 2021 10:29 AM
**To:** Anthony Barclay <barclayanthony0@gmail.com>
**Subject:** FW: 0082EP-Barge Second Visit Daily Progress Report RevB

**From:** Toby Butler <toby.butler@ams-ink.ca>
**Sent:** December 2, 2021 8:50 AM
**To:** Jason Flood <jflood@canadafluorspar.com>
**Cc:** Dick Spellacy <richardspellacy@hotmail.com>
**Subject:** 0082EP-Barge Second Visit Daily Progress Report RevB

Jason

A minor revision to the report for the second visit to the barge. Photo titles for ballast tank No.5 were incorrectly named ballast tank No.6

This Type-O has been corrected, the revised report is attached

Regards

**Toby Butler**
Vice President / Naval Architect
**Phone** (709) 746-4328
**Email** Toby.Butler@ams-ink.ca
**Web** www.ams-ink.ca

This is Exhibit L referred to in the Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 24th
day of October, 2022.

This message, including attachments, is confidential and may be privileged. If you are not an intended recipient, please notify the sender then delete and destroy the original message and all copies. You should not copy, forward and/ or disclose this message, in whole or part, without permission of the sender.

# Exhibit "L-2"

Canada Fluorspar Inc. (CFI)
Cash Flow Projection (CCAA - Care and Maintenance - Sale and Investor Solicitation Process)
For the Period of Mar 7, 2022 to February 26, 2022
(in 000s CAD)

| Week No. | Notes | Actual | 31 | 32 | 33 | 34 | 35 | 36 | 37 | 38 | 39 | 40 | 41 | 42 | 43 | 44 | 45 | 46 | 47 | 48 | 49 | 50 | 51 | 52 | 53 | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Week Start | | 07-Mar-22 | 19-Sep-22 | 26-Sep-22 | 03-Oct-22 | 10-Oct-22 | 17-Oct-22 | 24-Oct-22 | 31-Oct-22 | 07-Nov-22 | 14-Nov-22 | 21-Nov-22 | 28-Nov-22 | 05-Dec-22 | 12-Dec-22 | 19-Dec-22 | 26-Dec-22 | 02-Jan-23 | 09-Jan-23 | 16-Jan-23 | 23-Jan-23 | 30-Jan-23 | 06-Feb-23 | 13-Feb-23 | 20-Feb-23 | |
| Week Ending | | 18-Sep-22 | 25-Sep-22 | 02-Oct-22 | 09-Oct-22 | 16-Oct-22 | 23-Oct-22 | 30-Oct-22 | 06-Nov-22 | 13-Nov-22 | 20-Nov-22 | 27-Nov-22 | 04-Dec-22 | 11-Dec-22 | 18-Dec-22 | 25-Dec-22 | 01-Jan-23 | 08-Jan-23 | 15-Jan-23 | 22-Jan-23 | 29-Jan-23 | 05-Feb-23 | 12-Feb-23 | 19-Feb-23 | 26-Feb-23 | |
| **Cash Inflows** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Collection of Receivables | A | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| Other - Sale of Inventory | B | 5,637 | 100 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 5,737 |
| Other - Sale of Equipment | C | 175 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 175 |
| Other | | 178 | - | - | - | 1,500 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 1,678 |
| **Total Cash Inflows** | | 5,989 | 100 | - | - | 1,500 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 7,589 |
| **Cash Outflows** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Payroll | | 2,277 | - | 185 | - | 185 | - | 185 | 55 | 185 | - | 185 | 96 | - | - | - | - | - | - | - | - | - | - | - | - | 3,354 |
| Maintenance Costs | | 111 | 8 | 8 | 8 | 8 | 8 | 8 | 8 | 8 | 8 | 8 | 8 | - | - | - | - | - | - | - | - | - | - | - | - | 199 |
| Fuel | | 174 | 15 | 35 | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 35 | - | - | - | - | - | - | - | - | - | - | - | - | 379 |
| Freight | | 5 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | - | - | - | - | - | - | - | - | - | - | - | - | 16 |
| Utilities | | 382 | 18 | 18 | 18 | 18 | 20 | 20 | 20 | 22 | 22 | 22 | 22 | - | - | - | - | - | - | - | - | - | - | - | - | 602 |
| Insurance | | 520 | - | 1 | 85 | 10 | - | - | 1 | 85 | 10 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 713 |
| Materials/Supplies | | 26 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | - | - | - | - | - | - | - | - | - | - | - | - | 37 |
| Professional Fees - Restructuring | | 1,505 | 75 | 75 | 75 | 75 | 75 | 75 | 75 | 75 | 75 | 75 | 50 | 25 | 20 | 20 | - | 35 | 25 | 15 | 15 | 5 | - | 5 | 10 | 2,480 |
| Other/Miscellaneous | | 20 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 1 | | | | | | | | | | | | | 51 |
| Inventory Sale Costs | B | 517 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 517 |
| HSBC Inventory Sale Agreement | B | 2,732 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 2,732 |
| Telephone/Communications | | 80 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | - | - | - | - | - | - | - | - | - | - | - | - | 135 |
| Environmental | | 113 | 10 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | 5 | - | - | - | - | - | - | - | - | - | - | - | - | 173 |
| Logistics/Warehousing | | 3 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 3 |
| Contingency | | - | 10 | - | 10 | - | 10 | - | 10 | - | 10 | - | 10 | - | - | - | - | - | - | - | - | - | - | - | - | 60 |
| Equipment Lease Payments/Buyouts | | 198 | 4 | 2 | 4 | 2 | 4 | 2 | 4 | 2 | 4 | 2 | 2 | - | - | - | - | - | - | - | - | - | - | - | - | 229 |
| Barge | | 31 | 6 | - | - | - | - | 6 | - | - | - | 6 | - | - | - | - | - | - | - | - | - | - | - | - | - | 49 |
| Mining Leases / Licenses | | 131 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 131 |
| SLR/AGP - NI 43-101 Mining Report | | 372 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 372 |
| **Total Cash Outflows** | | 9,196 | 158 | 337 | 232 | 326 | 149 | 324 | 205 | 405 | 161 | 326 | 236 | 25 | 20 | 20 | - | 35 | 25 | 15 | 15 | 5 | - | 5 | 10 | 12,230 |
| **Net Cash Flow** | | (3,207) | (58) | (337) | (232) | 1,174 | (149) | (324) | (205) | (405) | (161) | (326) | (236) | (25) | (20) | (20) | - | (35) | (25) | (15) | (15) | (5) | - | (5) | (10) | (4,641) |
| **Cash Balance** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Opening Cash Balance | | 321 | 1,814 | 1,756 | 1,419 | 1,187 | 2,361 | 2,212 | 1,888 | 1,683 | 1,278 | 1,117 | 791 | 479 | 369 | 349 | 329 | 329 | 294 | 269 | 254 | 239 | 234 | 234 | 229 | 321 |
| DIP Financing - Bridging Finance (Receiver) | | 1,450 | | | | | | | | | | | | | | | | | | | | | | | | 1,450 |
| DIP Financing - Prov. of Newfoundland | | 3,250 | | | | | | | | | | | | | | | | | | | | | | | | 3,250 |
| Priority Charges | | - | - | - | - | - | - | - | - | - | - | - | (76) | (85) | - | - | - | - | - | - | - | - | - | - | - | (161) |
| Net Cash Flow | | (3,207) | (58) | (337) | (232) | 1,174 | (149) | (324) | (205) | (405) | (161) | (326) | (236) | (25) | (20) | (20) | - | (35) | (25) | (15) | (15) | (5) | - | (5) | (10) | (4,641) |
| **Closing Cash Balance** | | 1,814 | 1,756 | 1,419 | 1,187 | 2,361 | 2,212 | 1,888 | 1,683 | 1,278 | 1,117 | 791 | 479 | 369 | 349 | 329 | 329 | 294 | 269 | 254 | 239 | 234 | 234 | 229 | 219 | 219 |

Notes:

This is Exhibit L referred to in the Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 24th day of October, 2022

**Appendix M**

Affidavit of Richard A. Spellacy – February 8, 2023

e-document T-279-22-ID 49

| FILED | FEDERAL COURT<br>COUR FÉDÉRALE<br><br>February 15, 2023<br>15 février 2023 | DÉPOSÉ |
|---|---|---|
| Tanya Smith | | |
| STJ | 23 | |


# TAB 3 - AFFIDAVIT OF RICHARD A. SPELLACY DATED FEBRUARY 8, 2023

**Court File No. 279-22**

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED**

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.**

**Defendants**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL INTERESTED IN THE SHIP "BARGE H-404"**

**Defendants**
*(In Rem)*

---

**AFFIDAVIT**
**OF**
**RICHARD A. SPELLACY**

---

I, Richard A. Spellacy, of the City of St. John's, in the Province of Newfoundland and Labrador, being duly sworn, do depose and say that:

1. I am the sole shareholder, officer and director of the Plaintiff Inaminka Marine Services Limited ("**IMS**") in the within matter and, as such, I am aware of the matters relating to the claim of IMS against the Defendants and the arrest of the ship being CFI Pontoon 1, "BARGE H-404" (the "**Barge**").

2. I have read the within Motion of IMS, dated November 8, 2022 seeking an order to lift the stay of its action (the "**Action**"), reinstatement of the arrest of the Barge, and leave to bring a Motion before this Court for the sale of the Barge pursuant to the Federal Court Rules (all of which is referred to herein as "**IMS Motion**") and I give this second Affidavit in further support of IMS's Motion (the "**Second Affidavit**").

3. I gave my first Affidavit duly sworn to and dated October 24, 2022 in support of IMS's Motion (the "**First Affidavit**") which I understand from IMS's solicitor, Deborah L. J. Hutchings, KC, ("**Hutchings**") was initially filed with the Federal Court on November 8, 2022. Since that date, other matters and events have occurred respecting the appointment of Phil Clarke ("**Clarke**") of Grant Thornton Limited ("**GTL**") as Interim Receiver under the *Bankruptcy and Insolvency Act* ("***BIA***") of the Canada Fluorspar (NL) Inc. ("**CFINL**") and the Canada Fluorspar Inc. ("**CFI**") (collectively the "**Companies**") (the "**BIA Proceeding**"), and the initial order pursuant to the *Companies Creditor Arrangement Act* ("***CCAA***") wherein Clarke/GTL were appointed Monitor over CFINL and CFI (the "**CCAA Proceeding**"), and these matters and events need to be brought to the attention to this Honourable Court in the adjudication of the IMS Motion by way of this supporting Second Affidavit.

4. I further state that these such matters herein disposed to in this my Second Affidavit are true, except where I have stated to be based upon information and belief.

5. In my First Affidavit I explained that I reviewed the Affidavit of Clarke dated October 6, 2022 ("**Clarke's Affidavit**") which he made in support of the Monitor's application to the SCNL dated October 6, 2022 (the "**Monitor's Application**") seeking approval of the sale of the assets of the Companies. A complete copy of the Monitor's Application, including Clarke's Affidavit, is attached to my First Affidavit as Exhibit "J".

6. Upon review of the Monitor's Application, it was obvious that there was a significant change in information of the status of the sale, and the circumstances of and manner in which the sale of the assets was to be completed than what was previously communicated by the Monitor and communicated by CFINL's counsel during the CFI Motion before Mr. Justice Richard Southcott of the Federal Court ("**Justice Southcott**"). This change in information and circumstances were not known to IMS or the Federal Court prior to receipt of the Monitor's Application dated October 6, 2022 and filed in the CCAA Proceedings.

7. Both before and after I gave my Affidavit of October 24, 2022, I was back and forth to St. John's, NL as I was travelling offshore and outside of Canada for work, and it wasn't until after October 24, 2022 that I became fully aware, through my discussions with Hutchings of the type of transactional arrangement the Monitor had negotiated with the successful bidder of the Companies' assets (the "**Successful Bidder**") and the consequences thereof.

8. I am advised by the said Hutchings, and I do verily believe, that rather than selling the assets of the Companies to the Successful Bidder, the shares of the Companies were to be sold by way of a reverse vesting structure or a Reverse Vesting Order ("**RVO**"). I understand from Hutchings that the revised or new sale structure, that is the RVO, is a very different and more complicated structure than the sale of the assets.

9. The RVO required a Subscription Agreement between the Companies as vendor, and the Successful Bidder and a new company to be incorporated ("**Newco**"), as purchaser, for the purchase of the shares of the Companies.

10. In order to complete the RVO, an extension of time and, in turn, the stay of proceedings were to be extended until February 26, 2023 to complete the new arrangement or transaction, being the RVO. While at the hearing of the Monitor's Application on October 12, 2022, I understand from Hutchings that counsel for the Monitor indicated to the Court that it would likely take that amount of time <u>to complete the pieces of the new sale arrangement</u>; however, there was no mention made of dealing with the creditor's claims as Justice Southcott understood would be the case and expected to occur during the extended stay period to February 2023. CFINL, through it's solicitor, explained to Justice Southcott that the Barge would be taken as part of the general assts of the Companies and sold to the purchaser in the upcoming sale and that the proceeds of the sale are expected to be distributed among the secured creditors and unsecured creditors. I considered it to be a very important piece for Justice Southcott in his decision of October 5, 2022 that creditors, like IMS, would be given an opportunity to argue for their respective claims before the CCAA Proceedings and sale were completed. Therefore, when I learned from Hutchings that no mention was made at the hearing on October 12, 2022 for allocation of time to the creditors to prove claims before Justice MacDonald of the

Supreme Court of Newfoundland ("SCNL"), and, more importantly, that no proceeds from the proposed sale would be available to either the remaining secured or unsecured creditors, I knew then that there was no intention by the Monitor to consider IMS's position that it has a priority claim against the proceeds of the Barge.

11. I also understand from Hutchings that the RVO would result in the Successful Bidder buying only the shares of the Companies and become the sole shareholder of the Companies. All "excluded assets" and "excluded liabilities" of the Companies were to be transferred or "vested out" of Newco to a company incorporated by the Monitor (the "**ResidualCo**"). There was no information from the Monitor on what assets would be included and, in particular, whether this would include the Barge. This left me with no confidence that IMS would be notified of the details of the RVO as it affected IMS and whether IMS would be paid anything from this arrangement.

12. While the Monitor says that this arrangement will not result in any "material prejudice to the creditors", nor will it "impair any of the creditors' rights that they would otherwise have under the original asset sale", it has not been fully explained by the Monitor or contained in the Monitor's Application or Affidavit of Phil Clarke how this will work. There is little to no transparency to the creditors under the CCAA Proceedings, and it is difficult for IMS to have any confidence that it will be paid anything under this new arrangement. Therefore, regardless of the details, I believe that IMS will be prejudiced by this new arrangement. It seems to me that ultimately the Barge will be sold to a different entity, other than the Successful Bidder directly. The purchaser of the assets, being the Successful Bidder, in general, may do with the assets as it sees fit, including sell them or pieces of them to another third-party buyer or, if it includes the Barge, removing the Barge from the jurisdiction. If any of these actions occur, it will be very difficult for IMS to establish its position to the SCNL of being a secured creditor of CFINL and holding a maritime lien against the Barge. Further, any chance IMS previously had to realize its secured claim by way of a maritime lien against the Barge under the Federal Court, will be lost.

13. It is intended by the Monitor to ultimately assign or to cause ResidualCo to be assigned into bankruptcy upon completion of the above transactions. If the Barge becomes an asset of ResidualCo, it will be sold at bankruptcy prices, thereby making it all the more difficult for IMS to assert its secured claim by way of a maritime lien over the Barge.

14. The further details of the RVO are apparently contained in the Monitor's First Confidential Report and the Subscription Agreement, both of which, pursuant to the to the Monitor's request to SCNL are sealed from the public. Consequently, keeping the Report and Subscription Agreement confidential from the creditors, like IMS, hides critical information from the creditors which may be prejudicial to their respective positions in terms of recovery of the money owed to them by the Companies or either of them.

15. Further, it is clear from Phil Clarke's sworn statements dated October 6, 2022 that not only are the secured creditors taking a substantial loss under the CCAA Proceeding, they will have little to no recovery of the money owed to them by the Companies under the RVO. Additionally, the unsecured creditors will receive nothing. Consequently, IMS, with a maritime lien against the Barge, will be unable to assert its claim under the CCAA Proceeding.

16. I understood from Hutchings, and do verily believe, that in the late afternoon of October 11, 2022, the day preceding the hearing of the Monitor's Application, she received by way of email a copy of a letter of same date from the Monitor addressed to PricewaterhouseCoopers Inc. and to the Government of Newfoundland and Labrador. A true copy of the letter is attached hereto as Exhibit "A". In the letter, the Monitor advised that he would not be seeking approval of the RVO the following day as the Successful Bidder had failed to pay the required "top up of the deposit" in the amount of $1,400,000.00 which was to be deposited with the Monitor prior to the October 12, 2022 hearing. Further, the letter states, among other things, that "CFI's cashflow attached to the Monitors 5th Report as Appendix BB covering the period of September 19, 2022, through to February 26, 2023 contemplated that the Successful Bidder...having [failed to pay] to the Monitor an additional $1,400,000.00... the Monitor's view is that material adverse change has occurred in respect of the CFI's Proposed Transaction and, therefore, the go forward cashflows are based on the assumption the Proposed Transaction will close no later than November 30, 2022".

17. As I explained in my First Affidavit, the "Revised Cashflow" set out in Phil Clarke's Affidavit of October 6, 2022 is short by an approximate amount of $1,400,000, being the amount of the further funds, which was to be deposited by the Successful Bidder prior to the

hearing of October 12, 2022. Without this infusion of funds, the mine could not continue its operation. In my First Affidavit, I mentioned that I heard from a third-party that the Barge was up for sale. By the time I spoke with the broker who was preparing for the sale, the Barge was removed from sale. It has been my suspicion that the Barge was offered by the Monitor for sale to raise funds to keep the CCAA Proceeding moving along and the operation of the mine continuing.

18. Caterpillar Financial Services Limited ("**CAT Financial Credit**"), in accordance with documentation filed by the Monitor, had a secured claim against the Companies in the amount of $705,450.39. I understand from Hutchings that CAT Financial Credit had security for the Companies' indebtedness from the Caterpillar construction and mining equipment at the mine site (the "**CAT Equipment**"). During the hearing on October 12, 2022, CAT Financial Credit asked the Court to carve out of its order that day the CAT Equipment since CAT Financial Credit was going to take possession of its security equipment. The Monitor, in reply to CAT Financial Credit's request, stated that the CAT Equipment was necessary and a key component to the completion of the RVO and that the CAT Equipment was also necessary for continuing the ongoing operations of the mine. Hutchings, who attended the hearing, advised me that Justice MacDonald of SCNL, who presided over the Monitor's Application, said that he would need a lot more details from both parties before he could decide whether CAT Financial Credit could remove the CAT Equipment. I understand from Hutchings, who advised me that she was in contact with CAT Financial Credit, that CAT Financial Credit did not file anything with the SCNL to support the return of the CAT Equipment and the Monitor has since released the CAT Equipment unto CAT Financial without seeking an order from SCNL.

19. Further, I understand from Hutchings, and I do verily believe, that during the Monitor's Application, there was an approval of an Interim Distribution Order, made with the Monitor's approval, which ordered the payment to HSBC Bank Canada of $5.2 million towards debts owing to it by the Companies. A further $1.66 million was to be held by the Monitor to deal with agreements reached on settlements negotiated with (unknown) creditors, but no further details were given. Nothing has been filed by the Monitor to support these two payments. It appears that other creditors like IMS have been prejudiced by the Monitor's actions in paying HSDC and settling with other creditors in secret.

20. GTL, as Monitor, filed the Sixth Report of Grant Thornton Limited, in its capacity of Monitor, and dated October 27, 2022, wherein the Monitor confirmed,

(1) that a Material Adverse Change in the CCAA Proceeding has occurred;

(2) the Successful Bidder has yet to provide the top up deposit to close the New Transaction;

(3) the Monitor intends to retain the deposit of $750,000 made by the Successful Bidder;

(4) the "DIP Lenders do not support the Proposed Transaction without the payment of the deposit top up. As a result, the Monitor sought an extension of the stay of proceedings until February 26, 2023. This period will allow the DIP Lenders time to re-evaluate the situation and determine a revised path forward. The Court approved this application and granted the order"; and

(5) the "DIP Lenders supported the Monitor's application for an extension to the stay of proceeding to give the Monitor, Company, and the DIP Lenders time to re-evaluate their options. Those options could include re-running the SISP, running a different kind of sales process, closing the Proposed Transaction with the Successful Bidder, or a liquidation. In order to reduce the holding costs for the mine, the Monitor has determined that it is necessary to move the mine into a cold idle mode".

I attach hereto as Exhibit "B" to this my Affidavit a true copy of the said Sixth Report of GTL dated October 27, 2022.

21. I spoke with those who were working with CFINL at the mine and I was told that the employees of the fluorspar mine at the Terminal all received their lay off notices in or about November, 2022 and that the mine shut down its operations around the same time and has gone into 'cold idle mode', as referred to by Clarke in the Sixth Report of GTL.

22. I have not received from the Monitor or heard anything of the current status of the Monitor's plans for the assets. IMS and I are very worried that unless this Honourable Court orders the stay to be lifted, the availability of IMS's maritime lien against the Barge will be lost forever and neither IMS nor I will be paid for the services we were asked by the Companies to provide respecting the utilization of the Barge at the Terminal. With the

sale of the Companies assets under the CCAA Proceedings having failed and an alternate plan being developed and implemented by the Monitor being unknown as of the de hereof, I am concerned that the value of the Barge will deteriorate such that the Barge will be worth no more than scrap. In my position as master of the Barge, I was aware of the appraised value of the Barge and was confident that IMS, pursuant to its claim and arrest thereof, would be able to sell the Barge in a timely manner under a sale pursuant to the *Federal Courts Rules*. I believe that there would have been enough money realized from its sale to pay in full IMS's claim, my claim for Master's Wages owing, as further described by me in my First Affidavit, legal costs owing to IMS and myself, Sherriff's and Bailiff's fees pursuant to the sale of the Barge, with money left over to pay into court in the CCAA Proceeding, or as ordered by the Federal Court.

23. I am aware that the Barge has been secured alongside at a private facility at Marystown, NL since at least October, 2021. With the exception of one occasion subsequent to IMS's arrest of the Barge, the Barge has continued to sit idle alongside at a private facility in Marystown. It has not been used, nor maintained, nor has its generators been started since January, 2022. With respect to the one exception, I understand that the owner of the facility where the Barge laid anchor, asked that the Barge be moved once to allow a ship to tie up at the facility where the Barge has been anchored. This movement of the Barge was certainly not enough to circumvent the continued deterioration of the Barge, which deterioration is ongoing and will accelerate as time progresses. It is my and IMS's concern that without any ongoing maintenance and utilization of the Barge, its deterioration will accelerate. Rust has and will quickly form on the Barge's interior and exterior surfaces, on its generators and working components. As a consequence, the Barge's market value will diminish exponentially such that a sale may not produce enough funds to pay the amounts owing to IMS and me and cover the fees and costs relating to the sale thereof unless the Barge can be maintained soon. Based on the above, IMS will be seriously prejudiced if the stay of Justice Southcott is not lifted now to allow IMS to re-arrest the Barge and proceed with the sale of it pursuant to the Federal Courts Rules while it can still sell for a price to cover the costs of its sale and pay IMS's and my master's wages claims.

24. On the basis of the forgoing and in recognition of IMS's claim against CFI and the Barge, I support IMS's position that there has been a material change in the circumstances for

this Honourable Court to exercise its jurisdiction over IMS's claim and to lift the stay of its Action, to reinstate the arrest of the Barge, and to grant IMS leave to make a motion to this Court relating to the sale of the Barge under the arrest and pursuant to the provisions of the *Federal Courts Rules.*

25. All facts deposed herein I believe to be true, except where I have stated otherwise. I give this Affidavit knowing that it is a criminal offense to make a false statement.

**SWORN** before me at the City of St. John's, in the Province of Newfoundland and Labrador, this 8th day of February, 2023, before me:

Commissioner for Oaths / Barrister / Notary Public

**RICHARD A. SPELLACY**

DEBORAH L.J. HUTCHINGS, KC
Barrister of the Supreme Court of Newfoundland & Labrador

# Exhibit “A”

MCINNES COOPER

**Meghan King**
Direct +1 (709) 724 8228
meghan.king@mcinnescooper.com

5th Floor
10 Fort William Place
PO Box 5939
St. John's NL
Canada A1C 5X4
Tel +1 (709) 722 8735 | Fax +1 (709) 722 1763

This is Exhibit A referred to in the Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 8th day of February, 20 23.

DEBORAH L.J. HUTCHINGS, KC
Barrister of the Supreme Court of
Newfoundland & Labrador

Our File: 207444

October 11, 2022

***Via email and mail***

To whom it may concern:

Dear Sir/Madam:

**RE: 2022 01G 0709**
**Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively, the "Companies")**
**Our Client: Grant Thornton Limited, Court-Appointed Monitor of the Companies**

With respect to the above-noted matter, please find enclosed herewith correspondence from Grant Thornton Limited.

We trust this is in order.

Yours truly,

Meghan King
Lawyer

MK/tly
Encl.

Grant Thornton

October 11, 2022

**Grant Thornton Ltd**
Nova Centre, North Tower
Suite 1000, 1675 Grafton Street
Halifax, NS
B3J 0E9

T +1 902 421 1734
F +1 902 420 1068

PricewaterhouseCoopers Inc.
PwC Tower
18 York Street. Suite 2600
Toronto, Ontario
Attention: Michael.mctaggart@pwc.com

Government of Newfoundland and Labrador
Department of Industry, Energy and Technology
PO Box 8700
50 Elizabeth Avenue
St. John's, NL A1B 4J6
Attention: Minister
Facsimile: 709-729-2766

All:

We write to you in our capacity as the Court Appointed Monitor of Canada Fluorspar Inc., Canada Fluorspar (NL) Inc., and Newspar (a General Partnership) (collectively "**CFI**" or the "**Companies**") in respect of its proceeding under the *Companies' Creditors Arrangement Act* ("**CCAA**").

CFI's cashflow forecast attached to the Monitor's 5th Report as Appendix BB covering the period of September 19, 2022, through to February 26, 2023 contemplated that the Successful Bidder as defined in the Sales Solicitation and Investment Process ("**SISP**") having paid to the Monitor an additional $1,400,000, being the agreed upon top up of the deposit required by the SISP, to be received by the Monitor prior to the October 12, 2022 hearing to approve the Proposed Transaction.

The Successful Bidder has NOT paid the required top up of the deposit.

After the breach of numerous deadlines provided by the Monitor, and despite the Monitor's effort to avoid delays in closing the Proposed Transaction, and the failure of the Successful Bidder to meet multiple committed deadlines to provide the top up of the deposit, or provide definitive evidence the funds have been wired to the Monitor, the Successful Bidder has not made the deposit top up.

We understand that the support of the Proposed Transaction by the DIP Lenders, who are also CFI's the senior secured lenders, is contingent on the receipt of the top up of the deposit prior to the October 12, 2022 hearing to approve the Proposed Transaction.

Given the forgoing, the Monitor's view is that material adverse change has occurred in respect of the CFI's Proposed Transaction and therefore the go forward cashflows which are based on the assumption the Proposed Transaction will close no later than November 30, 2022. As required by s.23(1)(d)(i) of the CCAA, the Monitor intends on filing a report with the Court regarding this change without delay.

Your truly,

Grant Thornton Limited
*In its capacity as Court-Appointed Monitor of Court Appointed Monitor of Canada Fluorspar Inc., Canada Fluorspar (NL) Inc., and Newspar (a General Partnership)*

Phil Clarke, CPA, CA, CIRP, LIT
*Senior Vice President*

cc. Supreme Court of Newfoundland and Labrador, Darren O'Keefe (counsel to CFI), Service List in the Proceeding

## Deborah Hutchings

**From:** Young, Trina <trina.young@mcinnescooper.com>
**Sent:** Tuesday, October 11, 2022 3:13 PM
**To:** info@valminfireprotection.com; raluca.pop@epiroc.com; McGrath, Beth; Sherry Pottie; bbankrup@ford.com; graham.page@pwc.c o m; gboyd@french-associates.com; Stephanie.a.leroux@servicecanada.gc.ca; awheeler@gov.nl.ca; corporateca@dllgroup.com; O'Dea, Jamie; pam.smith@kiewit.com; delliott@pennecon.com; derekpardy@pardyswaste.com; michael.mctaggart@pwc.com; swarren@hickmanmotors.ca; lkorbak@toromont.com; David Williams; Keith Morgan; Julie.l.matte@servicecan ada.gc.ca; karine.leblanc@acoa-apeca.gc.ca; sean.macneil@ca.gt.com; michaelday@gov.nl.ca; davidrodgers@gov.nl.ca; jforan@deloitte.ca; dennis.wiebe@dentons.com; spittman@bensonbuffett.com; robert.kennedy@dentons.com; george@chaitons.com; boneill@goodmans.ca; kmacleod@deloitte.ca; sbelbin@curtisdawe.com; david@hounsell.ca; brian_pettit@hsbc.ca; Deborah Hutchings; phil.clarke@ca.gt.com; johannar.howes@labour-travail.gc.ca; Derrick Watton; sbomhof@t o rys.com; Baird, Maeve; aaronmorrow@gov.nl.ca; philreynolds@deloitte.ca; Lee Ballett; lianeprice@gov.nl.ca; aphilpott@coxandpalmer.com; bmurphy@monmar.nf.net; darren@okeefeandcompany.com; judy.langlais@global.komatsu; Joe Thorne
**Cc:** King, Meghan; Spencer, Geoffrey
**Subject:** RE: Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) [IWOV-Active.FID4642736]
**Attachments:** Letter to Creditors(1) - October 11, 2022.PDF

Good afternoon:

Please find attached correspondence from Meghan King with respect to the above-noted matter.

Regards
Trina

MCINNES COOPER

**Trina Young**
Legal Assistant
McInnes Cooper

tel +1 (709) 724 3620 | fax +1 (709) 722 1763

5th Floor
10 Fort William Place
PO Box 5939 St. John's, NL, A1C 5X4

NOTICE The health, safety and welfare of our people, our clients and our communities, as well as our commitment to continued service, is our top priority. Please visit our COVID-19 Resource Centre to learn more about how we can support you on the path forward.
AVIS La santé, la sécurité et le bien-être de nos gens, de nos clients et de nos communautés sont notre priorité au même titre que notre engagement envers un service continu. Nous vous invitons à consulter notre Centre de ressources COVID-19 pour savoir ce que nous pouvons faire pour vous soutenir sur la voie à suivre.

Notice This communication, including any attachments, is confidential and may be protected by solicitor/client privilege. It is intended only for the person or persons to whom it is addressed. If you have received this e-mail in error, please notify the sender by e-mail or telephone at McInnes Cooper's

# Exhibit “B”

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

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

**AND IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**"); and

**AND IN THE MATTER OF** a Plan of Compromise or Arrangement of the Company;

This is Exhibit B referred to in the Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 8th
day of February, 20 23.

DEBORAH L.J. HUTCHINGS, KC
Barrister of the Supreme Court of
Newfoundland & Labrador

**SIXTH REPORT OF GRANT THORNTON LIMITED,**

**IN ITS CAPACITY AS MONITOR**

**UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36**

**OF CANADA FLUORSPAR (NL) INC. AND CANADA FLUORSPAR INC. AND NEWSPAR.**

**October 27, 2022**

Grant Thornton

**Grant Thornton Limited,**
**Court Appointed Monitor**

Suite 300 - 15 International Place
St. John's, NL A1A 0L4

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## INTRODUCTION

1. On February 21, 2022, upon the application of PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and Bridging Income Fund LP (collectively referred to as "**Bridging**"), Grant Thornton Limited ("**GTL**") was appointed as Interim Receiver (the "**Interim Receiver**") of all the current and future assets, undertakings and properties (the "**Property**") of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. by Order of the Supreme Court of Newfoundland and Labrador (the "**Court**").

2. The Interim Receivership Order authorized the Interim Receiver, among other things, to:

   (a) receive, preserve, protect and maintain control over the Property;

   (b) to retain or hire any employees on behalf of the Company;

   (c) to report to, meet with and discuss with such Affected Persons (as defined in the Interim Receivership Order) as the Interim Receiver deems appropriate;

   (d) to utilize monies on hand or borrowed by the Interim Receiver to fund payments of employee payroll obligations, rent, insurance, utilities, and other obligations determined by the Interim Receiver to be integral to the preservation of the Property;

   (e) to commence proceedings for the Company pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**") or the *Companies' Creditors Arrangement Act* ("**CCAA**"); and

   (f) to report to the Court and the creditors of CFI regarding the status of the business and financial affairs of CFI, including its assets, liabilities, accounts payable and other matters deemed relevant by the Interim Receiver.

3. On March 8, 2022, the Interim Receiver made application to commence proceedings pursuant to the CCAA and the Court issued an Initial Order on March 11, 2022. Grant Thornton Limited was appointed Monitor ("**Monitor**").

4. The Initial Order imposed a stay of proceeding against Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively referred to as the "**Company**" or "**CFI**").

5. The Initial Order granted an initial stay of proceedings and authorized the Monitor, among other things, to:

(a) Preserve and protect the Business and Property of CFI excluding certain property in favour of HSBC Bank of Canada ("**HSBC**");

(b) Providing the Monitor with certain enhanced powers;

(c) Approving the debtor in possession financing to allow CFI to continue to operate in the ordinary course pending the comeback hearing; and

(d) Setting down the comeback hearing for March 18, 2022 at 10am NL Time.

6. On March 18, 2022 (Court order is dated March 21, 2021), the Court issued an Amended and Restated Initial Order ("**ARIO**") which affirmed the terms of the Initial Order and authorized the Monitor, among other things:

(a) Authority to file, if deemed appropriate, a plan of compromise and arrangement on behalf of the Company;

(b) Authority to implement operational changes and pursue restructuring opportunities on behalf the Company;

(c) Authority under s. 32 of the CCAA to disclaim or rescind agreements for real property;

(d) Granted an extension of the stay of proceedings to July 10, 2022;

(e) Empowered to run a Sales and Investment Solicitation Process ("**SISP**"), with the terms being outlined in the SISP Process on behalf of the Company and approved by the Court via a SISP Order;

(f) Provided enhanced powers within the CCAA due to the directors of the Company resigning and there being no officers;

(g) Authorized an increase to the DIP Financing Agreement to borrow on behalf of the Company in accordance with the DIP Financing Agreement.

7. On June 10, 2022, the Monitor made application to the Court to extend the stay of proceedings and extend the SISP process. The Court issued an Order regarding the SISP, an extension of the stay of proceedings and authorized the Monitor, among other things:

(a) Approved of the Monitor's activities to the date of the Third Report of the Monitor of May 30, 2022;

(b) Granted an extension of the stay of proceedings to September 2, 2022;

(c) Granted and declared that pursuant to section 5(5) of the *Wage Earners Protection Act* ("**WEPPA**") the Company's former employees meet the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 and are individuals to whom the WEPPA applies as of March 18, 2022;

(d) Granted approval of amendments to the SISP Order; and

(e) Granted approval of amendments to the ARIO Order.

8. On August 24, 2022, the Monitor made application to the Court for, amongst other things, an extension of the stay of proceedings and to extend the SISP process. The purpose of the second extension was to provide additional time for the Monitor to finalize the Definitive Agreements as required by the SISP Order. The Court issued an Order that, among other things:

(a) Approved the Monitor's activities to the date of the Fourth Report of the Monitor of August 24, 2022;

(b) Granted approval of amendments to the SISP Order;

(c) Granted approval of amendments to the ARIO Order; and,

(d) Granted an extension of the stay of proceedings to October 17, 2022;

9. On October 12, 2022, the Monitor made application to the Court for, amongst other things, an extension to the stay of proceedings. The purpose of the third extension was to provide additional time for the DIP Lenders to re-evaluate and determine next steps. The Court issued an Order that, among other things:

(a) Approved the Monitor's activities to the date of the Fifth Report of the Monitor of October 6, 2022;

(b) Granted approval of amendments to the ARIO Order; and

(c) Granted an extension of the stay of proceedings to February 26, 2022.

10. The preceding reports of Grant Thornton Limited as Interim Receiver and Monitor, and all other information in respect of the interim receivership, and all other information in respect to the CCAA proceeding, are posted on the Interim Receiver's and Monitor's website at www.GrantThornton.ca/CFI. Readers are encouraged to read the following reports of Grant Thornton Limited, the materials filed with the court in relation to the applications, and the orders of the Court to provide additional information:

Reports to the Court

a) First Report of Grant Thornton Limited in its capacity as Interim Receiver and Proposed Monitor dated March 8, 2022

b) Second Report of Grant Thornton Limited in its capacity as Monitor dated March 15, 2022

c) Third Report of Grant Thornton Limited in its capacity as Monitor dated May 30, 2022

d) Fourth Report of Grant Thornton Limited in its capacity as Monitor dated August 24, 2022

e) Fifth Report of Grant Thornton Limited in its capacity as Monitor dated October 6, 2022

f) First Confidential Report of Grant Thornton Limited in its capacity as Monitor dated October 5, 2022

Court Orders

a) Interim Receivership Order dated February 21, 2022, including reasons for judgement

b) CCAA Initial Order dated March 11, 2022, including reasons for judgement

c) ARIO dated March 21, 2022, including reasons for judgement

d) Order approving the SISP dated March 21, 2022

e) Order approving the Revised SISP, Amended and Restated Initial Order – Amendment #1, and WEPP eligibility dated June 10, 2022

f) Order approving the Amended and Restated Initial Order – Amendment #2 dated August 30, 2022

g) Order approving the Amended and Restated Initial Order – Amendment #3 dated October 12, 2022 and Order dated October 12, 2022 sealing the Monitor's First Confidential Report

11. On March 25, 2022, on application by HSBC Bank Canada, the Court appointed Deloitte Restructuring Inc. ("**Deloitte**") as receiver over the accounts receivable of the Company.

Stakeholders wishing additional information on that proceeding are encouraged to contact Deloitte.

12. This is the Sixth Report of the Monitor.

## PURPOSE OF THE REPORT

13. The purpose of this report (the "**Sixth Report**") is to inform the Court of the following:

    (a) That a Material Adverse Change in the CCAA proceeding has occurred and the details thereon;

    (b) That the Monitor has advised the stakeholders that the Monitor has sought an extension to the stay of proceedings to allow the Monitor, the Company and the DIP Lenders time to re-evaluate the situation and determine next steps. That extension was supported by the DIP Lenders, who are the senior secured creditors; and

    (c) That the Monitor advised the stakeholders that the Court granted the extension of the stay of proceedings to February 26, 2023 to allow the DIP Lenders time to evaluate the situation and determine next steps.

## TERMS OF REFERENCE

14. In preparing this Sixth Report, the Monitor has relied upon unaudited financial information, certain Company's records, financial information and projections, and discussions with the Management of the Company, and its legal advisors. While the Monitor reviewed various documents provided by the Company and its legal advisors (including, among other things, unaudited internal financial statements and financial projections) and believes that the information therein provides a fair summary of the transactions as reflected in the documents, such work does not constitute an audit or verification of such information for accuracy, completeness or compliance with Generally Accepted Accounting Principles ("**GAAP**") or International Financial Reporting Standards ("**IFRS**"). Accordingly, the Monitor expresses no opinion or other form of assurance pursuant to GAAP or IFRS with respect to such information.

15. Some of the information used in preparing this Sixth Report consists of financial projections, including the Cash Flow Forecast. The Monitor cautions that these forecasts are based upon assumptions about future events and conditions that are not

ascertainable. The Company's actual results may vary from the Cash Flow Forecast, even if the Hypothetical and Probable Assumptions (defined herein) contained therein materialize, and the variations could be significant. The Monitor's review of the future oriented information used to prepare this Sixth Report did not constitute an audit of such information under Generally Accepted Auditing Standards, GAAP or IFRS.

16. In the course of its mandate, the Monitor has assumed the integrity and truthfulness of the information and explanations presented to it by the Company, its Management and other stakeholders, within the context in which such information was presented. To date, nothing has come to the Monitor's attention that would cause it to question the reasonableness of these assumptions, or accuracy of the information. The Monitor has requested that Management bring to its attention any significant matters which were not addressed in the course of the Monitor's specific inquiries. Accordingly, this Sixth Report is based solely on the information (financial or otherwise) made available to the Monitor by the Company and its Management.

17. This Sixth Report has been prepared for the use of this Court and the Company's stakeholders as general information relating to the Company and to assist the Court in supervising the administration of the estate. Accordingly, the reader is cautioned that this Report may not be appropriate for any other purpose. The Monitor will not assume responsibility or liability for losses incurred by the reader as a result of the circulation, publication, reproduction or use of this Sixth Report contrary to the provisions of this paragraph.

18. All references to dollars are in Canadian currency unless otherwise noted.

## BACKGROUND

19. On July 22, 2022 the Successful Bidder submitted a binding offer to the Monitor pursuant to the SISP. The Successful Bidder submitted a deposit of $750,000 with this binding offer.

20. On August 14, 2022 the Successful Bidder submitted a further improved offer to the Monitor pursuant to the SISP (the "**Improved Offer**").

21. After discussion between the Company, the Monitor, and on consultation with the DIP Lenders, the Monitor accepted the Improved Offer.

22. The Successful Bidder had agreed to, and was required, pursuant to the SISP [paragraph 22(i)], to top up the deposit paid by the Successful Bidder in an amount of $1,400,000 to make the deposit total $2,150,000.

23. On August 29, 2022 the Monitor confirmed the Improved Offer required an increase in the deposit with the Successful Bidder in writing.

24. On September 15, 2022 the Successful Bidder was to provide the Monitor an update on the status of the deposit and confirm it was aware of the Monitor's deadlines. On September 16, 2022 the Successful Bidder acknowledged with the Monitor the deposit top up amount and requested confirmation of wire instructions.

25. On September 20, 2022 the Monitor advised the Successful Bidder that it did not believe the Successful Bidder could finalize the Definitive Agreements in time to have the Proposed Transaction approved by the Court at a hearing scheduled for September 27, 2022, and that it was NOT changing the Closing Date or Outside Date as defined in the SISP. The Monitor requested that the deposit top up be paid by September 21, 2022. The Monitor also warned the Successful Bidder that any delays would put the closing dates at risk. The deposit top up was not received as requested.

26. On September 29, 2022 the form of Warrants Agreement, a condition of closing under the Subscription Agreement, and the Subscription Agreement were finalized.

27. On September 29, 2022 the Successful Bidder requested confirmation of wire details for the deposit top up of $1,400,000 as required pursuant to the Subscription Agreement and SISP.

28. On September 30, 2022 the Monitor advised the Successful Bidder that the only available court date to approve the Proposed Transaction was October 12, 2022. The Monitor again indicated that the deposit top up was required in advance of the hearing.

29. On October 5, 2022 the Monitor advised the Successful Bidder that it would file materials seeking court approval of the Proposed Transaction relying on the representations made by the Successful Bidder that it would send the deposit on October 7, 2022. This was confirmed by the Successful Bidder, at which time it was confirmed that the top up of the deposit maybe available sooner. The Successful Bidder did not provide the top up of the deposit and therefore did not achieve this milestone as outlined in the Subscription Agreement and the SISP.

30. After multiple missed deadlines, the Successful Bidder had still not paid the top up deposit as required before the October 12, 2022 hearing date. On consultation with the DIP Lenders the Monitor adjourned the October 12, 2022 sale approval hearing sine die (without day).

31. The Monitor does not support the Proposed Transaction without payment of the top up of the deposit.

32. The DIP Lenders do not support the Proposed Transaction without the payment of the deposit top up.

33. As a result, the Monitor sought an extension to the stay of proceedings until February 26, 2023. This period will allow the DIP Lenders time to re-evaluate the situation and determine a revised path forward. The Court approved this application and granted the order.

34. It is the Monitor's opinion that no creditors would be prejudiced by extending the stay of proceedings.

35. The Monitor is supportive of extending the stay of proceeding to allow stakeholders to re-evaluate the situation.

36. The adjournment of the approval of the Proposed Transaction means that the Proposed Transaction will not close within the timelines outlined in the SISP.

37. Successful Bidder has not complied with the terms of the SISP. This failure to pay the top up of the deposit casts significant doubt on the Successful Bidders ability to close the Proposed Transaction.

38. The DIP Lenders supported the Monitor's application for an extension to the stay of proceeding to give the Monitor, Company, and the DIP Lender's time to re-evaluate their options. Those options could include re-running the SISP, running a different kind of sales process, closing the Proposed Transaction with the Successful Bidder, or a liquidation.

39. In order to reduce the holding costs for the mine, the Monitor has determined that it is necessary to move the mine into a cold idle mode.

## NOTICES AND STATUTORY REPORTING

40. The Monitor has reported to the Court in the Second Report on the CCAA statutory notices. The Monitor continues to update the estate's website at www.GrantThornton.ca/CFI providing estate stakeholders updates when available.

## MATERIAL ADVERSE CHANGE

41. The Monitor is of the opinion that the failure of the Successful Bidder to pay the top up of the deposit and close the Proposed Transaction in accordance with the SISP, is a Material Adverse Change pursuant to s.23(1)(d) of the CCAA, and the DIP Financing Agreement.

42. The Monitor continues to be of the opinion that s.23(1)(h) of the CCAA does NOT apply and it would be more beneficial to the Company's creditors to continue with the SISP within the CCAA proceeding.

## CASH FLOW UPDATE AND REVISED FORECAST

43. The Monitor has prepared an analysis of budget to actual as of September 18, 2022 which is attached in the Monitor's Fifth Report.

44. The Monitor has prepared a revised cash flow forecast, attached to the October 11, 2022 affidavit of Phil Clarke, CPA, CA, CIRP (the "**Revised Cash Flow Forecast**") as a result of the Monitor's proposed extension to the SISP. The Cash Flow Forecast covers the period from September 19, 2022 to February 26, 2023 (the "**Revised Cash Flow Period**");

45. The Revised Cash Flow Forecast has been prepared by the Monitor using probable and hypothetical assumptions set out therein (the "**Probable and Hypothetical Assumptions**");

46. The requirement of s. 23(1)(b) of the CCAA states that the Monitor is to review the Revised Cash Flow Forecast for reasonableness. As the Directors of the Company have resigned, the Monitor has prepared the Revised Cash Flow Forecast based on the actual expenses incurred since the date of the Interim Receivership and Initial Order. The Monitor is of the opinion that the Revised Cash Flow Forecast is reasonable in all material respects:

    (a) The Probable and Hypothetical Assumptions are consistent with the purpose of the Revised Cash Flow Forecast;

(b) As at the date of this Sixth Report, the Probable and Hypothetical Assumptions developed by the Monitor are suitably supported and consistent with the Company's plans and provide a reasonable basis for the Revised Cash Flow Forecast; and

(c) The Revised Cash Flow Forecast reflects the Probable and Hypothetical Assumptions.

47. The Company's cash position, held in trust with the Monitor, as of September 20, 2022 is $2,665,554.84. The Company is forecasting future cash receipt of $750,000 representing the Successful Bidders non-refundable deposit and $2,070,000 in future disbursements from September 19, 2022 through to February 26, 2023. This disbursement includes $77,000 to cover the unremitted withholding taxes payable, and an estimated $85,000 to pay the WEPP priority claim from Service Canada.

## GENERAL COMMENTS ON THE CASHFLOW

48. In addition, the Monitor makes the following general comments on the Revised Cash Flow Forecast:

    (a) Disbursements appear to be consistent with the level of operations since the date of the Initial Order;

    (b) The Revised Cash Flow Forecast includes the encumbering of estimated priority claims by the Canada Revenue Agency and Employment and Social Development Canada relating to WEPPA. The Monitor understands a portion of those claims would have priority over the secured creditors in relation to the Company's current assets; and

    (c) Disbursements include forecasted payments to the Company's legal counsel and financial advisors, and the Monitor and its legal counsel.

49. The Monitor has the funds in place to support the requested extension of the Revised SISP and stay of proceedings.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 27th day of October 2022.

**GRANT THORNTON LIMITED,**
**SOLELY IN ITS CAPACITY AS MONITOR**
**OF THE COMPANY, AND NOT IN ITS PERSONAL CAPACITY**

Per: _____

Phil Clarke, CPA, CA, CIRP, LIT

Senior Vice-President

**Appendix N**

Affidavit of Phil Clarke - February 22, 2023

Court File No. T-279-22

**FEDERAL COURT**

**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.**, a body corporate

**Defendants**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

---

**AFFIDAVIT OF PHIL CLARKE**

---

I, Phil Clarke, CPA, CA, CIRP, LIT, of the City of Halifax, in the Province of Nova Scotia, MAKE OATH AND SAY AS FOLLOWS:

1. I am a Senior Vice-President with Grant Thornton Limited ("**GTL**" or the "**Monitor**") and have personal knowledge of the matters deposed of herein.

2. Pursuant to an order dated February 21, 2022 (the "**Interim Receivership Order**"), the Supreme Court of Newfoundland and Labrador General Division appointed GTL as interim receiver of all of the current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, save and except

for the Excluded Property (as defined therein) of Canada Fluorspar Inc. and Canada Fluorspar (NL) Inc. ("**CFI**"). A copy of the Interim Receivership Order is attached hereto as **Exhibit "A"**.

3. Pursuant to an initial order dated March 11, 2022, which was order was subsequently amended and restated on March 18, 2022 (the "**CCAA Order**") the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency appointed GTL the monitor for Canada Fluorspar Inc., CFI, and Newspar (a General Partnership) pursuant to the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36. A copy of the CCAA Order filed on March 22, 2022 is attached hereto as **Exhibit "B"**.

4. Pursuant to an order on March 18, 2022 (the "**SISP Order**"), the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency approved a Sale and Investment Solicitation Process. A copy of the SISP Order filed on March 22, 2022 is attached hereto as **Exhibit "C"**.

5. Pursuant to an order dated June 10, 2022 (the "**Extension Order**") the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency extended the stay period granted pursuant to Section 14 of the CCAA Order to September 2, 2022. A copy of the Extension Order is attached hereto as **Exhibit "D"**.

6. The Monitor received multiple bids on CFI's assets. The Monitor made a recommendation to the DIP lenders as to its preferred choice on the bids received. The DIP lenders were in support of the Monitor's recommendation and the successful bidder (the "**Initial Successful Bidder**") was notified on August 18, 2022.

7. Pursuant to an order dated August 30, 2022 (the "**Second Extension Order**") the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency, inter alia, extended the stay period granted pursuant to Section 14 of the CCAA Order to extended to October 17, 2022. A copy of the Second Extension Order is attached hereto as **Exhibit "E"**.

8. The Monitor and CFI worked diligently to complete the definitive agreement with the Initial Successful Bidder. However, the Initial Successful Bidder failed to top up the agreed upon deposit as required by the SISP, and therefore failed to complete a key deadline as outlined in the SISP. As a result of this default, the agreement with the Initial Successful Bidder was terminated.

9. Pursuant to an order dated October 12, 2022 (the "**Third Extension Order**") the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency extended the stay period granted pursuant to Section 14 of the CCAA Order to February 26, 2023. The SISP Order was not extended. A copy of the Third Extension Order is attached hereto as **Exhibit "F"**.

10. Since October 12, 2022, the Monitor and CFI have been diligently working in good faith to solicit bids from parties that previously participated in the SISP. As of January 26, 2023, the Monitor, after consultation with the DIP lenders, and with the support of the DIP lenders, accepted the proposal of a new successful bidder has selected and the DIP lenders have approved a new successful bidder (the "**New Successful Bidder**"). On February 13, 2023, the Monitor entered into a binding letter of intent with the New Successful Bidder.

11. On February 16, 2023 the Monitor applied to the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency requesting that the stay of proceedings under Section 11 of the CCAA be extended until May 31, 2023 to allow time for the New Successful Bidder to complete its due diligence, enter into a definitive agreement, obtain court approval and close the proposed transaction. The Monitor's motion was heard on February 21, 2023 before Justice MacDonald of Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

12. Counsel for IMSL appeared at the hearing on February 21, 2023 and did not object to the extension of the stay. In fact, the extension to the stay of proceedings was not opposed by any party and was granted.

13. Pursuant to an order dated February 21, 2023 (the "**Fourth Extension Order**") the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency extended the stay period granted pursuant to Section 14 of the CCAA Order to May 31, 2023. A copy of the Fourth Extension Order is attached hereto as **Exhibit "G"**.

14. In support of the Monitor's motion to extend the say, the Monitor rendered its Seventh Report dated February 15, 2023 (the "**Monitor's Seventh Report**") which provides a comprehensive summary of activities undertaken by the since October 12, 2022 as well as a summary of the Monitor's efforts to solicit additional offers and acceptance of one of these new offers. A copy of Monitor's Seventh Report is attached hereto as **Exhibit "H"**.

15. As noted in the materials filed in support of the Monitor's motion to extend the stay, the extension of the stay of proceedings is in the best interest of the Company and its stakeholders and that it would not materially prejudice any stakeholder or creditor. The senior secured creditors and the DIP lenders consented to the requested extension and the Monitor expects that it will have sufficient cash from the DIP financing and the deposit paid by the New Successful Bidder to funds its projected operating costs during the extended stay period.

16. With respect to the scope of the consultation services provided by Inaminka Marine Services Limited ("**IMSL**") to CFI, while there were drawings prepared by IMSL and options presented to CFI for utilization of Barge H-404 (the "**Barge**") at CFI's marine terminal, such drawings were high-level and were not of such a nature that CFI could utilize same. Further, to the best of my knowledge, information and belief: (i) while a high-level budget was prepared, CFI did not decide on any one option presented by IMSL and IMSL were directed not to undertake any further services either prior to or after February 21, 2022, being the date of the interim receivership order against CFI; (ii) no contractors were sourced by IMSL; (iii) nothing was manufactured by IMSL for the Barge or CFI's marine terminal; and (iii) no physical work was undertaken by IMSL in relation to the Barge or CFI's marine terminal. Copies of all invoices received from IMSL are attached hereto as **Exhibit "I"**.

17. For greater certainty, no goods, materials or services were supplied by IMSL to the Barge which could be characterized as necessary for its operation or maintenance and both the Barge and CFI's marine terminal remain operational in the same manner as prior to any consulting services provided by IMSL. In the event the stay of proceedings is lifted by this Court, CFI intends to defend the in rem action against the Barge on the basis that the consulting services provided to CFI by IMS do not constitute "goods, materials or services supplied to a ship" within the meaning of Section 22(2)(m) of the Federal Courts Act and, as such, do not fall within the in rem jurisdiction of the Federal Court.

18. The Monitor is maintaining the Barge the same as CFI did prior to the Monitor's appointment in February, 2022. This includes paying berthage fees, insurance and regular inspections of the Barge by CFI staff.

19. With respect to the Richard A. Spellacy's ("**Spellacy**") personal claim for unpaid master's wages, to the best of my knowledge, information and belief, there is no agreement, written or otherwise, between CFI and Spellacy in relation to the provision of any services in his personal capacity nor has the Monitor instructed Spellacy to undertake any duties in relation to the Barge since its appointment in February, 2022. In the event the stay of proceedings is lifted, CFI intends to defend any action brought against CFI and/or the Barge in relation to such claims.

20. With respect to Spellacy's assertions that CFI and/or the Monitor had placed the Barge for sale, I can advise that at no time did the Monitor engage the services of a broker to list or prepare the Barge for sale rather, as part of the SISP, the Monitor did engage GB Marine Surveys and Valuations of 581 Scotch Lake, Nova Scotia to complete an appraisal of the Barge. The appraisal is dated August 5, 2022. The principal of that company is Gregory Buffet. There is no intention by CFI or the Monitor to sell the Barge other than to the New Successful Bidder.

21. Like the contemplated transaction with the Initial Successful Bidder, the proposed transaction contemplated by the New Successful Bidder is a Reverse Vesting Order. The proposed transaction contemplates the vesting out of liabilities except certain retained

liabilities and the retention of all assets with the exception of certain excluded assets. While the list of retained liabilities and excluded assets has yet to be finalized, given the Barge is a key asset of CFI and given that the Barge will be required by the New Successful Bidder to successfully re-start the operations of CFI post-closing, the Barge is not intended to be an excluded asset but will rather form part of the sale to the New Successful Bidder.

22. As is normal in a CCAA proceeding, and as noted at paragraph 106 of the Seventh Monitor's Report, after the closing of the proposed transaction with the New Successful Bidder, the Monitor will seek a claims procedure order from the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency. While the proposed transaction will see no recovery for unsecured creditors, that claims procedure will allow any creditor to advance a priority claim over the proceeds from the sale. The Monitor will review the claims and then seek a further distribution order from the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency for the proceeds from the sale. Any creditor who objects to the proposed distribution will have an opportunity to object and have their claim adjudicated by that Court. The entire process is court supervised. The Monitor expects numerous priority claims including those from lessors, parties with purchase money security interests, Canada Revenue Agency trust claims, secured creditors, and others including IMSL. This process is the same process as was contemplated and communicated to IMSL in September, 2022.

23. Given the status of the sale to the New Successful Bidder, the CCAA proceedings are in a very similar circumstance to those at the time of this Court's previous decision recognizing the CCAA stay of proceedings. As such, in my view, there has been no material change in circumstances which would dictate the varying of the Order of this Court dated October 7, 2023.

24. The New Successful Bidder's offer is the best offer for creditors and stakeholders in that (i) the Monitor understands that the New Successful Bidder intends to restart operation which will present an opportunity for future business and preserve a number of jobs; (ii) provides for the repaying of the DIP on closing; and (iii) provides consideration on closing that is materially greater than any other offer received. The lifting the stay of proceeding

against CFI and the Barge in the within matter will frustrate the Monitor's ability to include the Barge in the sale and will jeopardize the sale process as a whole to the detriment of all creditors and stakeholders.

25. I make this Affidavit in good faith and in response to the motion brought by IMSL to lift the stay of proceedings.

**SWORN** before me at the City of Halifax, in the Province of Nova Scotia, on the 22nd day of February, 2023.

Notary Public or Commissioner for Oaths (affix seal)

**PHIL CLARKE**

GAVIN D. F. MACDONALD
A Notary Public in and for the Province of Nova Scotia

GAVIN D. F. MACDONALD NOTARY PUBLIC NOVA SCOTIA

**This is Exhibit "A" referred to in the affidavit of Phil Clarke sworn before me this 22nd day of February, 2023.**

Notary Public or Commissioner of Oaths
(affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

**SCHEDULE "I"**

**2022 01G 0709**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**GENERAL DIVISION**

**BETWEEN:**

**PRICEWATERHOUSECOOPERS INC. in its capacity as court-appointed receiver and manager of BRIDGING FINANCE INC. and BRIDGING INCOME FUND LP**

**APPLICANT**

**AND:**

**CANADA FLUORSPAR (NL) INC. and CANADA FLUORSPAR INC.**

**RESPONDENTS**

**INTERIM RECEIVERSHIP ORDER**

**BEFORE THE HONOURABLE CHIEF JUSTICE RAYMOND P. WHALEN:**

**UPON** The application of PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and Bridging Income Fund LP (formerly Sprott Bridging Income Fund LP) (the "**Applicant**"), for appointment of an interim receiver in respect of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. (collectively, the "**Debtor**");

**AND UPON READING** the Originating Application and the affidavit of Graham Page sworn February 19, 2022, and the consent of Grant Thornton Limited to act as interim receiver (in such capacity, the "**Interim Receiver**") of the Debtor;

**AND UPON HEARING** counsel for the Applicant any other counsel or other interested parties present;

Filed Feb 22, 22

R.W.

**IT IS HEREBY ORDERED THAT:**

SERVICE

1. The time for service of the notice of application and the material filed herein for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today and any further service thereof is hereby dispensed.

APPOINTMENT

2. Pursuant to section 47(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "*BIA*") Grant Thornton Limited is hereby appointed Interim Receiver, without security, of all of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, save and except for the Excluded Property (the "**Property**").

3. For greater certainty, the Interim Receiver will not take possession of the Property except to the extent necessary to carry out its obligations hereunder.

DEFINED TERMS

4. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in **Schedule "A"**.

INTERIM RECEIVER'S POWERS

5. The Interim Receiver is not authorized or permitted to operate or conduct the business of the Debtor; provided, however, that the Receiver is hereby empowered and authorized, but not obligated, to take such steps as are necessary (or cause the Debtor to take such steps as are necessary) to protect, preserve, and secure the Property.

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6. The Interim Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Interim Receiver is hereby expressly empowered and authorized to do any of the following where the Interim Receiver considers it necessary or desirable:

(a) to exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, protect, and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, preserve and protect the assets of the Debtor, including the power to incur any obligations in the ordinary course of business, and the powers to enter into any agreements, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

(d) to retain or hire any employees on behalf of the Debtor for any period of time on substantially the same terms and conditions as those existing between such employees and the Debtor, if applicable, prior to the appointment of the Interim Receiver;

(e) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Interim

R.W

Receiver's powers and duties, including without limitation those conferred by this Order;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor. For greater certainty, this provision shall not apply to the Excluded Property;

(g) to settle, extend or compromise any indebtedness owing to or by the Debtor;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Interim Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Interim Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to report to, meet with and discuss with such affected Persons (as defined below) as the Interim Receiver deems appropriate all matters relating to the Property and the interim receivership, and to share information, subject to such terms as to confidentiality as the Interim Receiver deems advisable;

(k) to register a copy of this Order and any other orders in respect of the Property against title to any of the Property, and when submitted by the Interim Receiver for registration this Order shall be immediately registered by the Registrar of Deeds

for the Province of Newfoundland and Labrador or any other similar government authority, notwithstanding Section 7 of the *Registration of Deeds Act*, 2009, SNL 2009, c R-10.01, or the provisions of any other similar legislation in any other province or territory, and notwithstanding that the appeal period in respect of this Order has not elapsed and the Registrar of deeds shall accept all Affidavits of Corporate Signing Authority submitted by the Interim Receiver in its capacity as Interim Receiver of the Debtor and not in its personal capacity;

(l) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Interim Receiver, in the name of the Debtor;

(m) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(n) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have;

(o) to commence proceedings for the Debtor pursuant to the *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act*; and

(p) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Interim Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons, including the Debtor, and without interference from any other Person (as defined below).

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE INTERIM RECEIVER

7. (i) The Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Interim Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Interim Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependent on maintaining possession) to the Interim Receiver upon the Interim Receiver's request.

8. All Persons shall forthwith advise the Interim Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records (and all transaction related thereof), and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Interim Receiver or permit the Interim Receiver to make, retain and take away copies thereof and grant to the Interim Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph or in paragraphs 7 and 9 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Interim Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

J.W.

9. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Interim Receiver for the purpose of allowing the Interim Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Interim Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Interim Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Interim Receiver with all such assistance in gaining immediate access to the information in the Records as the Interim Receiver may in its discretion require including providing the Interim Receiver with instructions on the use of any computer or other system and providing the Interim Receiver with any and all access codes, account names, and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE INTERIM RECEIVER

10. Without leave of the Court no action lies against the interim receiver with respect to any report made under, or any action taken pursuant to *BIA*.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

11. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Interim Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing

agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph; and (ii) affect a Regulatory Body's investigation in respect of the debtor or an action, suit or proceeding that is taken in respect of the debtor by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "**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.

NO EXERCISE OF RIGHTS OR REMEDIES

12. All rights and remedies of any Person, whether judicial or extra-judicial, statutory or non-statutory (including, without limitation, set-off rights) against or in respect of the Debtor or the Interim Receiver or affecting the Property are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided, however, that nothing in this Order shall:

    (a) empower the Debtor to carry on any business that the Debtor is not lawfully entitled to carry on;

    (b) prevent the filing of any registration to preserve or perfect a security interest;

    (c) prevent the registration of a claim for lien; or

    (d) exempt the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment.

13. Nothing in this Order shall prevent any party from taking an action against the Applicant where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such

party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Interim Receiver at the first available opportunity.

14. Nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Debtor with respect to the Excluded Property.

NO INTERFERENCE WITH THE INTERIM RECEIVER

15. No Person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, except with the written consent of the Debtor and the Interim Receiver, or leave of this Court.

CONTINUATION OF SERVICES

16. All persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Debtor, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Debtor

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Debtor or exercising any other remedy provided under such agreements or arrangements. The Debtor shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain

names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Debtor in accordance with the payment practices of the Debtor, or such other practices as may be agreed upon by the supplier or service provider and each of the Debtor and the Interim Receiver, or as may be ordered by this Court.

INTERIM RECEIVER TO HOLD FUNDS

17. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Interim Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, but excluding the Excluded Property, shall be deposited into one or more new accounts to be opened by the Interim Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Interim Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

EMPLOYEES

18. Subject to employees' rights to terminate their employment, all employees of the Debtor shall remain the employees of the Debtor until such time as the Interim Receiver, on the Debtor's behalf, may terminate the employment of such employees.

19. Despite anything in federal or provincial law, if the Interim Receiver, in that position, carries on the business of the Debtor or continues the employment of a debtor's employees, the interim receiver is not by reason of that fact personally liable in respect of a liability,

including one as a successor employer, that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees and that exists before the interim receiver is appointed or that is calculated by reference to a period before the appointment.

LIMITATION ON ENVIRONMENTAL LIABILITIES

20. Nothing herein contained shall require the Interim Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination (collectively, the "Environmental Legislation"), provided however that nothing herein shall exempt the Interim Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Interim Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

21. The Interim Receiver shall not be liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Interim Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Interim Receiver's appointment; or

(ii) after the Interim Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Interim Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Interim Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring the Interim Receiver to remedy any environmental condition or environmental damage affecting the Property, the Interim Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Interim Receiver, if the order is in effect when the Interim Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Interim Receiver:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Interim Receiver, if the order is in effect when the Interim Receiver is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Interim Receiver to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Interim Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

LIMITATION ON THE INTERIM RECEIVER'S LIABILITY

22. Except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of this Order the Interim Receiver shall incur no liability or obligation that exceeds an amount for which it may obtain full indemnity from the Property provided that the interim receiver shall act honestly and in good faith and deal with the Property in a commercially reasonable manner. Nothing in this Order shall derogate from any

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limitation on liability or other protection afforded to the Interim Receiver under any applicable law.

INTERIM RECEIVER'S ACCOUNTS

23. The Interim Receiver and counsel to the Interim Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges.

24. The Interim Receiver and counsel to the Interim Receiver shall be entitled to the benefits of and are hereby granted a charge (the "**Interim Receiver's Charge**") on the Property, which charge shall not exceed an aggregate amount of $250,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Interim Receiver and such counsel, both before and after the making of this Order in respect of these proceedings, and the Interim Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person but subject to sections 14.06(7), 81.4(4) and 81.6(2) of the BIA.

25. The Interim Receiver and its legal counsel shall pass their accounts from time to time.

26. Prior to the passing of its accounts, the Interim Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Interim Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE INTERIM RECEIVERSHIP

27. Subject to prior approval of the Applicant, the Interim Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $2,000,000 (or such greater amount as this Court may by further order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Interim Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Interim Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Interim Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) of the BIA.

28. Neither the Interim Receiver's Borrowings Charge nor any other security granted by the Interim Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

29. The Interim Receiver is at liberty and authorized to issue certificates substantially in the form annexed as **Schedule "B"** hereto (the "**Interim Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

30. The monies from time to time borrowed by the Interim Receiver pursuant to this Order or any further order of this Court and any and all Interim Receiver's Certificates evidencing the same or any part thereof shall rank on a pari passu basis, unless otherwise agreed to by the holders of any prior issued Interim Receiver's Certificates.

31. The Interim Receiver shall be allowed to repay any amounts borrowed by way of Interim Receiver's Certificates out of the Property or any proceeds, including any proceeds from the sale of any assets without further approval of this Court.

ALLOCATION

32. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Interim Receiver's Charge and the Interim Receiver's Borrowings Charge amongst the various assets comprising the Property.

GENERAL

33. For greater certainty, neither the Interim Receiver's Charge nor the Interim Receiver's Borrowing Charge shall apply or attach to the Excluded Property.

34. The Interim Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

35. Unless otherwise ordered by this Court, the Interim Receiver will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Interim Receiver's reports shall be filed by the registry notwithstanding that they do not include an original signature.

36. Nothing in this Order shall prevent the Interim Receiver from acting as a receiver, a receiver and manager, a trustee in bankruptcy, or a monitor of the Debtor.

37. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction to give effect to this Order and to assist the Interim Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby

R.W

respectfully requested to make such orders and to provide such assistance to the Interim Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Interim Receiver in any foreign proceeding, or to assist the Interim Receiver and its agents in carrying out the terms of this Order.

38. The Interim Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Interim Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

39. The Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis, including legal costs on a solicitor-client full indemnity basis, to be paid by the Interim Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

40. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Interim Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

FILING

41. The Interim Receiver shall establish and maintain a website in respect of these proceedings at www.grantthornton.ca/cfi (the "**Interim Receiver's Website**") and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publicly available; and

(b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Interim Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

42. Service of this Order shall be deemed good and sufficient by:

a. serving the same on:

(i) the persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order; and

b. posting a copy of this Order on the Interim Receiver's Website.

and service on any other person is hereby dispensed with.

43. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 21 day of February, 2022.

COURT OFFICER

R.W.

SCHEDULE "A"

**Defined Terms**

"**Excluded Property**" means: (i) any and all Receivables and / or Financed Receivables, as such terms are defined pursuant to a Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc. dated May 25, 2018, as amended, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favour of HSBC.

"**HSBC**" means HSBC Bank Canada.

R.W.

SCHEDULE "B"

**Interim Receiver Certificate**

Certificate No.

Amount $

This is to certify that Grant Thornton Limited, the interim receiver (the "**Interim Receiver**") of the assets, undertakings, and properties of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Debtors**") acquired for, or used in relation to, a business carried on by the Debtors, including all proceeds thereof (collectively, the "**Property**") appointed by order of the Supreme Court of Newfoundland and Labrador (the "**Court**") dated the day of February, 2022 (the "**Order**") made in an action having court file number 2022 01G 0709, has received as such Interim Receiver from the holder of this certificate (the "**Lender**") the principal sum of $ , being part of the total principal sum of $ which the Interim Receiver is authorized to borrow under and pursuant to the Order.

The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [*monthly/semi-annually/annually/other*] not in advance on the day of each month after the date hereof at a rate per annum equal to the rate of per cent above the prime commercial lending rate of from time to time.

Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Interim Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Interim Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at .

Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Interim Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

The charge securing this certificate shall operate so as to permit the Interim Receiver to deal with the Property (as defined in the Order) as authorized by the Order and as authorized by any further or other order of the Court.

The Interim Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

[*signature page to follow*]

R.W

Dated the day of , 2022.

Grant Thornton Limited, solely in its capacity as Interim Receiver of the Property, and not in its personal capacity

Per:

_____

Name:
Title:

**This is Exhibit "B" referred to in the affidavit of Phil Clarke sworn before me this 22nd day of February, 2023.**

Notary Public or Commissioner of Oaths
(affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

**SERVICE**

Filed March 21, 22

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

   (b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

   (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect

of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

## RESTRUCTURING

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

    (a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

    (b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

    (c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

    All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants

during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

## NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including the 10th day of July, 2022 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

## NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

## NO INTERFERENCE WITH RIGHTS

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

## CONTINUATION OF SERVICES

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

## NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to

advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

## APPOINTMENT OF MONITOR

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

    (d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

    (e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to

the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

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(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the

"**Administration Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

## ENHANCEMENT OF MONITOR'S POWERS

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other

data storage media containing any such information (**"Records"**) of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

## LIMITATION ON THE MONITOR'S LIABILITY

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act,* R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

## DIP FINANCING

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the **"DIP Financing Agreement"**) dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as

made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

(a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

(b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

(c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

## SERVICE AND NOTICE

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

## GENERAL

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

COURT OFFICER

Schedule "A"

Defined Terms

**"Excluded Inventory"** means inventory representing a value in the amount of USD2,500,000

**"Excluded Property"** means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

**"HSBC"** means HSBC Bank Canada; and

**"RFA"** means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.

**This is Exhibit "C" referred to in the affidavit of Phil Clarke sworn before me this 22nd day of February, 2023.**

Notary Public or Commissioner of Oaths
(affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

MAR 15 '22 14:15

**2022 01G 0709**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**IN BANKRUPTCY AND INSOLVENCY**

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

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

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## ORDER APPROVING A SALE AND INVESTMENT SOLICITATION PROCESS

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[1] **CONSIDERING** the Applicant's *Application for the issuance of (i) an Initial Order, (ii) an Amended and Restated Initial Order, (iii) an Order approving the DIP Financing Agreement ;and (iv) an Order approving a Sale and Investment Solicitation Process* (the "**Application**"), the affidavit of Phil Clarke dated the 8th day of March, 2022 and the exhibits in support thereof;

[2] **CONSIDERING** the submissions of counsel;

[3] **CONSIDERING** the pre-filing report prepared by Grant Thornton Limited (the "**Monitor**");

[4] **CONSIDERING** the provisions of the *Companies' Creditors Arrangement Act* ("**CCAA**");

**THE COURT:**

[5] **GRANTS** the Application.

**DEFINITIONS**

[6] **DECLARES** that all capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Bidding Procedures (as defined below).

**SERVICE**

[7] **DECLARES** that sufficient prior notice of the presentation of the Application has been given by the Applicant to interested parties, and that further service thereof is hereby dispensed with.

[8] **PERMITS** the service of the present Order (this "**Order**") at any time and place and by any means whatsoever.

Filed Mar. 21/22 CA

**SISP**

[9] **APPROVES** and **RATIFIES** the Sale and Investment Solicitation Process ("**SISP**") set forth in the Procedures for the Sale and Investment Solicitation Process attached as Schedule "A" hereto (the "**Bidding Procedures**").

[10] **AUTHORIZES** the Applicant and the Company, to the extent the Company assists with the SISP, to implement the SISP and to take such steps and execute such documentation as may be necessary or incidental thereto, the whole in accordance with the Bidding Procedures.

[11] **ORDERS** that the Applicant and the Company, as well as respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of performing their duties under the SISP, except to the extent of such losses, claims, damages or liabilities resulting from gross negligence or willful misconduct of any such person or entity, as applicable, as determined by this Court.

**GENERAL**

[12] **ORDERS** that the Applicant and the Company, to the extent the Company assists with the SISP are authorized and permitted under applicable law to disclose and transfer to Potential Bidders and to their advisors personal information in the custody or control of the Company relating to the operation of the business, including human resources and payroll information, records pertaining to the Company's past and current employees, and information about any consumer, website visitor or other individual (collectively, "**Personal Information**"), but only to the extent necessary to negotiate, determine whether to proceed with, and attempt to complete a transaction in accordance with the SISP (a "**Transaction**"). Each Potential Bidder to whom any Personal Information is disclosed shall maintain and protect the Personal Information with security safeguards appropriate to the sensitivity of the Personal Information and as may otherwise be required by applicable federal or provincial privacy legislation and limit the use of such information to its evaluation of a Transaction, and if it does not complete a Transaction with the Applicant, shall return all such information to the Applicant, or in the alternative permanently destroy all such information.

[13] **ORDERS** that the Applicant may from time to time apply to this Court for advice and directions in the discharge of their respective powers and duties hereunder or under the SISP.

[14] **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or elsewhere, to give effect to this Order and to assist the Applicant, as applicable, and their respective agents in carrying out the terms of this Order.

[15] **ORDERS** the provisional execution of this Order notwithstanding appeal and without any security or provision for costs whatsoever.

[16] **WITHOUT COSTS.**

C. Foley

COURT
OFFICER

02

# Schedule "A"

## Procedures for the Sale and Investment Solicitation Process

On March 7, 2022, Canada Fluorspar Inc., and Canada Fluorspar (NL) Inc., by their Interim Receiver, Grant Thornton Limited, and Newspar (a General Partnership) (collectively the "**Company**" or the "**Applicant**") commenced proceedings (the "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") before the Supreme Court of Newfoundland and Labrador (in Bankruptcy and Insolvency) in the City of St. John's, in the Province of Newfoundland and Labrador (the "**Court**") pursuant to an order granted by the Court on March 11, 2022. Said order was amended and restated by the Court on March 18, 2022 (collectively, as further amended or restated from time to time, the "**Initial Order**").

Pursuant to the Initial Order, Grant Thornton Limited was appointed as monitor in the CCAA Proceedings (in such capacity, the "**Monitor**").

On March 18, 2022, the Court granted an order (the "**Bidding Procedures Order**"), authorizing the Applicant to undertake a sale and investment solicitation process ("**SISP**") for the sale of the Company's business, property, assets and undertakings (collectively, the "**Business**"). The SISP shall be conducted by the Monitor, supported by the Company as required, in the manner set forth herein.

Among other things, the Bidding Procedures Order authorizes and directs the Monitor and the Company to conduct the SISP in accordance with the bidding procedures set out herein (the "**Bidding Procedures**") governing the solicitation of offers or proposals (each a "**Bid**") for the acquisition of the Business or some portion thereof.

### Defined Terms

1. Capitalized terms used in this SISP have the meanings given thereto in Appendix A.

### Bidding Procedures

***Opportunity***

2. The SISP is intended to solicit interest in, and opportunities for: (i) one or more sales or partial sales of all, substantially all, or certain portions of the Business; and/or (ii) for an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Company or its Business. Bids considered pursuant to the SISP may include one or more of an investment, restructuring, recapitalization, refinancing or other form of reorganization of the business and affairs of the Company as a going concern or a sale (or partial sales) of all, substantially all, or certain aspects of the Business, or a combination thereof (the "**Opportunity**").

3. All interested parties are encouraged to submit bids based on any form of Opportunity that they may elect to advance pursuant to the SISP, including as a Sale Proposal or an Investment Proposal.

4. The Bidding Procedures describe the manner in which prospective bidders may gain access to due diligence materials concerning the Company and the Business, the manner in which

bidders may participate in the SISP, the requirement of and the receipt and negotiation of bids received, the ultimate selection of a Successful Bidder and the requisite approvals to be sought from the Court in connection therewith. The Monitor shall conduct the SISP in the manner set forth herein.

The Monitor, in consultation with the Company and the DIP Lenders, may at any time and from time to time, modify, amend, vary or supplement, whether material or immaterial the SISP or the Bidding Procedures, if necessary or useful in order to give effect to the substance of the SISP, the Bidding Procedures and the Bidding Procedures Order.

The Monitor shall post on the Monitor's website, as soon as practicable, any such modification, amendment, variation or supplement to the Bidding Procedures and inform the bidders impacted by such modifications.

In the event of a dispute as to the interpretation or application of the SISP or Bidding Procedures, the Court will have exclusive jurisdiction to hear and resolve such dispute.

5. No bidder may request or receive any form of bid protection as part of any bid made pursuant to the SISP.

As more particularly set out herein, a summary of the key dates pursuant to the SISP are as follows:[1]

| Event | Date |
|---|---|
| **1. Solicitation Letter**<br>Monitor to distribute Solicitation Letter, to potentially interested parties | By no later than March 20 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **2. CIM and VDR**<br>Monitor to prepare and have available for parties having executed the NDA (Potential Bidders) the CIM and VDR | By no later than March 23, 2022, at 5:00 p.m. (Newfoundland Standard Time), or at such later time as the Monitor, in consultation with the Company, deems appropriate |
| **3. Phase 1 Qualified Bidders & Bid Deadline**<br>Phase 1 Bid Deadline (for delivery of non-binding LOIs by Phase 1 Qualified Bidders in accordance with the requirement of paragraph 14 of the Bidding Procedures) | By no later than April 17, 2022, at 5:00 p.m. (Newfoundland Standard Time) |

[1] All capitalized terms not already defined are defined further below. Titles in the chart are for presentation purposes only.

| Event | Date |
|---|---|
| | |
| **4. Phase 1 Successful Bid**<br>Monitor to notify each Phase 1 Qualified Bidder in writing as to whether its bid constituted a Phase 1 Successful Bid | By no later than April 24, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **5. Phase 2 Bid Deadline & Qualified Bidders**<br>Phase 2 Bid Deadline (for delivery of definitive offers by Phase 2 Qualified Bidders in accordance with the requirement of paragraph 22 of the Bidding Procedures) | By no later than June 12, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **6. Auction**<br>Auction Commencement Date (if needed) | By no later than June 19, 2022 |
| **7. Selection of final Successful Bid**<br>Deadline for selection of final Successful Bid | By no later than June 19, 2022, at 5:00 p.m. (Newfoundland Standard Time) |
| **8. Definitive Documentation**<br>Deadline for completion of definitive documentation in respect of Successful Bid | By no later than June 26, 2022 |
| **9. Approval Motion – Successful Bid**<br>Deadline for filing of Approval Motion in respect of Successful Bid | By no later than July 3, 2022 |
| **10. Closing – Successful Bid**<br>Anticipated deadline for closing of Successful Bid being the Target Closing Date | July 10, 2022 or such earlier date as is achievable |
| **11. Outside Date – Closing**<br>Outside Date by which the Successful Bid must close | July 10, 2022 |

*Solicitation of Interest: Notice of the SISP*

6. As soon as reasonably practicable after the granting of the Bidding Procedures Order:

   (a) a notice of the SISP and such other relevant information which the Company, in consultation with the Monitor and the DIP Lenders, considers appropriate shall be published in the *National Post*, the *Telegram (NL)* and *The Globe & Mail* and such other publications as may be considered appropriate;

   (b) a press release setting out the notice and such other relevant information regarding the Opportunity as may be considered appropriate, shall be issued with *Canada Newswire* designating dissemination in Canada; and

   (c) any parties that have already reached out to the Monitor expressing their interest.

7. The Monitor shall send a letter describing the Opportunity (a "**Solicitation Letter**"), outlining the SISP and inviting recipients of the Solicitation Letter to express their interest pursuant to the SISP, for distribution to potential bidders as soon as practical.

*Virtual Data Room*

8. A confidential virtual data room (the "**VDR**") in relation to the Opportunity will be made available by the Company or the Monitor to Potential Bidders that have executed the NDA (as defined below) in accordance with paragraph 9 herein. The VDR will be made available as soon as practicable. Following the completion of "**Phase 1**", but prior to the completion of "**Phase 2**", additional information may be added to the VDR to enable Phase 2 Qualified Bidders to complete any confirmatory due diligence in respect of the Company and the Opportunity. The Monitor, in consultation with the Company and the DIP Lenders, may establish or cause the Company to establish separate VDRs (including "**clean rooms**"), if the Monitor reasonably determines that doing so would further the Company's and any Potential Bidders' compliance with applicable antitrust and competition laws, or would prevent the distribution of commercially sensitive competitive information. The Monitor may also, in consultation with the Company and the DIP Lenders, limit the access of any Potential Bidder to any confidential information in the VDR where the Monitor reasonably determines that such access could negatively impact the SISP, the ability to maintain the confidentiality of the information, the Business or its value.

**PHASE 1: NON-BINDING LOIS**

*Phase 1 Qualified Bidders and Delivery of Confidential Information Memorandum*

9. In order to participate in the SISP, and prior to the distribution of any confidential information to an interested party (including access to the VDR), such interested party must deliver to the Monitor at the address specified in Appendix B hereto (including by email) a Non Disclosure Agreement (an "**NDA**") which shall enure to the benefit of any Successful Bidder that closes a transaction contemplated by the Successful Bid. Pursuant to the terms of the NDA to be signed by a potential bidder (each potential bidder who has executed an NDA with the Monitor, a "**Potential Bidder**"), each Potential Bidder will be

prohibited from communicating with any other Potential Bidder regarding the Opportunity during the term of the SISP, without the consent of the Monitor. Prior to the Monitor executing an NDA with any potential bidder, any potential bidder may be required to provide evidence, reasonably satisfactory to the Monitor, in consultation with the Company, of its financial wherewithal to complete a transaction in respect of the Opportunity (either with existing capital or with capital reasonably anticipated to be raised prior to closing) and/or to disclose details of their ownership and/or investors. For the avoidance of doubt, a party who has executed an NDA or a joinder with a Potential Bidder for the purpose of providing financing to a Potential Bidder in connection with the Opportunity (such party a "**Financing Party**") shall not be deemed a Potential Bidder for purposes of the SISP, provided that such Financing Party undertakes to inform the Monitor in the event that it elects to act as a Potential Bidder.

10. A Potential Bidder that has executed an NDA and provided any additional information required pursuant to paragraph 9, will be deemed a "**Phase 1 Qualified Bidder**" and will be promptly notified of such classification by the Monitor.

11. The Monitor with the assistance of the Company and the DIP Lenders, as required, will prepare and send to each Phase 1 Qualified Bidder a confidential information memorandum providing additional information considered relevant to the Opportunity (a "**CIM**") as soon as practicable. The Monitor, the Company, the DIP Lenders and their respective advisors make no representation or warranty as to the information contained in the CIM or otherwise made available pursuant to the SISP.

12. The Monitor shall provide any person deemed to be a Phase 1 Qualified Bidder with access to the VDR. The Monitor, the Company, the DIP Lenders and their respective advisors make no representation or warranty as to the information contained in the VDR. The VDR shall contain a template letter of intent (the "**Template LOI**") and a template purchase and sale agreement ("**Template PSA**").

13. If a Phase 1 Qualified Bidder wishes to submit a bid, it must deliver a non-binding letter of intent (an "**LOI**") (each such LOI, provided in accordance with paragraph 14 below, a "**Phase 1 Qualified Bid**"), to the Monitor at the address specified in Appendix B hereto (including by email) so as to be received by the Monitor not later than 5:00 p.m. (Newfoundland Standard Time) on April 17, 2022, or such other date or time as may be agreed by the Monitor in consultation with the Company and the DIP Lenders (the "**Phase 1 Bid Deadline**"). To the extent possible, the Phase 1 Qualified Bid should follow the format as set out in the Template LOI.

14. An LOI submitted by a Phase 1 Qualified Bidder will only be considered a "**Phase 1 Qualified Bid**" if the LOI complies at a minimum with the following:

    (a) it has been duly executed by all required parties;

    (b) it is received by the Phase 1 Bid Deadline;

    (c) it provides written evidence, satisfactory to the Monitor, in consultation with the Company and the DIP Lenders, of the ability to consummate the transaction within

the timeframe contemplated by the SISP and to satisfy any obligations or liabilities to be assumed on closing of the transaction, including, without limitation, a specific indication of the sources of capital;

(d) it identifies all proposed material conditions to closing including, without limitation, any internal, regulatory or other approvals and any form of agreement or other document required from a government body, stakeholder or other third party, and an estimate of the anticipated timeframe and any anticipated impediments for obtaining such approvals;

(e) it: (i) identifies the Qualified Phase 1 Bidder and representatives thereof who are authorized to appear and act on behalf of the Qualified Phase 1 Bidder for all purposes regarding the contemplated transaction; and (ii) fully discloses the identity of each entity or person that will be sponsoring, participating in or benefiting from the transaction contemplated by the LOI;

(f) an outline of any additional due diligence required to be conducted in order to submit a binding offer;

(g) it clearly indicates:

(i) that the Phase 1 Qualified Bidder is seeking to acquire all or substantially all of the Business whether through an asset purchase, a share purchase or a combination thereof (either one being, a "**Sale Proposal**") or some other portion of the Business (a "**Partial Sale Proposal**"); and/or

(ii) whether the Phase 1 Qualified Bidder is offering to make an investment in, restructure, recapitalize, reorganize or refinance the Company or their business (an "**Investment Proposal**");

(h) it contains such other information as may be reasonably requested by the Monitor, in consultation with the Company and the DIP Lenders;

(i) it does not provide for any break fee or expense reimbursement;

(j) in the case of a Sale Proposal, it identifies or contains the following:

(i) the purchase price or price range and key assumptions supporting the valuation and the anticipated amount of cash payable on closing of the proposed transaction;

(ii) any contemplated purchase price adjustment;

(iii) a description of the specific assets that are expected to be subject to the transaction and any assets or obligations expected to be excluded;

(iv) a description of those liabilities and obligations (including operating liabilities, obligations to employees, and reclamation obligations) which the

Phase 1 Qualified Bidder intends to assume and which such liabilities and obligations it does not intend to assume;

(v) information sufficient for the Monitor, in consultation with the Company and the DIP Lenders, to determine that the Phase 1 Qualified Bidder has sufficient ability to satisfy and perform any liabilities or obligations assumed pursuant to subparagraph (iv) above; and

(vi) any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the transaction; and

(k) in the case of an Investment Proposal, it identifies the following:

(i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment, restructuring, recapitalization, refinancing or reorganization;

(ii) the aggregate amount of the equity and/or debt investment to be made in the Company or their business;

(iii) the underlying assumptions regarding the *pro forma* capital structure;

(iv) a description of those liabilities and obligations (including operating liabilities, obligations to employees, and reclamation obligations) which the Phase 1 Qualified Bidder intends to assume and which such liabilities and obligations it does not intend to assume;

(v) information sufficient for the Monitor, in consultation with the Company, to determine that the Phase 1 Qualified Bidder has sufficient ability to satisfy and perform any liabilities or obligations assumed pursuant to subparagraph (iv) above; and

(vi) any other terms or conditions of the Investment Proposal that the Phase 1 Qualified Bidder believes are material to the transaction.

15. Notwithstanding the foregoing, the Monitor in consultation with the Company and the DIP Lenders may waive compliance with any one or more of the requirements in paragraph 14 and deem any such non-compliant LOI to be a Phase 1 Qualified Bid, provided that doing so shall not constitute a waiver by the Monitor of the requirements of paragraph 14 or an obligation on the part of the Monitor to designate any other LOI as a Phase 1 Qualified Bid. The Monitor will be under no obligation to negotiate identical terms with, or extend identical terms to, each Phase 1 Qualified Bidder;

***Assessment of Phase 1 Qualified Bids and Subsequent Process***

16. The Monitor, in consultation with the Company and the DIP Lenders, may, following the receipt of any LOI, seek clarification with respect to any of the terms or conditions of such LOI and/or request and negotiate one or more amendments to such LOI prior to

determining if the LOI should be considered a Phase 1 Qualified Bid or a Phase 1 Successful Bid (as defined below).

17. Following the Phase 1 Bid Deadline, the Monitor shall determine, in accordance with the requirements of paragraph 14 and in consultation with the Company, the LOI(s) that are selected as the most favourable Phase 1 Qualified Bid(s), which Phase 1 Qualified Bid(s) shall be deemed a "**Phase 1 Successful Bid(s)**" and which Phase 1 Qualified Bidder(s) accordingly shall be deemed a "**Phase 2 Qualified Bidder(s)**". For greater certainty, there can be more than one Phase 1 Qualified Bid that may be determined as being a Phase 1 Successful Bid, and more than one Phase 1 Qualified Bidder that may be determined as being a Phase 2 Qualified Bidder.

18. Only Phase 2 Qualified Bidders – being those that have submitted a Phase 1 Successful Bid – shall be permitted to proceed to Phase 2 of the SISP.

19. The Monitor shall notify each Phase 1 Qualified Bidder in writing as to whether its Phase 1 Qualified Bid constituted a Phase 1 Successful Bid – such that it is a Phase 2 Qualified Bidder – within five (5) Business Days of the Phase 1 Bid Deadline, or at such later time as the Monitor deems appropriate, in consultation with the Company.

20. Without limiting the provisions governing amendment of the SISP set out in paragraph 33 below, and notwithstanding the process and timeline for Phase 1, the process to identify and designate Phase 2 Qualified Bidders and the terms upon which Phase 2 may be continued as described below, the Monitor may at any time before or after the Phase 1 Bid Deadline, determine that Phase 2 is not required and may proceed to execute a definitive agreement (which shall be subject to Court approval) with respect to a transaction contemplated in a Phase 1 Qualified Bid submitted at any time on or before the Phase 1 Bid Deadline.

## PHASE 2: FORMAL OFFERS AND REMOVAL OF CONDITIONS

### *Formal Binding Offers*

21. Any Phase 2 Qualified Bidder that wishes to make a formal offer with respect to his/her/its Sale Proposal or Investment Proposal shall submit a binding offer (a "**Binding Offer**"): (a) in the case of a Sale Proposal, in the form of the Template PSA provided in the VDR, along with a marked version showing edits to the original form of Template PSA provided in the VDR; or (b) in the case of an Investment Proposal, a plan or restructuring support agreement in form and substance satisfactory to the Monitor, in consultation with the Company and the DIP Lenders (each, such Binding Offer submitted in accordance with paragraph 22 below, a "**Phase 2 Qualified Bid**") in each case to the Monitor, at the address specified in Appendix B hereto (including by email) so as to be received by the Monitor not later than 5:00 p.m. (Newfoundland Standard Time) on June 12, 2022, or such other date or time as may be agreed by the Monitor in consultation with the Company and the DIP Lenders (as may be extended, the "**Phase 2 Bid Deadline**").

22. A Binding Offer will only be considered as a Phase 2 Qualified Bid if the Binding Offer:

(a) has been received by the Phase 2 Bid Deadline;

(b) is a Binding Offer: (i) to purchase all, substantially all, or a portion of the Business; and/or (ii) to make an investment in, restructure, recapitalize, reorganize or refinance the Company or their business, on terms and conditions reasonably acceptable to the Company and the DIP Lenders;

(c) identifies all executory contracts of the Company that the Phase 2 Qualified Bidder will assume and clearly describes, for each contract or on an aggregate basis, how all monetary defaults and non-monetary defaults will be remedied, as applicable;

(d) is not subject to any financing conditionality;

(e) is unconditional, other than upon the receipt of the Approval Order(s) (as defined below) and satisfaction of any other conditions expressly set forth in the binding offer;

(f) includes acknowledgments and representations of the Phase 2 Qualified Bidder that it: (i) has had an opportunity to conduct any and all due diligence regarding the Opportunity prior to making its Binding Offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Business in making its Binding Offer; (iii) did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Opportunity or the completeness of any information provided in connection therewith, other than as expressly set forth in the Binding Offer or other transaction document submitted with the Binding Offer; and (iv) promptly will commence any governmental or regulatory review of the proposed transaction by the applicable competition, antitrust or other applicable governmental authorities;

(g) the Binding Offer must be accompanied by a letter that confirms that the Binding Offer: (i) may be accepted by the Monitor by countersigning the Binding Offer, and (ii) is irrevocable and capable of acceptance until the earlier of (A) two business days after the date of closing of the Successful Bid; and (B) the Outside Date;

(h) does not provide for any break fee or expense reimbursement;

(i) is accompanied by a deposit in the amount of not less than **5%** of the cash purchase price payable on closing or total new investment contemplated, as the case may be (the "**Deposit**"), along with acknowledgement that if the Phase 2 Qualified Bidder is selected as the Successful Bidder (as defined below), that the Deposit will be non-refundable subject to approval of the Successful Bid (as defined below) by the Court and the terms described in paragraph 32 below;

(j) contemplates and reasonably demonstrates a capacity to consummate a closing of the transaction set out therein on or before July 10 2022, or such earlier date as is practical for the parties to close the contemplated transaction, following the satisfaction or waiver of the conditions to closing (the "**Target Closing Date**") and in any event no later than July 10, 2022 (the "**Outside Date**"); and

(k) contains an agreement that the Phase 2 Qualified Bidder submitting such bid, if not chosen as the Successful Bidder, shall serve, without modification to such bid, as a Backup Bidder (as defined below), in the event the Successful Bidder fails to close.

23. The Monitor shall not purport to waive strict compliance with any one or more of the requirements specified above (for greater certainty, other than paragraph 22(c) above and paragraph 32 below and deem any such non-compliant Binding Offer to be a Phase 2 Qualified Bid.

***Selection of Successful Bid***

24. The Monitor, in consultation with the Company and the DIP Lenders, may, following the receipt of any Binding Offer, seek clarification with respect to any of the terms or conditions of such Binding Offer and/or request and negotiate one or more amendments to such Binding Offer prior to determining if the Binding Offer should be considered a Phase 2 Qualified Bid.

25. The Monitor, in consultation with the Company and the DIP Lenders, will: (a) review and evaluate each Phase 2 Qualified Bid; and (b) identify the highest or otherwise best bid (the "**Successful Bid**", and the Phase 2 Qualified Bidder making such Successful Bid, the "**Successful Bidder**") pursuant to the paragraphs below. Any Successful Bid shall be subject to approval by the Court.

26. In the event there is at least two Phase 2 Qualified Bids, the Successful Bid shall be identified through an Auction.

27. Auction: In the event that an auction (the "**Auction**") is required in accordance with the terms of this SISP, it shall be conducted in accordance with the procedures set forth in this paragraph:

(a) The Auction shall commence at a time to be designated by the Monitor, no later than June 19, 2022, and may, in the discretion of the Monitor, be held virtually due to the COVID-19 pandemic via videoconference, teleconference or such other reasonable means as the Monitor deems appropriate. The Monitor and the Company shall work in good faith with the parties entitled to attend the Auction to arrange for the Auction to be so held. The Monitor reserves the right to cancel or postpone the Auction in the consultation with the DIP Lenders.

(b) The identity of each Phase 2 Qualified Bidder participating in the Auction will be disclosed, on a confidential basis, to each other Phase 2 Qualified Bidder participating in the Auction.

(c) Except as otherwise permitted in the Monitor's discretion, only the Company, the Dip Lenders, the Monitor and the Phase 2 Qualified Bidders, and, in each case, their respective professionals shall be entitled to attend the Auction. Only a Phase 2 Qualified Bidder is eligible to participate in the Auction.

(d) Phase 2 Qualified Bidders shall appear at the Auction, or through a duly authorized representative.

(e) Except as otherwise set forth herein, the Monitor, in consultation with the Company and the DIP Lenders, may waive and/or employ and announce at the Auction additional rules, including rules to facilitate the participation of parties participating in an aggregated bid, that are reasonable under the circumstances for conducting the Auction, provided that such rules are: (i) not inconsistent with the Initial Order, the SISP, the Bidding Procedures, the DIP, the CCAA, or any order of the Court entered in connection with the CCAA Proceedings; (ii) disclosed to each Phase 2 Qualified Bidder; and (iii) designed, in the Monitor's business judgment, to result in the highest and otherwise best offer.

(f) The Monitor will arrange for the actual bidding at the Auction to be transcribed or recorded. Each Phase 2 Qualified Bidder participating in the Auction shall designate a single individual to be its spokesperson during the Auction.

(g) Each Phase 2 Qualified Bidder participating in the Auction must confirm on the record, at the commencement of the Auction and again at the conclusion of the Auction, that it has not engaged in any collusion with the Company or any other person regarding the SISP that has not been disclosed to all other Phase 2 Qualified Bidders.

(h) Prior to the Auction, the Monitor shall identify, in consultation with the Company and the DIP Lenders, the highest and best of the Phase 2 Qualified Bids received and such Phase 2 Qualified Bid shall constitute the opening bid for the purposes of the Auction (the "**Opening Bid**"). Subsequent bidding will continue in minimum increments valued at not less than **$[250,000]** cash in excess of the Opening Bid. For the purposes of facilitating bidding, the Monitor may ascribe a monetary value to non-cash considerations, including by way of example, to different levels of conditionality to closing. Each Phase 2 Qualified Bidder shall provide evidence of its financial wherewithal and ability to consummate the transaction at the increased purchase price, if so requested by the Monitor. Further, in the event that an Aggregated Bid qualifies to participate in the Auction, modifications to the bidding requirements may be made by the Monitor to facilitate bidding by the participants in the Aggregated Bid.

(i) All Phase 2 Qualified Bidders shall have the right to, at any time, request that the Monitor announce, subject to any potential new bids, the then-current highest and best bid and, to the extent requested by any Phase 2 Qualified Bidder, use reasonable efforts to clarify any and all questions such Phase 2 Qualified Bidder

may have regarding the Monitor's announcement of the then-current highest and best bid.

(j) Each participating Phase 2 Qualified Bidder shall be given reasonable opportunity to submit an overbid at the Auction to any then-existing overbids. The Auction shall continue until the bidding has concluded and there is one remaining Phase 2 Qualified Bidder that the Monitor, in consultation with the Company and the DIP Lenders, determine has submitted the highest and otherwise best Phase 2 Qualified Bid of the Auction. At such time and upon the conclusion of the bidding, the Auction shall be closed and the final remaining Phase 2 Qualified Bidder shall be the Successful Bidder.

(k) Upon selection of a Successful Bidder, the Monitor shall require the Successful Bidder to deliver as soon as practicable an amended and executed transaction document that reflects its final bid and any other modifications submitted and agreed to during the Auction, prior to the filing of the application material for the hearing to consider the Approval Motion (as defined below).

(l) The Monitor shall not consider any bids submitted after the conclusion of the Auction.

28. The final Successful Bid and the Backup Bid (as defined below) shall be selected by no later than June 19, 2022 and the definitive documentation in respect of the Successful Bid must be finalized and executed no later than June 26, 2022, which definitive documentation shall be conditional only upon the receipt of the Approval Order(s) and the express conditions set out therein and shall provide that the Successful Bidder shall use all reasonable efforts to close the proposed transaction by no later than the Target Closing Date, or such longer period as shall be agreed to by the Monitor in consultation with the Company, the DIP Lenders and the Successful Bidder. In any event, the Successful Bid must be closed by no later than the Outside Date, unless with the authorization of the DIP Lenders, acting reasonably.

29. Notwithstanding anything in the SISP to the contrary, if an Auction is conducted, the Phase 2 Qualified Bidder with the next highest or otherwise best Phase 2 Qualified Bid at the Auction, as determined by the Monitor will be designated as the backup bidder (the "**Backup Bidder**"). The Backup Bidder shall be required to keep its initial Phase 2 Qualified Bid (or if the Backup Bidder submitted one or more overbids at the Auction, the Backup Bidder's final overbid) (the "**Backup Bid**") open until the earlier of: (A) two business days after the date of closing of the Successful Bid; and (B) the Outside Date.

*Approval of Successful Bid*

30. The Monitor shall apply to the Court (the "**Approval Motion**") for one or more orders: (i) approving the Successful Bid and the Backup Bid (as applicable) and authorizing the taking of such steps and actions and completing such transactions as are set out therein or required thereby; and (ii) granting a vesting order and/or reverse vesting order to the extent that such relief is contemplated by the Successful Bid or the Backup Bid, as applicable, so

as to vest title to any purchased assets in the name of the Successful Bidder or the Backup Bidder (as applicable) and/or vesting unwanted liabilities out of one or more of the Company (collectively, the "**Approval Order(s)**"). The Approval Motion will be held on a date to be scheduled by the Monitor and confirmed by the Court upon application by the Monitor, who shall use their best efforts to schedule the Approval Motion on or before July 3, 2022, subject to Court availability. The Approval Motion may be adjourned or rescheduled by the Monitor without further notice, by an announcement of the adjourned date at the Approval Motion or in a notice to the service list of the CCAA Proceedings prior to the Approval Motion.

31. All Phase 2 Qualified Bids (other than the Successful Bid) shall be deemed rejected on and as of the date of the closing of the Successful Bid, with no further or continuing obligation of the Monitor to any unsuccessful Phase 2 Qualified Bidders.

***Deposits***

32. The Deposit(s):

(a) shall, upon receipt from the Phase 2 Qualified Bidder(s), be retained by the Monitor and deposited in a non-interest-bearing trust account.

(b) received from the Successful Bidder, shall:

(i) be applied to the purchase price to be paid by the applicable Successful Bidder whose Successful Bid is the subject of the Approval Order(s), upon closing of the approved transaction; and

(ii) shall otherwise be held and refundable in accordance with the terms of the definitive documentation in respect of any Successful Bid, provided that all such documentation shall provide that the Deposit shall be retained by the Monitor and forfeited by the Successful Bidder, if the Successful Bid fails to close by the Outside Date, and such failure is attributable directly to any failure or omission of the Successful Bidder to fulfil its obligations under the terms of the Successful Bid;

(c) received from the Backup Bidder, unless it is subsequently selected as the Successful Bidder, shall be fully refunded, to the Backup Bidder on or before the earlier of: (i) two (2) Business Days after the date of the closing to the Successful Bid; or (ii) July 17, 2022; and

(d) received from the Phase 2 Qualified Bidder(s) that are not the Successful Bidder or the Backup Bidder shall be fully refunded, to the Phase 2 Qualified Bidder(s) that paid the Deposit(s) as soon as practical following the selection of the Successful Bidder and in any event no later than July 17, 2022.

**Amendment**

33. The Monitor shall have the right at any time, in consultation with the Company and the DIP Lenders, to: (i) make material amendments to the SISP (including by extending the Phase 1 Bid Deadline or the Phase 2 Bid Deadline); and (ii) make non-material amendments to the SISP, in each case if, in the Monitor's reasonable judgment in consultation with the Company and/or the DIP Lenders, such material or non-material amendment will enhance the procedure for conducting the SISP or maximize the value of a transaction pursuant to the SISP. The Monitor shall advise the Service List in the CCAA Proceedings of any material amendment to the SISP. Without limiting the foregoing and notwithstanding the process and timeline for Phase 1 and the continuation of the SISP into Phase 2, the Monitor may at any time during Phase 1 or Phase 2: (i) subject to Court approval, enter into a stalking horse agreement involving a transaction with respect to some or all of the Business with a party identified through the SISP or otherwise; or (ii) subject to Court approval, enter into a definitive agreement with respect to a transaction involving some or all of the Business with a party identified through the SISP or otherwise and suspend or terminate the SISP.

**"As is, Where is"**

34. Any sale (or sales) of the Business will be on an "**as is, where is**" basis except for representations and warranties that are customarily provided in purchase agreements for a company subject to CCAA proceedings and any such representations and warranties provided for in the definitive documents shall not survive closing.

**Free of Any and All Claims And Interests**

35. In the event of a sale, to the extent permitted by law, all of the rights, title and interests of the Company in and to the Business to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the "**Claims and Interests**") pursuant to section 36(6) of the CCAA, such Claims and Interests to attach to the net proceeds of the sale of such Business (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof), except to the extent otherwise set forth in the relevant transaction documents with a Successful Bidder.

**Credit Bidding**

36. Any party or parties holding a valid, enforceable, and properly perfected security interest in the Business may, subject in all respects to such party's compliance with the Bidding Procedures, credit bid the amount of debt secured by such lien as part of any transaction contemplated by the Bidding Procedures; provided, however, that such transaction shall also provide for the indefeasible and irrevocable repayment in full in cash on the date of closing of any such transaction of any and all obligations: (i) owing to the DIP Lenders; (ii) owing pursuant to any charges granted by the Court in the CCAA Proceedings; and (iii) secured by a security interest in the Business that is to be acquired under such transaction that is senior to the security interest held in such Business by the party

submitting such credit bid unless the holder or indenture trustee or agent of any such senior security interest otherwise agrees. Nothing contained in this paragraph 36 is intended to, or shall, alter or amend the rights, terms or obligations under any intercreditor agreement or other form of agreement in respect of existing indebtedness of the Company.

**Confidentiality**

37. For greater certainty other than as shall be required in connection with any Auction or Approval Motion, neither the Company nor the Monitor will share: (i) the identity of any Potential Bidder, or Phase 1 Qualified Bidder; or (ii) the terms of any bid, LOI, Phase 1 Qualified Bid, Sale Proposal, Investment Proposal or Phase 2 Qualified Bid, with any other bidder without the consent of such party (including by way of email).

**Further Orders**

38. At any time during the SISP, the Monitor may apply to the Court for advice and directions with respect to any aspect of this SISP and the Bidding Procedures including, but not limited to, the continuation of the SISP or with respect to the discharge of its powers and duties hereunder.

**Additional Terms**

39. In addition to any other requirement of these Bidding Procedures:

    (a) The Monitor, as applicable, shall at all times prior to the selection of a Successful Bid use commercially reasonable efforts to facilitate a competitive bidding process in the SISP including, without limitation, by actively soliciting participation by all persons who would be customarily identified as high potential bidders in a process of this kind or who may be reasonably proposed by any of the Monitor, the DIP Lenders or the Company's stakeholders as a high potential bidder.

    (b) Any consent, approval or confirmation to be provided by the Company and/or the Monitor is ineffective unless provided in writing and any approval required pursuant to the terms hereof is in addition to, and not in substitution for, any other approvals required by the CCAA or as otherwise required at law in order to implement a Successful Bid. For the avoidance of doubt, a consent, approval or confirmation provided by email shall be deemed to have been provided in writing for the purposes of this paragraph.

    (c) All Phase 1 Qualified Bidders and Phase 2 Qualified Bidders shall at all times be granted information, access and facilitation that is no less complete and timely than is granted by the Monitor, or their representatives, to other Phase 1 Qualified Bidders and Phase 2 Qualified Bidders pursuant to the SISP. This shall include, without limitation, reasonable access to the Company's books, records, financial information, management, advisors and business partners. The Monitor shall review all information and materials provided by the Company or its representatives to the DIP Lenders or their representatives pursuant to the DIP and, to the extent that the Monitor, in consultation with the Company, is of the view that

any such information or materials are materially relevant to a Potential Bidder or Phase 1 Qualified Bidder or Phase 2 Qualified Bidder, then such information or materials shall be promptly posted to the VDR or otherwise made available to all Potential Bidders, Phase 1 Qualified Bidders and Phase 2 Qualified Bidders. Nothing in this paragraph creates binding obligations of third parties.

(d) Nothing in this SISP shall require that a Successful Bid, Backup Bid or any other bid must be approved by the Court. The Court at all times retains the discretion to direct the clarification, termination, extension or modification of the SISP and Bidding Procedures on application of any interested party.

(e) Prior to the seeking of Court approval for any transaction or bid contemplated by this SISP, the Monitor will provide a report to the Court on the SISP process, parts of which may be filed under seal, including in respect of any and all bids received.

## APPENDIX A
## DEFINED TERMS

**"Applicant"** shall have the meaning set forth in the preamble.

**"Approval Motion"** shall have the meaning set forth in paragraph 30.

**"Approval Order(s)"** shall have the meaning set forth in paragraph 30.

**"Auction"** shall have the meaning set forth in paragraph 27.

**"Backup Bid"** shall have the meaning set forth in paragraph 29.

**"Backup Bidder"** shall have the meaning set forth in paragraph 29.

**"Bid"** shall have the meaning set forth in the preamble.

**"Bidding Procedures"** shall have the meaning set forth in the preamble.

**"Bidding Procedures Order"** shall have the meaning set forth in the preamble.

**"Binding Offer"** shall have the meaning set forth in paragraph 21.

**"Business"** shall have the meaning set forth in the preamble.

**"Business Day"** means a day on which banks are open for business in St. John's, Newfoundland and Labrador but does not include a Saturday, Sunday or statutory holiday in the Province of Newfoundland and Labrador.

**"CCAA"** shall have the meaning set forth in the preamble.

**"CCAA Proceedings"** shall have the meaning set forth in the preamble.

**"CIM"** "shall have the meaning set forth in paragraph 11.

**"Claims and Interests"** shall have the meaning set forth in paragraph 35.

**"Court"** shall have the meaning set forth in the preamble.

**"Deposit"** shall have the meaning set forth in paragraph 22(i).

**"DIP"** means the DIP Financing Agreement dated March 7, 2022 among Grant Thornton Limited, as the Monitor/Interim Receiver of the Company and the lenders party thereto from time to time providing for DIP financing.

**"DIP Lenders"** means, collectively, Bridging Finance Inc. and/or an affiliate to be named, and Her Majesty in Right of Newfoundland and Labrador, as represented by the Minister of Industry, Energy and Technology, each in its capacity as lender under the DIP.

**"Financing Party"** shall have the meaning set forth in paragraph 9.

**"Initial Order"** shall have the meaning set forth in the preamble.

**"Investment Proposal"** shall have the meaning set forth in paragraph 14(g)(ii).

**"LOI"** shall have the meaning set forth in paragraph 13.

**"Monitor"** shall have the meaning set forth in the preamble.

**"NDA"** shall have the meaning set forth in paragraph 9.

**"Opening Bid"** shall have the meaning set forth in paragraph 27(h)27(h).

**"Opportunity"** shall have the meaning set forth in paragraph 2.

**"Outside Date"** shall have the meaning set forth in paragraph 22(j).

**"Partial Sale Proposal"** shall have the meaning set forth in paragraph 14(g)(i).

**"Phase 1"** shall have the meaning set forth in paragraph 8.

**"Phase 1 Bid Deadline"** shall have the meaning set forth in paragraph 13.

**"Phase 1 Qualified Bid"** shall have the meaning set forth in paragraph 13.

**"Phase 1 Qualified Bidder"** shall have the meaning set forth in paragraph 10.

**"Phase 1 Successful Bid"** shall have the meaning set forth in paragraph 17.

**"Phase 2"** shall have the meaning set forth in paragraph 8.

**"Phase 2 Bid Deadline"** shall have the meaning set forth in paragraph 21.

**"Phase 2 Qualified Bid"** shall have the meaning set forth in paragraph 21.

**"Phase 2 Qualified Bidder"** shall have the meaning set forth in paragraph 17.

**"Potential Bidder"** shall have the meaning set forth in paragraph 9.

**"Sale Proposal"** shall have the meaning set forth in paragraph 14(g)(i).

**"SISP"** shall have the meaning set forth in the preamble.

**"Successful Bid"** shall have the meaning set forth in paragraph 25.

**"Successful Bidder"** shall have the meaning set forth in paragraph 25.

**"Target Closing Date"** shall have the meaning set forth in paragraph 22(j).

**"Solicitation Letter"** shall have the meaning set forth in paragraph 7.

**"Template LOI"** shall have the meaning set forth in paragraph 12.

**"Template PSA"** shall have the meaning set forth in paragraph 12.

**"VDR"** shall have the meaning set forth in paragraph 8.

# APPENDIX B

**TO the Company:**

**Canada Fluorspar Inc., Canada Fluorspar (NL) Inc, and Newspar (a General Partnership)**

with a copy to:

**Cox & Palmer**

**Attention:** **Darren O'Keefe and Allison Philpott**
Email: dokeefe@coxandpalmer.com and aphilpott@coxandpalmer.com

**TO THE MONITOR:**

**Grant Thornton Limited**

**Attention:** **Phil Clarke and Sean MacNeil**
Email: phil.clarke@ca.gt.com and sean.macneil@ca.gt.com

with a copy to:

**McInnes Cooper**

**Attention:** **Meghan King and Geoff Spencer**
Email: meghan.king@mcinnescooper.com and geoffrey.spencer@mcinnescooper.com

**This is Exhibit "D" referred to in the affidavit of Phil Clarke sworn before me this 22nd day of February, 2023.**

Notary Public or Commissioner of Oaths
(affix seal)

**GAVIN D. F. MACDONALD**
**A Notary Public in end for the Province of Nova Scotia**

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

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

**AND IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**"); and

**AND IN THE MATTER OF** a Plan of Compromise or Arrangement of the Company;

**ORDER**

Before the Honourable Justice MacDonald;

**THIS APPLICATION,** made by Grant Thornton Limited ("**GTL**" or the "**Monitor**"), in its capacity as Court-Appointed Monitor of the Company, pursuant to the *Companies Creditors Arrangement Act* R.S.C., 1985 c. C-36 as Amended ("**CCAA**") and *Wage Earners Protection Program Act* S.C. 2005, c. 47, s. 1 ("**WEPPA**") for an Order substantially in the form filed with the Application was heard on this 10th day of June, 2022.

**ON READING** the affidavits of Phil Clarke sworn on the 30th day of May, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and of Melissa Spearns sworn on the 27th day of May, 2022 (the "**Spearns Affidavit**") and the Exhibits thereto, and the Monitor's Third Report;

**UPON HEARING** Meghan M. King of Counsel for the Monitor, Darren D. O'Keefe of Counsel for the Company, other counsel as they may appear, no one else appearing for any party duly served as outlined in the affidavit of service dated the __ day of _____, 2022 ,

**IT IS HEREBY ORDERED:**

1. **THAT** the time for service of the within Notice of Motion and materials filed, as set out in

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the affidavit of served is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

2. **THAT** all terms not otherwise defined herein shall have the meaning ascribed to them in the Amended and Restated Initial Order of this Court dated March 18th, 2022 (the "**ARIO**"), the order of this Court dated March 18th, 2022, approving the Sales, Solicitation and Investment Process (the "**SISP Order**"), the Clarke Affidavit, the Spearns Affidavit, and the Third Report of the Monitor filed on May 30th, 2022 (the "**Monitors Third Report**");

**EXTENSION OF THE STAY PERIOD**

3. **THIS COURT ORDERS** that the current Stay Period under the CCAA be and is hereby extended to and including September 2, 2022.

**WAGE EARNER PROTECTION PROGRAM ACT**

4. **THIS COURT ORDERS AND DECLARES** that pursuant to section 5(5) of WEPPA the Company and their collective former employees meet the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 and are a former employer, employees and individuals to whom the WEPPA applies as of March 21, 2022.

**AMENDMENTS TO THE SISP AND ARIO**

5. **THIS COURT ORDERS** that the amendments to the SISP Order as proposed by the Monitor attached hereto as **Exhibit "A"**, and the amendments to the ARIO as proposed by the Monitor, attached hereto as **Exhibit "B"**, are hereby approved.

6. **THIS COURT ORDERS** that in carrying out the terms of this Order, the Monitor whether in its personal capacity or in its capacity as the Monitor:

   (a) shall have all the protections provided to it as an officer of the Court, including the protections granted pursuant to the CCAA and other orders granted in

these CCAA proceedings, including the stay of proceedings; and

(b) shall incur no liability or obligation as a result of carrying out any duties or work in connection with this Order, save and except for any gross negligence or willful misconduct on its part.

**APPROVAL OF THE MONITORS THIRD REPORT**

7. **THIS COURT ORDERS** that the Third Report, and the activities of the Monitor and its counsel referred to therein be and are hereby approved; provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 10 day of June ,2022.

COURT OFFICER

# Exhibit "A"

**2022 01G 0709**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**IN BANKRUPTCY AND INSOLVENCY**

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

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

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## ORDER APPROVING A REVISED SALE AND INVESTMENT SOLICITATION PROCESS

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[1] **CONSIDERING** the Applicant's *Application for the Issuance of (i) an Initial Order, (ii) an Amended and Restated Initial Order, (iii) an Order –approving the DIP Financing Agreement~~;~~ and (iv) an Order approving a Sale and Investment Solicitation Process* (the **"Application"**), the affidavit of Phil Clarke dated the 8th day of March, 2022 and the exhibits in support thereof;

[2] **CONSIDERING** the submissions of counsel;

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[3] **CONSIDERING** the pre-filing report prepared by Grant Thornton Limited (the **"Monitor"**);

[4] **CONSIDERING** the further materials filed with this Court since March 8th, 2022, including the First, Second and Third Reports of the Monitor, and the affidavit of Phil Clarke dated the 30th day of May, 2022 and Melissa Spearns dated May 26th, 2022 and the exhibits thereto;

~~[4]~~[5] **CONSIDERING** the provisions of the *Companies' Creditors Arrangement Act* (**"CCAA"**);

**THE COURT:**

~~[5] GRANTS the Application.~~

[6] **CONFIRMS ITS GRANT** of the original Order dated March 18th, 2022, in connection with the Application (defined above), with the modifications blacklined herein being approved and deemed effective as of the date of the Order to which this revised Order is attached as Exhibit "A"

**DEFINITIONS**

~~[6]~~[7] **DECLARES** that all capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Bidding Procedures (as defined below).

**SERVICE**

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[7][8] **DECLARES** that sufficient prior notice of the presentation of the Application has been given by the Applicant to interested parties, and that further service thereof is hereby dispensed with.

[8][9] **PERMITS** the service of the present Order (this "**Order**") at any time and place and by any means whatsoever.

**SISP**

[9][10] **APPROVES** and **RATIFIES** the Revised Sale and Investment Solicitation Process ("**SISP**") set forth in the Procedures for the Sale and Investment Solicitation Process attached as Schedule "A" hereto (the "**Bidding Procedures**").

[10][11] **AUTHORIZES** the Applicant and the Company, to the extent the Company assists with the SISP, to implement the SISP and to take such steps and execute such documentation as may be necessary or incidental thereto, the whole in accordance with the Bidding Procedures.

[11][12] **ORDERS** that the Applicant and the Company, as well as respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of performing their duties under the SISP, except to the extent of such losses, claims, damages or liabilities resulting from gross negligence or willful misconduct of any such person or entity, as applicable, as determined by this Court.

**GENERAL**

[12][13] **ORDERS** that the Applicant and the Company, to the extent the Company assists with the SISP are authorized and permitted under applicable law to disclose and transfer to Potential Bidders and to their advisors personal information in the custody or control of the Company relating to the operation of the business, including human resources and payroll information, records pertaining to the Company's past and current employees, and information about any consumer, website visitor or other individual (collectively, "**Personal Information**"), but only to the extent necessary to negotiate, determine whether to proceed with, and attempt to complete a transaction in accordance with the SISP (a "**Transaction**"). Each Potential Bidder to whom any Personal Information is disclosed shall maintain and protect the Personal Information with security safeguards appropriate to the sensitivity of the Personal Information and as may otherwise be required by applicable federal or provincial privacy legislation and limit the use of such information to its evaluation of a Transaction, and if it does not complete a Transaction with the Applicant, shall return all such information to the Applicant, or in the alternative permanently destroy all such information.

[13][14] **ORDERS** that the Applicant may from time to time apply to this Court for advice and directions in the discharge of their respective powers and duties hereunder or under the SISP.

[14][15] **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or

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elsewhere, to give effect to this Order and to assist the Applicant, as applicable, and their respective agents in carrying out the terms of this Order.

[~~15~~][16] **ORDERS** the provisional execution of this Order notwithstanding appeal and without any security or provision for costs whatsoever.

[~~16~~][17] **WITHOUT COSTS.**

Exhibit "B"

**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER – AMENDMENT #1**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the **"Interim Receiver"** or the **"Applicant"**) pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the **"CCAA"**) for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the **"Clarke Affidavit"**) and the Exhibits thereto, the consent of Grant Thornton Limited (**"GTL"**) to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the **"Monitor"**), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON READING** the affidavits of Phil Clarke sworn the 30th day of March, 2022 (the **"Clarke Affidavit"**) and the Exhibits thereto, and of Melissa Spearns on the 26th day of May, 2022 (the **"Spearns Affidavit"**) and the Exhibits thereto, and the Monitors First, Second and Third Reports

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

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## SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such

other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

   (b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

## RESTRUCTURING

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

    (a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

    (b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

    (c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

    All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice

period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

## NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including the 2 day of September, 2022 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

## NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which



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the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

## NO INTERFERENCE WITH RIGHTS

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

## CONTINUATION OF SERVICES

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

## NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

**APPOINTMENT OF MONITOR**

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

    (d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

(e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the

"**Administration Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

## ENHANCEMENT OF MONITOR'S POWERS

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other

data storage media containing any such information ("**Records**") of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

**LIMITATION ON THE MONITOR'S LIABILITY**

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

**DIP FINANCING**

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the "**DIP Financing Agreement**") dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as

made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

    (a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

    (b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

    (c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

## SERVICE AND NOTICE

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

## GENERAL

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

Schedule "A"

Defined Terms

**"Excluded Inventory"** means inventory representing a value in the amount of USD2,500,000

**"Excluded Property"** means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

**"HSBC"** means HSBC Bank Canada; and

**"RFA"** means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.

**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER – AMENDMENT #1**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON READING** the affidavits of Phil Clarke sworn the 30th day of May, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and of Melissa Spearns on the 26th day of May, 2022 (the "**Spearns Affidavit**") and the Exhibits thereto, and the Monitors First, Second and Third Reports

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

Filed June 10, 20

## SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such

other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

   (b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, **"Sales Taxes"**) required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time (**"Rent"**), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

## RESTRUCTURING

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

    (a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

    (b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

    (c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

    All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice

period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

## NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including the 2 day of September, 2022 or such later date as this Court may order (the **"Stay Period"**), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

## NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being **"Persons"** and each being a **"Person"**) against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which

the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

## NO INTERFERENCE WITH RIGHTS

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

## CONTINUATION OF SERVICES

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

## NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

## APPOINTMENT OF MONITOR

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

    (d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

(e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, **"Possession"**) of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the **"Environmental Legislation"**), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the

"**Administration Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

## ENHANCEMENT OF MONITOR'S POWERS

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other

data storage media containing any such information (**"Records"**) of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

**LIMITATION ON THE MONITOR'S LIABILITY**

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

**DIP FINANCING**

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the **"DIP Financing Agreement"**) dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as

made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

    (a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

    (b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

    (c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

## SERVICE AND NOTICE

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

## GENERAL

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

COURT OFFICER

Dated June 10, 2022

Schedule "A"

Defined Terms

"**Excluded Inventory**" means inventory representing a value in the amount of USD2,500,000

"**Excluded Property**" means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

"**HSBC**" means HSBC Bank Canada; and

"**RFA**" means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.

**This is Exhibit "E" referred to in the affidavit of Phil Clarke sworn before me this 22nd day of February, 2023.**

Notary Public or Commissioner of Oaths
(affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

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

**AND IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**"); and

**AND IN THE MATTER OF** a Plan of Compromise or Arrangement of the Company;

**ORDER**

Before the Honourable Justice MacDonald;

**THIS APPLICATION,** made by Grant Thornton Limited ("**GTL**" or the "**Monitor**"), in its capacity as Court-Appointed Monitor of the Company, pursuant to the *Companies Creditors Arrangement Act* R.S.C., 1985 c. C-36 as Amended ("**CCAA**") for an Order substantially in the form filed with the Application heard on this 30th day of August, 2022.

**ON READING** the affidavit of Phil Clarke sworn on the 24th day of August, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and the Monitor's Fourth Report;

**UPON HEARING** Meghan M. King Counsel for the Monitor, Darren D. O'Keefe Counsel for the Company, other counsel as they may appear, no one else appearing for any party duly served as outlined in the affidavit of service dated the 25th day of August, 2022 ,

**IT IS HEREBY ORDERED:**

1. **THAT** the time for service of the within Notice of Motion and materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

Filed Aug 30/22 DK

2. **THAT** all terms not otherwise defined herein shall have the meaning ascribed to them in the Amended and Restated Initial Order of this Court dated March 18th, 2022 (the "**ARIO**"), and Amendment #1 of ARIO dated June 10th, 2022 (the "**Amended ARIO**"), approving the Sales, Solicitation and Investment Process (the "**SISP Order**") and the amended SISP Order dated the 10th day of June, 2022 (the "**Amended SISP Order**"), the Clarke Affidavit, and the Fourth Report of the Monitor filed on August 24, 2022 (the "**Monitor's Fourth Report**");

**EXTENSION OF THE STAY PERIOD**

3. **THIS COURT ORDERS** that the current Stay Period under the CCAA be and is hereby extended to and including October 17, 2022.

**AMENDMENTS TO THE SISP AND AMENDED ARIO**

4. **THIS COURT ORDERS** that the amendments to the Amended SISP Order as proposed by the Monitor attached hereto as **Exhibit "A"**, and the amendments to the Amended ARIO as proposed by the Monitor, attached hereto as **Exhibit "B"**, are hereby approved.

5. **THIS COURT ORDERS** that in carrying out the terms of this Order, the Monitor whether in its personal capacity or in its capacity as the Monitor:

   (a) shall have all the protections provided to it as an officer of the Court, including the protections granted pursuant to the CCAA and other orders granted in these CCAA proceedings, including the stay of proceedings; and

   (b) shall incur no liability or obligation as a result of carrying out any duties or work in connection with this Order, save and except for any gross negligence or willful misconduct on its part.

**APPROVAL OF THE MONITOR'S FOURTH REPORT**

6. **THIS COURT ORDERS** that the Fourth Report, and the activities of the Monitor and its counsel referred to therein be and are hereby approved; provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 30 day of August, 2022.

COURT OFFICER

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# Exhibit "A"

**2022 01G 0709**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**IN BANKRUPTCY AND INSOLVENCY**

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

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

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**ORDER APPROVING A REVISED SALE AND INVESTMENT SOLICITATION PROCESS – Revision #2**

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[1] **CONSIDERING** the Applicant's *Application for the issuance of (i) an Initial Order, (ii) an Amended and Restated Initial Order, (iii) an Order approving the DIP Financing Agreement; and (iv) an Order approving a Sale and Investment Solicitation Process* (the "**Application**"), the affidavit of Phil Clarke dated the 8th day of March, 2022 and the exhibits in support thereof;

[2] **CONSIDERING** the submissions of counsel;

[3] **CONSIDERING** the pre-filing report prepared by Grant Thornton Limited (the "**Monitor**");

[4] **CONSIDERING** the further materials filed with this Court since March 8th, 2022, including the First, Second and Third Reports of the Monitor, and the affidavit of Phil Clarke dated the 30th day of May, 2022 and Melissa Spearns dated May 26th, 2022 and the exhibits thereto;

[5] **CONSIDERING** the further materials filed since May 31st, 2022 including the Fourth Report of the Monitor, and the affidavit of Phil Clarke dated the 24th of August, 2022 and the exhibits thereto;

[6] **CONSIDERING** the provisions of the *Companies' Creditors Arrangement Act* ("**CCAA**");

**THE COURT:**

[7] **CONFIRMS ITS GRANT** of the original Order dated March 18th, 2022 and its subsequent Order dated June 10th, 2022, in connection with the Application (defined above), with the modifications blacklined herein being approved and deemed effective as of the date of the Order to which this revised Order is attached as **Exhibit "A"**

**DEFINITIONS**

[8] **DECLARES** that all capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Bidding Procedures (as defined below).

**SERVICE**

[9] **DECLARES** that sufficient prior notice of the presentation of the Application has been given by the Applicant to interested parties, and that further service thereof is hereby dispensed with.

[10] **PERMITS** the service of the present Order (this "**Order**") at any time and place and by any means whatsoever.

**SISP**

[11] **APPROVES** and **RATIFIES** the Revised Sale and Investment Solicitation Process ("**SISP**") set forth in the Procedures for the Sale and Investment Solicitation Process attached as Schedule "A" hereto (the "**Bidding Procedures**").

[12] **AUTHORIZES** the Applicant and the Company, to the extent the Company assists with the SISP, to implement the SISP and to take such steps and execute such documentation as may be necessary or incidental thereto, the whole in accordance with the Bidding Procedures.

[13] **ORDERS** that the Applicant and the Company, as well as respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of performing their duties under the SISP, except to the extent of such losses, claims, damages or liabilities resulting from gross negligence or willful misconduct of any such person or entity, as applicable, as determined by this Court.

**GENERAL**

[14] **ORDERS** that the Applicant and the Company, to the extent the Company assists with the SISP are authorized and permitted under applicable law to disclose and transfer to Potential Bidders and to their advisors personal information in the custody or control of the Company relating to the operation of the business, including human resources and payroll information, records pertaining to the Company's past and current employees, and information about any consumer, website visitor or other individual (collectively, "**Personal Information**"), but only to the extent necessary to negotiate, determine whether to proceed with, and attempt to complete a transaction in accordance with the SISP (a "**Transaction**"). Each Potential Bidder to whom any Personal Information is disclosed shall maintain and protect the Personal Information with security safeguards appropriate to the sensitivity of the Personal Information and as may otherwise be required by applicable federal or provincial privacy legislation and limit the use of such information to its evaluation of a Transaction, and if it does not complete a Transaction with the Applicant, shall return all such information to the Applicant, or in the alternative permanently destroy all such information.

[15] **ORDERS** that the Applicant may from time to time apply to this Court for advice and directions in the discharge of their respective powers and duties hereunder or under the SISP.

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[16] **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or elsewhere, to give effect to this Order and to assist the Applicant, as applicable, and their respective agents in carrying out the terms of this Order.

[17] **ORDERS** the provisional execution of this Order notwithstanding appeal and without any security or provision for costs whatsoever.

[18] **WITHOUT COSTS.**

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**2022 01G 0709**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**IN BANKRUPTCY AND INSOLVENCY**

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

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

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**ORDER APPROVING A REVISED SALE AND INVESTMENT SOLICITATION PROCESS – Revision #2**

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[1] **CONSIDERING** the Applicant's *Application for the issuance of (i) an Initial Order, (ii) an Amended and Restated Initial Order, (iii) an Order approving the DIP Financing Agreement; and (iv) an Order approving a Sale and Investment Solicitation Process* (the "**Application**"), the affidavit of Phil Clarke dated the 8th day of March, 2022 and the exhibits in support thereof;

[2] **CONSIDERING** the submissions of counsel;

[3] **CONSIDERING** the pre-filing report prepared by Grant Thornton Limited (the "**Monitor**");

[4] **CONSIDERING** the further materials filed with this Court since March 8th, 2022, including the First, Second and Third Reports of the Monitor, and the affidavit of Phil Clarke dated the 30th day of May, 2022 and Melissa Spearns dated May 26th, 2022 and the exhibits thereto;

[5] **CONSIDERING** the further materials filed since May 31st, 2022 including the Fourth Report of the Monitor, and the affidavit of Phil Clarke dated the 24th of August, 2022 and the exhibits thereto;

[6] [5]**CONSIDERING** the provisions of the *Companies' Creditors Arrangement Act* ("**CCAA**");

**THE COURT:**

[7] [6]**CONFIRMS ITS GRANT** of the original Order dated March 18th, 2022 and its subsequent Order dated June 10th, 2022, in connection with the Application (defined above), with the modifications blacklined herein being approved and deemed effective as of the date of the Order to which this revised Order is attached as **Exhibit "A"**

**DEFINITIONS**

[8] ~~[7]~~**DECLARES** that all capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Bidding Procedures (as defined below).

**SERVICE**

[9] ~~[8]~~**DECLARES** that sufficient prior notice of the presentation of the Application has been given by the Applicant to interested parties, and that further service thereof is hereby dispensed with.

[10] ~~[9]~~**PERMITS** the service of the present Order (this "**Order**") at any time and place and by any means whatsoever.

**SISP**

[11] ~~[10]~~**APPROVES** and **RATIFIES** the Revised Sale and Investment Solicitation Process ("**SISP**") set forth in the Procedures for the Sale and Investment Solicitation Process attached as Schedule "A" hereto (the "**Bidding Procedures**").

[12] ~~[11]~~**AUTHORIZES** the Applicant and the Company, to the extent the Company assists with the SISP, to implement the SISP and to take such steps and execute such documentation as may be necessary or incidental thereto, the whole in accordance with the Bidding Procedures.

[13] ~~[12]~~**ORDERS** that the Applicant and the Company, as well as respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of performing their duties under the SISP, except to the extent of such losses, claims, damages or liabilities resulting from gross negligence or willful misconduct of any such person or entity, as applicable, as determined by this Court.

**GENERAL**

[14] ~~[13]~~**ORDERS** that the Applicant and the Company, to the extent the Company assists with the SISP are authorized and permitted under applicable law to disclose and transfer to Potential Bidders and to their advisors personal information in the custody or control of the Company relating to the operation of the business, including human resources and payroll information, records pertaining to the Company's past and current employees, and information about any consumer, website visitor or other individual (collectively, "**Personal Information**"), but only to the extent necessary to negotiate, determine whether to proceed with, and attempt to complete a transaction in accordance with the SISP (a "**Transaction**"). Each Potential Bidder to whom any Personal Information is disclosed shall maintain and protect the Personal Information with security safeguards appropriate to the sensitivity of the Personal Information and as may otherwise be required by applicable federal or provincial privacy legislation and limit the use of such information to its evaluation of a Transaction, and if it does not complete a Transaction with the Applicant,

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shall return all such information to the Applicant, or in the alternative permanently destroy all such information.

[15] ~~[14]~~**ORDERS** that the Applicant may from time to time apply to this Court for advice and directions in the discharge of their respective powers and duties hereunder or under the SISP.

[16] ~~[15]~~**REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or elsewhere, to give effect to this Order and to assist the Applicant, as applicable, and their respective agents in carrying out the terms of this Order.

[17] ~~[16]~~**ORDERS** the provisional execution of this Order notwithstanding appeal and without any security or provision for costs whatsoever.

[18] ~~[17]~~**WITHOUT COSTS.**

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Exhibit "B"

**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER – AMENDMENT #2**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION,** made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON READING** the affidavits of Phil Clarke sworn the 30th day of May, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and of Melissa Spearns sworn on the 26th day of May, 2022 (the "**Spearns Affidavit**") and the Exhibits thereto, and the Monitors First Second and Third Reports;

**ON READING** the affidavit of Phil Clarke sworn the 24th day of August, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and the Monitor's Fourth Report;

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

## SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such

other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

   (b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

## RESTRUCTURING

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

    (a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

    (b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

    (c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

    All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

**NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY**

14. **THIS COURT ORDERS** that until and including the 17th day of October, 2022 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA,

(iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

**NO INTERFERENCE WITH RIGHTS**

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

**CONTINUATION OF SERVICES**

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

**NON-DEROGATION OF RIGHTS**

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this

Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

## APPOINTMENT OF MONITOR

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Company's receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

(d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

(e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to

the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the

"**Administration Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

**ENHANCEMENT OF MONITOR'S POWERS**

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other

data storage media containing any such information ("**Records**") of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

**LIMITATION ON THE MONITOR'S LIABILITY**

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act,* R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

**DIP FINANCING**

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the "**DIP Financing Agreement**") dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as

made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

(a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

(b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

(c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.



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46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

## SERVICE AND NOTICE

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

## GENERAL

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

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Schedule "A"

Defined Terms

"**Excluded Inventory**" means inventory representing a value in the amount of USD2,500,000

"**Excluded Property**" means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

"**HSBC**" means HSBC Bank Canada; and

"**RFA**" means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.



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**This is Exhibit "F" referred to in the affidavit of Phil Clarke sworn before me this 22nd day of February, 2023.**

Notary Public or Commissioner of Oaths
(affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**"); and

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

**ORDER**

Before the Honourable Justice MacDonald;

**THIS APPLICATION,** made by Grant Thornton Limited ("**GTL**" or the "**Monitor**"), in its capacity as Court-Appointed Monitor of the Company, pursuant to the CCAA for an Order substantially in the form filed with the Application heard on this 12th day of October, 2022.

**ON READING** the affidavits of Phil Clarke sworn on the 6th day of October, 2022 and the 11th day of October, 2022 (collectively, the "**Clarke Affidavit**") and the Exhibits thereto, the Monitor's First Confidential Report and the Monitor's Fifth Report;

**UPON HEARING** Counsel for the Monitor and other counsel as they may appear;

**IT IS HEREBY ORDERED:**

1. **THAT** the time for service of the within Notice of Motion and materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and this Court hereby dispenses with further service thereof.

2. **THAT** all terms not otherwise defined herein shall have the meaning ascribed to them in the Amended and Restated Initial Order of this Court dated March 18th, 2022 (the "**ARIO**"), Amendment #1 of ARIO dated June 10th, 2022 (the "**Amended ARIO**") and

Filed Oct 12, 2022

Amendment #2 to the ARIO dated August 30, 2022 (" **2nd Amended ARIO** "), the Clarke Affidavit, the Monitor's First Confidential Report and the Fifth Report of the Monitor filed on October 11th, 2022;

**EXTENSION OF THE STAY PERIOD**

3. **THIS COURT ORDERS** that the current Stay Period under the CCAA be and is hereby extended to and including the 26th day of February 2023.

**AMENDMENTS TO THE 2nd AMENDED ARIO**

4. **THIS COURT ORDERS** that the amendments to the 2nd Amended ARIO as proposed by the Monitor, attached hereto as **Exhibit "A"**, are hereby approved.

5. **THIS COURT ORDERS** that in carrying out the terms of this Order, the Monitor whether in its personal capacity or in its capacity as the Monitor:

   (a) shall have all the protections provided to it as an officer of the Court, including the protections granted pursuant to the CCAA and other orders granted in these CCAA proceedings, including the stay of proceedings; and

   (b) shall incur no liability or obligation as a result of carrying out any duties or work in connection with this Order, save and except for any gross negligence or willful misconduct on its part.

**SEALING ORDER**

6. **THIS COURT ORDERS** that the Monitor's First Confidential Report shall be sealed with the court until the earlier of the following: (a) the closing of a transaction for the sale of all of the assets or shares of the Company; (b) the conclusion of the CCAA proceedings in the within matter; or (c) further order of this Honourable Court.

7. **THIS COURT ORDERS THAT** any interested party may apply, on notice to the Monitor, to vary the terms of the within Sealing Order or to unseal the Monitor's First Confidential

Report.

**APPROVAL OF THE MONITOR'S FIFTH REPORT**

8. **THIS COURT ORDERS** that the Monitor's Fifth Report and the activities of the Monitor and its counsel referred to therein be and are hereby approved; provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 10th day of October ,2022.

COURT
OFFICER

**EXHIBIT "A"**

**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER – AMENDMENT #3**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON READING** the affidavits of Phil Clarke sworn the 30th day of May, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and of Melissa Spearns sworn on the 26th day of May, 2022 (the "**Spearns Affidavit**") and the Exhibits thereto, and the Monitors First Second and Third Reports;

**ON READING** the affidavit of Phil Clarke sworn the 24th day of August, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and the Monitor's Fourth Report;

**ON READING** the affidavits of Phil Clarke sworn the 6th day of October 2022 and the 11th day of October 2022 (collectively the "**Clarke Affidavit**") and the Exhibits thereto, the Monitor's First Confidential Report and the Monitor's Fifth Report;

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

## SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner

consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

(b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, **"Sales Taxes"**) required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time (**"Rent"**), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

**RESTRUCTURING**

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

    (a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

    (b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

    (c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

    All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any



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such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

## NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including the 26th day of February, 2023 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

## NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except

the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

**NO INTERFERENCE WITH RIGHTS**

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

**CONTINUATION OF SERVICES**

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

## NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

## APPOINTMENT OF MONITOR

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

(d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

(e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

**ENHANCEMENT OF MONITOR'S POWERS**

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;



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(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information ("**Records**") of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

**LIMITATION ON THE MONITOR'S LIABILITY**

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.



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## DIP FINANCING

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the "**DIP Financing Agreement**") dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership

Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall

subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to

be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

(a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

(b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

(c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at

undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

## SERVICE AND NOTICE

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

## GENERAL

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

Schedule "A"

Defined Terms

"**Excluded Inventory**" means inventory representing a value in the amount of USD2,500,000

"**Excluded Property**" means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

"**HSBC**" means HSBC Bank Canada; and

"**RFA**" means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.

**This is Exhibit "G" referred to in the affidavit of Phil Clarke sworn before me this 22nd day of February, 2023.**

Notary Public or Commissioner of Oaths
(affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**"); and

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

**ORDER**

Before the Honourable Justice MacDonald;

**THIS APPLICATION,** made by Grant Thornton Limited ("**GTL**" or the "**Monitor**"), in its capacity as Court-Appointed Monitor of the Company, pursuant to the CCAA for an Order substantially in the form filed with the Application heard on this 21st day of February 2023.

**ON READING** the affidavit of Phil Clarke sworn on the 16th day of February 2023 (the "**Clarke Affidavit**") and the Exhibits thereto, the Monitor's Second Confidential Report and the Monitor's Seventh Report;

**UPON HEARING** Counsel for the Monitor and other counsel as they may appear;

**IT IS HEREBY ORDERED:**

1. **THAT** the time for service of the within Notice of Motion and materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and this Court hereby dispenses with further service thereof.

2. **THAT** all terms not otherwise defined herein shall have the meaning ascribed to them in the Amended and Restated Initial Order of this Court dated March 18th, 2022 (the "**ARIO**"), Amendment #1 of ARIO dated June 10th, 2022 (the "**Amended ARIO**"),

Filed Feb 21/23

Amendment #2 to the ARIO dated August 30th, 2022 (" **2nd Amended ARIO** ") and the Amendment #3 to the ARIO dated October 12th 2022 (" **3rd Amended ARIO**"), the Clarke Affidavit, the Monitor's Second Confidential Report and the Seventh Report of the Monitor filed on February 16th 2023;

**EXTENSION OF THE STAY PERIOD**

3. **THIS COURT ORDERS** that the current Stay Period under the CCAA be and is hereby extended to and including the 31st day of May 2023.

**AMENDMENTS TO THE 3rd AMENDED ARIO**

4. **THIS COURT ORDERS** that the amendments to the 3rd Amended ARIO as proposed by the Monitor, attached hereto as **Exhibit "A"**, are hereby approved.

5. **THIS COURT ORDERS** that in carrying out the terms of this Order, the Monitor whether in its personal capacity or in its capacity as the Monitor:

   (a) shall have all the protections provided to it as an officer of the Court, including the protections granted pursuant to the CCAA and other orders granted in these CCAA proceedings, including the stay of proceedings; and

   (b) shall incur no liability or obligation as a result of carrying out any duties or work in connection with this Order, save and except for any gross negligence or willful misconduct on its part.

**SEALING ORDER**

6. **THIS COURT ORDERS** that the Monitor's Second Confidential Report shall be sealed with the court until the earlier of the following: (a) the closing of a transaction for the sale of all of the assets or shares of the Company; (b) the conclusion of the CCAA proceedings in the within matter; or (c) further order of this Honourable Court.

7. **THIS COURT ORDERS THAT** any interested party may apply, on notice to the Monitor,

to vary the terms of the within Sealing Order or to unseal the Monitor's Second Confidential Report.

**APPROVAL OF THE MONITOR'S SEVENTH REPORT**

8. **THIS COURT ORDERS** that the Monitor's Seventh Report and the activities of the Monitor and its counsel referred to therein be and are hereby approved; provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 21 day of February 2023.

**COURT OFFICER**

EXHIBIT "A"



**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER – AMENDMENT #4**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON READING** the affidavits of Phil Clarke sworn the 30th day of May, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and of Melissa Spearns sworn on the 26th day of May, 2022 (the "**Spearns Affidavit**") and the Exhibits thereto, and the Monitors First Second and Third Reports;

**ON READING** the affidavit of Phil Clarke sworn the 24th day of August, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and the Monitor's Fourth Report;

**ON READING** the affidavits of Phil Clarke sworn the 6th day of October 2022 and the 11th day of October 2022 (collectively the "**Clarke Affidavit**") and the Exhibits thereto, the Monitor's First Confidential Report and the Monitor's Fifth Report;

**ON READING** the affidavit of Phil Clarke sworn the 16th day of February, 2023 (the "Clarke Affidavit") and the Exhibits thereto, and the Monitor's Seventh Report and Second Confidential Report;

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

## SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

(b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice

monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

**RESTRUCTURING**

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

    (a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

    (b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

    (c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

    All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the

premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

## NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including the 31st day of May, 2023 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

## NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

## NO INTERFERENCE WITH RIGHTS

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

## CONTINUATION OF SERVICES

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor,

on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

## NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

## APPOINTMENT OF MONITOR

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel,

pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

(d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

(e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations

in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days

after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and

counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

## ENHANCEMENT OF MONITOR'S POWERS

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

## DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other

persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information ("**Records**") of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

## LIMITATION ON THE MONITOR'S LIABILITY

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

## DIP FINANCING

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the **"DIP Financing Agreement"**) dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

## VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

(a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

(b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

(c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

## SERVICE AND NOTICE

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

## GENERAL

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

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49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance

in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

Schedule "A"

Defined Terms

"**Excluded Inventory**" means inventory representing a value in the amount of USD2,500,000

"**Excluded Property**" means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

"**HSBC**" means HSBC Bank Canada; and

"**RFA**" means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.

**This is Exhibit "H" referred to in the affidavit of Phil Clarke sworn before me this 22nd day of February, 2023.**

Notary Public or Commissioner of Oaths
(affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

**2022 01G 0709**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court- Appointed Monitor of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (collectively, "**CFI**" or the "**Company**"); and

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

**SEVENTH REPORT OF GRANT THORNTON LIMITED,**

**IN ITS CAPACITY AS MONITOR**

**UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36**

**OF CANADA FLUORSPAR (NL) INC. AND CANADA FLUORSPAR INC. AND NEWSPAR.**

**February 15, 2023**

Grant Thornton

**Grant Thornton Limited,**
**Court Appointed Monitor**

Suite 300 - 15 International Place
St. John's, NL A1A 0L4

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## INTRODUCTION

1. On February 21, 2022, upon the application of PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and Bridging Income Fund LP (collectively referred to as "**Bridging**"), Grant Thornton Limited ("**GTL**") was appointed as Interim Receiver (the "**Interim Receiver**") of all the current and future assets, undertakings and properties (the "**Property**") of Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. by Order of the Supreme Court of Newfoundland and Labrador (the "**Court**").

2. The Interim Receivership Order authorized the Interim Receiver, among other things, to:

   a) receive, preserve, protect and maintain control over the Property;

   b) to retain or hire any employees on behalf of the Company;

   c) to report to, meet with and discuss with such Affected Persons (as defined in the Interim Receivership Order) as the Interim Receiver deems appropriate;

   d) to utilize monies on hand or borrowed by the Interim Receiver to fund payments of employee payroll obligations, rent, insurance, utilities, and other obligations determined by the Interim Receiver to be integral to the preservation of the Property;

   e) to commence proceedings for the Company pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**") or the *Companies' Creditors Arrangement Act* ("**CCAA**"); and

   f) to report to the Court and the creditors of CFI regarding the status of the business and financial affairs of CFI, including its assets, liabilities, accounts payable and other matters deemed relevant by the Interim Receiver.

3. On March 8, 2022, the Interim Receiver made application to commence proceedings pursuant to the CCAA and the Court issued an Initial Order on March 11, 2022. Grant Thornton Limited was appointed Monitor ("**Monitor**").

4. The Initial Order imposed a stay of proceeding against Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively referred to as the "**Company**" or "**CFI**").

5. The Initial Order granted an initial stay of proceedings and authorized the Monitor, among other things, to:

a) Preserve and protect the Business and Property of CFI excluding certain property in favour of HSBC Bank of Canada ("**HSBC**");

b) Providing the Monitor with certain enhanced powers;

c) Approving the debtor in possession financing to allow CFI to continue to operate in the ordinary course pending the comeback hearing; and

d) Setting down the comeback hearing for March 18, 2022 at 10am NL Time.

6. On March 18, 2022 (Court order is dated March 21, 2021), the Court issued an Amended and Restated Initial Order ("**ARIO**") which affirmed the terms of the Initial Order and authorized the Monitor, among other things:

a) Authority to file, if deemed appropriate, a plan of compromise and arrangement on behalf of the Company;

b) Authority to implement operational changes and pursue restructuring opportunities on behalf the Company;

c) Authority under s. 32 of the CCAA to disclaim or rescind agreements for real property;

d) Granted an extension of the stay of proceedings to July 10, 2022;

e) Empowered to run a Sales and Investment Solicitation Process ("**SISP**"), with the terms being outlined in the SISP Process on behalf of the Company and approved by the Court via a SISP Order;

f) Provided enhanced powers within the CCAA due to the directors of the Company resigning and there being no officers;

g) Authorized an increase to the DIP Financing Agreement to borrow on behalf of the Company in accordance with the DIP Financing Agreement.

7. On June 10, 2022, the Monitor made application to the Court to extend the stay of proceedings and extend the SISP process. The Court issued an Order regarding the SISP, an extension of the stay of proceedings and authorized the Monitor, among other things:

a) Approved of the Monitor's activities to the date of the Third Report of the Monitor of May 30, 2022;

b) Granted an extension of the stay of proceedings to September 2, 2022;

c) Granted and declared that pursuant to section 5(5) of the *Wage Earners Protection Act* ("**WEPPA**") the Company's former employees meet the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 and are individuals to whom the WEPPA applies as of March 18, 2022;

d) Granted approval of amendments to the SISP Order; and

e) Granted approval of amendments to the ARIO Order.

8. On August 24, 2022, the Monitor made application to the Court for, amongst other things, an extension of the stay of proceedings and to extend the SISP process. The purpose of the second extension was to provide additional time for the Monitor to finalize the Definitive Agreements as required by the SISP Order. The Court issued an Order that, among other things:

a) Approved the Monitor's activities to the date of the Fourth Report of the Monitor of August 24, 2022;

b) Granted approval of amendments to the SISP Order;

c) Granted approval of amendments to the ARIO Order; and,

d) Granted an extension of the stay of proceedings to October 17, 2022.

9. On October 6, 2022, the Monitor made application to the Court for, amongst other things, an extension of the stay of proceedings to February 28, 2023. The purpose of the third extension was to provide additional time for the Monitor to close the proposed transaction and proceed to terminating these CCAA proceedings as contemplated in the Fifth Report of Grant Thornton Limited in its Capacity as Monitor (the "**Fifth Report**"). However, as a result of a Material Adverse Change (**"MAC**") this application was withdrawn.

10. On October 12, 2022, the Monitor filed with the Court a MAC as described in the Sixth Report of Grant Thornton Limited in its Capacity as Monitor (the "**Sixth Report**") as the previously selected successful bidder had not provided the Monitor a top up of the deposit as contemplated in the proposed transaction in the Fifth Report. The purpose of the application or an extension to February 26, 2023 was to determine next steps in consultation with the DIP Lenders. On the same date, the Court issued an Order that, amount other things:

a) Approved the Monitor's activities to the date of the Fifth Report;

b) Granted approval of amendments to the ARIO Order; and

c) Granted an extension of the stay of proceedings to February 26, 2023.

11. A copy of the Order regarding the Amended and Restated Initial Order – Amendment #3 dated October 12, 2022 is attached hereto as **Appendix "A"**.

12. The preceding reports of Grant Thornton Limited as Interim Receiver and Monitor, and all other information in respect of the interim receivership, and all other information in respect to the CCAA proceeding, are posted on the Interim Receiver's and Monitor's website at www.GrantThornton.ca/CFI. Readers are encouraged to read the following reports of Grant Thornton Limited, the materials filed with the court in relation to the applications, and the orders of the Court to provide additional information:

Reports to the Court

a) First Report of Grant Thornton Limited in its capacity as Interim Receiver and Proposed Monitor dated March 8, 2022;

b) Second Report of Grant Thornton Limited in its capacity as Monitor dated March 15, 2022;

c) Third Report of Grant Thornton Limited in its capacity as Monitor dated May 30, 2022;

d) Fourth Report of Grant Thornton Limited in its capacity as Monitor dated August 24, 2022;

e) Fifth Report of Grant Thornton Limited in its capacity as Monitor dated October 6, 2022; and

f) Sixth Report of Grant Thornton Limited in its capacity as Monitor dated October 12, 2022.

Court Orders

a) Interim Receivership Order dated February 21, 2022, including reasons for judgement

b) CCAA Initial Order dated March 11, 2022, including reasons for judgement

c) ARIO dated March 21, 2022, including reasons for judgement

d) Order approving the SISP dated March 21, 2022

e) Order approving the Revised SISP, Amended and Restated Initial Order – Amendment #1, and WEPP eligibility dated June 10, 2022

f) Order approving the Amended and Restated Initial Order – Amendment #2 dated August 30, 2022

g) Order approving the Amended and Restated Initial Order – Amendment #3 dated October 12, 2022

13. On March 25, 2022, on application by HSBC Bank Canada, the Court appointed Deloitte Restructuring Inc. ("**Deloitte**") as receiver over the accounts receivable of the Company. Stakeholders wishing additional information on that proceeding are encouraged to contact Deloitte.

14. This is the Seventh Report of the Monitor.

**PURPOSE OF THE REPORT**

15. The purpose of this report (the "**Seventh Report**") is to inform the Court of the following:

(a) The activities of the Monitor since October 12, 2022, the date of the Sixth Report;

(b) Advise the Court as to the Monitor's efforts to solicit additional offers and acceptance of one of these new offers;

(c) Seeking the following Orders:

(i) Approving this Seventh Report, the activities of the Monitor and its counsel;

(ii) Approving of the Second Confidential Report of the Monitor ("**Second Confidential Report**");

(iii) Granting a Sealing Order of the Second Confidential Report; and

(iv) Granting an extension to the stay of proceedings to May 31, 2023.

**TERMS OF REFERENCE**

16. In preparing this Seventh Report, the Monitor has relied upon unaudited financial information, certain Company's records, financial information and projections, and

discussions with the Management of the Company, and its legal advisors. While the Monitor reviewed various documents provided by the Company and its legal advisors (including, among other things, unaudited internal financial statements and financial projections) and believes that the information therein provides a fair summary of the transactions as reflected in the documents, such work does not constitute an audit or verification of such information for accuracy, completeness or compliance with Generally Accepted Accounting Principles ("**GAAP**") or International Financial Reporting Standards ("**IFRS**"). Accordingly, the Monitor expresses no opinion or other form of assurance pursuant to GAAP or IFRS with respect to such information.

17. Some of the information used in preparing this Seventh Report consists of financial projections, including the Cash Flow Forecast. The Monitor cautions that these forecasts are based upon assumptions about future events and conditions that are not ascertainable. The Company's actual results may vary from the Cash Flow Forecast, even if the Hypothetical and Probable Assumptions (defined herein) contained therein materialize, and the variations could be significant. The Monitor's review of the future oriented information used to prepare this Seventh Report did not constitute an audit of such information under Generally Accepted Auditing Standards, GAAP or IFRS.

18. In the course of its mandate, the Monitor has assumed the integrity and truthfulness of the information and explanations presented to it by the Company, its Management and other stakeholders, within the context in which such information was presented. To date, nothing has come to the Monitor's attention that would cause it to question the reasonableness of these assumptions, or accuracy of the information. The Monitor has requested that Management bring to its attention any significant matters which were not addressed in the course of the Monitor's specific inquiries. Accordingly, this Seventh Report is based solely on the information (financial or otherwise) made available to the Monitor by the Company and its Management.

19. This Seventh Report has been prepared for the use of this Court and the Company's stakeholders as general information relating to the Company and to assist the Court in determining whether to grant the relief sought by the Company. Accordingly, the reader is cautioned that this Report may not be appropriate for any other purpose. The Monitor will not assume responsibility or liability for losses incurred by the reader as a result of the

circulation, publication, reproduction or use of this Seventh Report contrary to the provisions of this paragraph.

20. All references to dollars are in Canadian currency unless otherwise noted.

**BUSINESS, PROPERTY, AND COLD IDLE**

21. Since its appointment, the Monitor, has continued to preserve and protect the Company's business and property. Due to the failure of the previously selected successful bidder, as detailed in the MAC and Sixth Report, the Monitor proceeded to transition the mine and its assets to Cold Idle as follows:

a) Reduced headcount of employees from 36 to 15 for a period of three weeks, with a further reduction to 11 employees remaining. Four mill technicians were maintained for three weeks to assist with winterization ("**Cold Idle Transition Team**");

b) Maintained internet connection throughout site as well as power to any existing security cameras;

c) Oversaw the Cold Idle Transition Team winterization of the Warehouse as follows:

i. All power shutdown with the exception of cameras and the air monitoring station;

ii. Water shutoff, drained and plumbing filled with antifreeze;

iii. All entrances locked and secured; and

iv. Installed thermometers to monitor temperature inside of building.

d) Oversaw the Cold Idle Transition Team winterization of the Clarke's Pond Office, Old Lab, Core Shed, Mobile Maintenance, Welding Shop and Administrative Building as follows:

i. All power shutdown;

ii. Water shutoff, drained and plumbing filled with antifreeze;

iii. All entrances locked and secured; and

iv. Installed thermometers to monitor temperature inside of building.

e) Oversaw the Cold Idle Transition Team winterization of the Mill Dry as follows:

i. All power shutdown;

ii. Water shutoff, drained and plumbing filled with antifreeze;

iii. Water pump below building has been removed;

iv. All entrances locked and secured; and

v. Installed thermometers to monitor temperature inside of building.

f) Oversaw the Cold Idle Transition Team winterization of the Lab building as follows:

i. All power shutdown with the exception of a mini-split heat pump to maintain moderate heat for the scientific instruments;

ii. Water shutoff, drained and plumbing filled with antifreeze;

iii. All entrances locked and secured; and

iv. Installed thermometers to monitor temperature inside of building.

g) Power and heat have been maintained in the substations and UPS buildings to prevent condensation buildup on electrical systems and corrosion of batteries;

h) Oversaw the Cold Idle Transition Team winterization of the Mill as follows:

i. Most power has been shutdown with the exception of a mini-split heat pump and a few small heaters in the control room to maintain moderate heat for the computer systems;

ii. Fully winterized flocculant skid used to treat water in the Tailings Management Facility;

iii. Drained all pump and water lines with valves left open for airflow;

iv. All compressors powered down;

v. All exhaust fans powered down;

vi. All pumps powered down with water drained;

vii. Ball mill was jacked up will all internal balls removed. An external contractor was hired to assist with this process;

viii. Installed thermometers to monitor temperature inside of building.

i) Water pump located at Tarefare was shutdown. No fresh water is actively being pumped to site;

j) The Security Kiosk and Mine Dry are the only occupied buildings on site;

k) Power, internet and heat has been maintained at the Security Kiosk for use by employees on shift. Washcart washroom facilities have been decommissioned, septic tank pumped out and plumbing filled with antifreeze as a result of Tarefare water being shutdown. Security employees use the washroom facilities located at the Mine Dry;

l) Power, internet, heat and water has been maintained at the Mine Dry. Water is maintained by way of its own water tank, which is replenished from Upper Island Pond should the tank become low;

m) The main gate to Blue Beach has been secured using jersey barriers and is regularly patrolled by Security. Most items were removed from Blue Beach to be stored at the mine site, with the exception of:

i. Fencing around the perimeter;

ii. Certain minor pieces of equipment;

iii. Exterior light poles; and

iv. Life ring buoys for safety.

n) Security employees regularly patrol the above noted assets during both day and night shift with 24/7 coverage.

22. The Monitor has continued to maintain:

a) Security – Maintained the existing Company security processes and procedures, and developed and continues to maintain enhanced physical security protocols for the mine sites and IT security enhancements;

b) Insurance – Successfully renewed the Company's insurance policies with the exception of Directors and Officers Liability Insurance (there are no directors or officers), and insurance over finished good inventory in transit (the mine is in cold idle and no further sales of inventory are contemplated). Details of the renewal are further described later in this Seventh Report;

c) Utilities and services – Arranged for the continued provision of services from utilities and other vendors, including new payment processes and credit terms (if applicable). The Monitor has paid for all services rendered to date in the normal course;

d) Employees – Reduced employee headcount to 11 for Security, environmental monitoring, the operation of mobile equipment and support the SISP process. Details on the employee reduction and maintained employees are further described later in this Seventh Report;

e) Operations – In conjunction with Company management, participate weekly updates and planning processes as part of the cold idle program. The weekly operational report is shared with the Bridging and the Province of Newfoundland and Labrador (together the "**DIP Lenders**");

f) Inventory of certain assets – Monitor has worked to complete an inventory of capital assets, leases, supply agreements, etc. in support

of its estate communication processes, the SISP, and for use by other stakeholders in the process;

g) Statutory Filing – Monitor has continued to communicate with, file all statutory reports, and make all required payments with/to Canada Revenue Agency, Service Canada (for the WEPP Program), Workplace NL, Department of Industry Energy and Technology ("**DIET**"), Department of Fisheries and Oceans, and Environment Canada;

h) DIP Lenders – Monitor has continued to report to the DIP Lenders in accordance with the DIP Financing Agreement without issue; and

i) Reporting to Creditors and Other Stakeholders – Monitor has continued to respond to creditor and stakeholder queries, attend meetings with various creditors and stakeholders, and has continued to maintain the estates website by posting updated information as it becomes available.

**ENVIRONMENTAL ACTIVITIES**

Open Pits

23. The Company has allowed for both Grebe's Nest Pit and Center Pit to flood with water levels being monitored weekly. Current water levels for both pits are 84 meters and 77 meters, respectively.

24. The flooding of the open pits is in line with the Company's Initial Mine Rehabilitation and Closure Plan, as prepared by Knight Piesold ("**KP**"), which recommended both pits to be flooded gradually over time to an elevation of 116 meters to be in line with sea level.

Tailings Pond

25. Throughout the Care and Maintenance phase, from the date of the Monitor's appointment to October 12, 2022, the Company had been actively treating and discharging the water in the Tailings Pond to the Events Pond and Polishing Pond.

26. The current water level of the Tailings Pond is 109 meters, a substantial decrease from 116 meters on and around March 12, 2022.

27. On October 17, 2022, the Company informed the Monitor that a small tear in the tailings' liner was discovered by staff on routine patrols. The Company immediately informed the Engineer of Record, Alex MacIntyre with KP, of the tear and requested guidance on possible solutions.

28. The Company has been conversing with KP to identify the cause of the tear and possible repair solutions.

29. Water currently flows through the tear into the tailings pond (not into the environment) during heavy rainfall. The Company has performed numerous investigative steps in consultation with KP in an attempt to determine the cause of the tear.

30. The current plan, as suggested by KP, is to monitor and wait to perform the repair in the Spring 2023 when the weather improves. Fixing the liner in the winter months is not ideal as the snow cover and freezing conditions impairs the repair of the liner. KP and another contractor plan to be on site in the spring of 2023 to determine the source of the water flow and propose on a plan to repair the tear.

31. Both the Company and KP feel that the water level in the Tailings Pond will not increase before this time to the level of the tear. Currently, the only water input into the Tailings Pond is natural precipitation. In addition, various trenches have been dug from the tear in the liner into divert water to the middle of the Tailings Pond.

32. Estimated costs of the repair have been included in the Monitor's cash flow forecast, as detailed later in this Seventh Report.

Events Pond and Polishing Pond

33. As a part of the transition to cold idle, the Company has not been treating water from the Tailings Pond to the Events and Polishing Ponds. Currently, the only water input in the Events and Polishing Ponds are rainwater and snow melt.

34. A minimum water level is maintained in both the Events Pond and Polishing Pond for fire suppression in the case of an emergency with the Mill or other surrounding buildings.

35. The Company regularly tests the Total Suspended Solids ("**TSS**") levels, as per the Certificate of Approval ("**CofA**"), issued by the Department of Environment and Climate Change of the Province of Newfoundland and Labrador on August 17, 2022.

36. As the water level rises, or if significant rainfall is expected in the coming days, the Company will verify that the TSS levels are within acceptable range for the water to be discharged to the environment, and if so, will allow discharge to the environment.

Water Testing and Air Quality Monitoring

37. The Company has continued to test and monitor various bodies of water around site, as directed in the CofA. The results of these tests are provided the Department of Environment and Climate Change as required.

38. The Company has no uncorrected water testing environmental non-compliances since transitioning to cold idle.

39. The Company also continues to maintain the Air Quality Monitoring station as required by the CofA.

40. The Company notes that on its most recent audit performed by the Department of Environment and Climate Change that the NOx monitor failed and is currently operating outside of acceptable performance limits.

41. The Company is currently obtaining quotes from independent contractors to repair the NOx monitor.

**INSURANCE RENEWAL**

42. In October 2023, the Company began to engage with AON and BFL Canada the Company's existing insurance brokers regarding a renewal of the various insurance policies maintained by the Monitor since its appointment. In addition, AJ Gallagher was retained to source automobile insurance coverage. All are experienced insurance brokers with international reach.

43. The Company's various insurance policies expired on November 30, 2022, except for the automobile insurance policy which was to expire on November 21, 2022.

44. The Company was unable to successfully renew the automobile insurance policy before expiry with the existing brokerage and underwriter. The Company proceeded to bind automobile insurance with a different broker and underwriter that now expires on November 30, 2023.

45. The Company successfully renewed all existing insurance policies that were in place at the date of the appointment of the Monitor, with the exception of the Directors and Officers Liability Insurance (there are no directors or officers), insurance over finished good inventory in transit (called Charter insurance - the mine is in cold idle and no further sales of inventory are contemplated), and Crime coverage. All property of the Company is covered by insurance coverage, and the Company is covered by Liability coverage.

46. All insurance policies have been renewed for a one-year term to November 30, 2023 with the exception of 72% of the property insurance which will expire March 31, 2023.

47. Certain underwriters of the property insurance, representing 72% of participation, were unwilling to support a full renewal of the property insurance for a one-year term due to the insolvency proceeding. The Company was able to secure an extension of the existing underwriters to March 30, 2023. The remaining 28% of the coverage was renewed for a full year.

48. To support the insurance renewal the Company, and Monitor, prepared additional reporting to the underwriters on activities completed to move the mine into cold idle, cold idle maintenance plans, fire suppression and emergency response, and security planning.

49. The Company is currently working with its insurance broker to attain property insurance for the 72% participation that expires on March 31, 2023.

50. The Monitor has pre-paid the above noted insurance policies up front for their entire term.

51. The Monitor is of the opinion that all coverage renewed and obtained is sufficient and reasonable in the circumstances.

**CREDITORS**

52. The Monitor has, and continues, to engage with all significant creditors and stakeholders in the CCAA proceeding by responding to queries when possible in a timely and factual manner.

53. Secured Creditors – Bridging and the Province of Newfoundland and Labrador ("PNL") – The Monitor has provided regular updates to Bridging and PNL on operational and the financial matters in the estate pursuant to the DIP Loan agreement. In addition, the Monitor has responded to all queries to the satisfaction of Bridging and PNL.

54. HSBC Bank of Canada ("HSBC") – The CCAA proceeding has carved out the Company's accounts receivable and those assets are being dealt with by Deloitte. The Monitor has continued to cooperate with Deloitte in furtherance of its mandate, and Deloitte has cooperated with the Monitor in furtherance of its mandate.

55. Unsecured – The Monitor continues to manage an email address to engage with stakeholders in the proceeding (canadafluorspar@ca.gt.com). That address is monitored, and queries responded too. In addition, the Monitor has created a website for stakeholders on this proceeding at www.grantthornton.ca/cfi. This website is updated regularly.

56. Employees – The Monitor has created a section on the estate's website dedicated to employees and posts responses to employee related questions, and other updates.

57. Equipment leases – The Monitor has engaged with the various leasing companies for equipment and has made satisfactory arrangements with the majority of them. Further details are:

    a) The Monitor continues to maintain lease payments to 2 lease agreements detailed in the Fourth Report:

        i. Lease agreements with Ford Credit Canada Leasing for a 2020 Ford F150 and a 2020 Ford F250.

    b) The Monitor has also been in communication with Komatsu International (Canada) Inc. ("**Komatsu**"), beneficiary of 13 lease agreements for various equipment with the Company. Komatsu has agreed to suspend future payments on these lease agreements through the SISP;

    c) On October 12, 2023, Caterpillar Financial Services Limited ("**Caterpillar**"), beneficiary of 3 lease agreements for various equipment with the Company, requested of the Court to have its equipment released from the Company's possession:

        i. The Monitor investigated this request and issued Form 4 – Notice by Debtor Company to Disclaim or Resiliate an Agreement (a "**Form 4**") on November 7, 2022 by way of registered mail and also on November 14, 2022 by way of email.

A copy of this notice and proof of delivery is attached hereto as **Appendix "B"**.

ii. Upon receiving the above noted Form 4, Caterpillar proceeded to retrieve its equipment on November 15, 2022.

iii. The Monitor received a Notice of Disposition from Caterpillar, by way of prepaid ordinary mail. A copy of this notice is attached hereto as **Appendix "C"**; and

iv. The Monitor has not received any further correspondence or communication regarding the status of the disposition of the retrieved equipment.

d) The Monitor has ceased payments on the following lease and financing agreements:

i. Financing agreement with Navstar Capital (Bank of Montreal) for the purchase of a 2020 International Truck and a 2020 Tremcar 1000LT Tank, with the last payment by the Monitor being made on October 6, 2022;

ii. Financing agreement with Meridian OneCap Credit Corp. for the purchase of a 2019 Takeuchi Mini Excavator, with the last payment by the Monitor being made on October 6, 2022;

iii. Financing agreement with De Lage Landen Financial Services Canada Inc. ("**DLL**") for the purchase of two 2021 Takeuchi TL8CRWH Track Loaders, with the last payment by the Monitor being made on October 6, 2022; and

iv. Lease agreements with DLL for the rental of a MX3051, two MX3071 and a MX4071 printers, with the last payments by the Monitor being made on October 6, 2022.

e) The Monitor had previously classified the above noted financing agreements as lease agreements in previous reports of the Monitor. Since the date of the Sixth Report, the Monitor has reviewed these agreements with its legal counsel who have determined that these are financing agreements or Purchase Money Security Interests ("**PMSI**");

f) It is of the Monitor's opinion, and of its legal counsel, that due to these agreements being PMSI's, the beneficiary creditors are stayed under the current stay of proceedings. Furthermore, it is of the Monitor's opinion, and of its legal counsel, that the DIP Lender's would have a priority charge on any equity associated with this equipment.

g) Since the Monitor last remitted payment on the PMSI's, the equipment has been parked with minimal movement around site.

h) To date, DLL has not retrieved their printers from site.

i) The Monitor notes that previous lease agreements were disclaimed by way of issuing a Form 4 on May 19, 2022 which have also not been retrieved by DLL.

j) The Monitor has not been made aware of any creditor seeking to dispute any disclaimers and has not received any notice that any of the lessors intend to dispute the disclaimer.

58. Supply Agreements – The Company had entered into various supply agreements with customers for the sale of acid grade fluorspar, and certain supply agreements with vendors. It is the Monitors view that claims, if any, can be dealt with in any claims process should one be ordered by the Court.

**THIRD PARTY ASSETS**

59. The Monitor developed a process to receive and evaluate claims from stakeholders for the return of property owned by third parties using Form 74 of the *Bankruptcy and Insolvency Act*. The Monitor has received and accepted, or partially accepted claims for reclamation of property owned by:

a) Air Liquide Canada Inc.;

b) T R Excavating Inc.;

c) Blue Water Newfoundland Ltd.;

d) GFL Environment Inc.;

e) Modspace Financial Services, Canada;

f) General Auto and Industrial (operating as NAPA Auto Parts 6305) ("**NAPA**");

g) SMS Equipment Inc.;

h) Weir Minerals Canada Inc. ("**Weir**");

i) RJG Construction Ltd; and

j) St. Lawrence Area Trails Association.

60. The assets subject to these claims have been returned to their owners. Details are noted in the Monitor's previous reports.

61. Since the date of the Sixth Report, the following owners have retrieved their property as released by the Monitor by way of accepting their property claim submitted:

a) SLATA retrieved all of its property from site on October 7, 2022. A copy of confirmation that all property was retrieved, as well as the release letter and evidence of delivery of said letter by way of registered mail, is attached hereto as **Appendix "D"**;

b) Weir retrieved all of its property from site on November 29, 2022. A copy of confirmation that all property was retrieved, as well as the release letter and evidence of delivery of said letter by way of registered mail, is attached hereto as **Appendix "E"**; and

c) NAPA retrieved all of its property from site on December 21, 2023. A copy of confirmation that all property was retrieved, as well as the release letter and evidence of delivery of said letter by way of registered mail, is attached hereto as **Appendix "F".**

62. Since the date of the Sixth Report, the Monitor has not received any further property claims.

63. As mentioned in the Fifth Report, the Monitor had not received a property claim from Atlantic Explosives Limited ("**AEL**") or Brenco High Voltage Solutions ("**Brenco**") and proceeded to issue letters, dated September 8, 2022, acknowledging their ownership of their respective property. To date, the Monitor has not received a response from either AEL or Brenco. As such, their respective property remains on site as of the date of this

Seventh Report. This will not impact any transaction as this asset will be included with the Excluded Assets.

**EMPLOYEES AND CONTRACTORS**

Employees

64. Since the date of the Sixth Report, the Company has completed its transition from care and maintenance mode to cold idle.

65. Beginning on October 12, 2023, the Monitor has terminated 24 employees as follows:

| Date of Termination | Active Employees Terminated |
|---|---|
| October 12, 2022 | 20 |
| October 28, 2022 | 4 |
| **Total** | **24** |

66. As of the date of this Seventh Report, there are 11 employees employed with the Company.

67. Of the remaining employees, five rotate shifts as Security with the assistance of three mill technicians. In total, the Company has eight employees performing security duties.

68. The Monitor retained the three mill technicians in the event maintenance was required on the mill or to assist a new owner operator with restarting the mill. Two of these technicians are temporarily away pursuing further training to return early April 2023.

69. The Monitor considers the current work force level of 11 is what is required to continue to preserve and protect the business and assets of the Company in cold idle.

70. No further reductions are anticipated; however, the Monitor will continue to evaluate this need, and the circumstances of the business and its assets, and retain and employ those parties whose experience and skill sets are required to continue to preserve and protect the business and assets for the benefit of the stakeholders.

71. On June 10, 2022, this Court approved an Order concerning the WEPP eligibility of terminated employees.

72. Since the date of this Order, the Monitor has filed with Service Canada all Trustee Information Forms ("**TIF**") for employees who have filed a proof of claim with the Monitor.

73. In total, 251 eligible employees have submitted a proof of claim with the Monitor. The Monitor has filed the required TIF's with Service Canada for these employees.

74. As of the date of this report, 9 eligible employees have not submitted a proof of claim with the Monitor. The Monitor will file the TIF with Service Canada for these employees when a proof of claim form has been submitted.

Contractors

75. On October 5, 2022, the Monitor gave notice to terminate the Services Contract with Box L Mining and Ranching LLC. Box L Mining and Ranching LLC provided services to the Company as a Business Optimization Consultant, as well as operating as a General Manager. Pursuant to the Services Contract, the agreement can be terminated by either party, being Box L Mining and Ranching LLC or the Company, by providing 30 days' notice. Box L Mining and Ranching LLC continued to provide services to CFI up to, and including, November 5, 2022, pursuant to the Services Contract. The Monitor has paid all current outstanding invoices owing to Box L Mining and Ranching LLC from the date of appointment of GTL as Interim Receiver and is reviewing a claim for additional compensation.

76. During the month of January 2023, two of the mill technicians requested a leave from work temporarily to return to school. The Monitor has agreed with this request and proceeded to temporarily layoff the employees on January 17, 2023 and January 24, 2023 as both individuals would be valuable in restarting the mill to a new owner operator.

77. Both employees intend to return to work on April 1, 2023 and April 8, 2023, respectively.

78. The Monitor has replaced the two temporarily laid off mill technicians with local individuals who are former employees of the Company on a contract basis until April 2023.

**NOTICES AND STATUTORY REPORTING**

79. The Monitor has reported to the Court in the Second Report on the CCAA statutory notices. The Monitor continues to update the estate's website at www.GrantThornton.ca/CFI providing estate stakeholders updates when available.

80. The Monitor, together with CFI management continues to work to update, and file, all statutory filings, reports and payments with the Canada Revenue Agency ("**CRA**"), Workplace NL, Service Canada (for the WEPP Program), Department of Industry Energy and Technology ("**DIET**"), Department of Fisheries and Oceans, Natural Resources Canada, and Environment Canada.

81. CRA completed a payroll trust examination for Canadian employees covering the prefiling pay period in the calendar year 2022. The Monitor has been advised by CRA that there are no issues, and that no property claim will be forthcoming.

82. As detailed in the Fifth Report, CRA issued a letter to the Monitor dated June 1, 2022, indicating a proposed change to the GST/HST return for the audit period of March 1, 2022, to March 11, 2022, ("**HST Assessment**"):

    a) On receipt of this letter, the Monitor requested and was granted an extension to July 18, 2022, to respond;

    b) On July 18, 2022, the Monitor formally responded to the letter concerning the HST Assessment;

    c) On August 8, 2022, the Monitor has received a response from CRA dismissing the Monitor's response to the audit. A copy of this letter from CRA is attached hereto as **Appendix "G"**;

    d) On November 7, 2022, the Monitor filed a Notice of Objection (GST/HST) with CRA. A copy of this notice and proof of delivery, by way of facsimile, is attached hereto as **Appendix "H"**;

    e) On December 8, 2022, CRA notified the Company that it has received the Monitor's Notice of Objection (GST/HST). A copy of this letter is attached hereto as **Appendix "I"**; and

    f) CRA is reviewing the objection and has contacted the Monitor to source the Monitor's own calculation of this HST reassessment. As of the date

of this Seventh Report, this request has not been received. The Monitor will provide the calculation once instructions are received. This will not impact any transaction as this liability is intended to be an excluded liability in any reverse vesting order transaction.

83. On June 8, 2022, CFI's received notice from CRA of a tax audit of the Part XIII, Regulation 105 and Regulation 102, of Account 89811 4087 RC0001 for the years 2016 to 2020. A copy of this letter is attached hereto as **Appendix "J"**. A summary of activity regarding this audit is as follows:

a) The Monitor, with assistance from CFI's management, have compiled the documents requested by CRA. The Monitor provided these documents to CRA on December 9, 2022. A copy of the Monitor's summary of documents provided and proof of sending by way of courier is attached hereto as **Appendix "K"**;

b) On November 29, 2022, CRA issued a subsequent letter to the Monitor requesting additional items concerning this audit. Notably being, among other things, previously provided documents for the years 2016 to 2020 (as requested on June 8, 2022) and further increasing this request to cover the periods of January 1, 2021 to March 11, 2022. A copy of this letter is attached hereto as **Appendix "L"**.

c) The Monitor, with assistance from CFI's management, have compiled the documents requested by CRA. The Monitor provided these documents to CRA on January 11, 2023. A copy of the Monitor's summary of documents provided and proof of sending by way of courier is attached hereto as **Appendix "M"**;

d) On January 13, 2023, CRA issued a letter to the Monitor requesting audit samples as a result of the information provided to CRA by the Monitor on December 9, 2022. A copy of this letter is attached hereto as **Appendix "N"**;

e) The Monitor has responded to CRA's audit sample requests by informing them that the Monitor will endeavor to pull the audit samples

requested the next time the Monitor travels to site, likely within the next two months. A copy of this letter is attached hereto as **Appendix "O"**.

f) As of the date of this Seventh Report, no further communication has been received by CRA regarding this matter.

84. The Monitor has estimated that the deemed trust claim related to withholding taxes to be $76,438.26. The unsecured portion of the withholding tax is estimated to be approximately $31,000. This ongoing audit should not impact any transaction. The deemed trust amount has been withheld from the net proceeds from the inventory sales and represents a priority charge on the assets of CFI. The unsecured portion is a liability that is expected to be discharged as an excluded liability in any reverse vesting order transaction.

85. On October 20, 2022, the Monitor was informed by the Canadian Nuclear Safety Commission ("**CNSC**") of the Company's requirement to register a new Radiation Safety Officer ("**RSO**") following the termination of the previous RSO on October 12, 2022:

a) The Monitor was provided the regulation by the CNSC as the *General Nuclear Safety and Control Regulations*, specifically *Section 15* being to inform the CNSC of the names of the individual who would be the newly appointed RSO;

b) The Monitor has also been made aware by the CNSC on October 26, 2022 a new Applicant Authority ("**AA**") will also need to be appointed, as the contract with the General Manager has been terminated effective November 5, 2022;

c) The Monitor was informed on October 12, 2022 by the previous RSO that the Company's radiation devices are up to date on their leak testing, as required by its license; and

d) The Monitor has requested quotes for various RSO services from independent contractors and is currently reviewing the Companies' options to maintain the license for a new owner operator.

**SALES AND INVESTMENT SOLICITICATION PROCESS ("SISP")**

86. The Monitor, after consulting with the DIP Lenders/secured creditors, has entered into a binding letter of intent with a party who intends to purchase and operate the mine.

87. The Monitor has prepared a Second Confidential Report disclosing financial details, commercial terms, and identities of the bidders and the offers submitted. The Monitor is requesting a sealing order over this information until the earlier of closing of the Proposed Transaction or further order of the Court.

88. Details of the Monitor's activities pursuant to the SISP Order can be found in the Fifth Report and Sixth Report. The activities of the Monitor in the Fifth Report were approved by the Court on October 12, 2022, attached hereto as **Appendix "A**.

89. As last advised, the previous offer accepted by the Monitor did not move forward and was ultimately terminated by the Monitor.

90. After consulting with the DIP Lenders on a path forward, the Monitor proceeded on October 20, 2022, to engage parties who were previous participants in the SISP to inform them of the material adverse change and request a response should they be interested in submitting a revised letter of intent ("**LOI**").

91. The Monitor initiated a Phase 4 of the sales process and proceeded to reach out to 20 potentially interested parties and requested proposals to acquire the assets of CFI by no later than January 16, 2023.

92. The Monitor has provided notice to the previously selected Successful Bidder, as mentioned in the Sixth Report, that it is in violation of its binding LOI, signed July 22, 2022. The Monitor terminated that agreement on November 1, 2022.

93. One of the parties who requested an ability to submit a proposal by January 16, 2023 was the previous Successful Bidder. The Monitor, after consultation with the DIP Lenders, and on agreement with that Successful Bidder, required the Successful Bidder to pay to the Monitor $500,000 for the opportunity to rebid. It was the Monitor's, and DIP Lenders, view that the $500,000 paid by the Successful Bidder to re-engage in the process was a reduction of the liability owed to CFI by the Successful Bidder pursuant to the previous agreement.

94. On December 9, 2022, the Monitor received from the previously selected Successful Bidder, as described in the Sixth Report, the $500,000 payment to fund holding costs.

95. The Monitor and the Company provided assistance to parties interested in participating in Phase 4 of the sales process including, but not limited to:

a) Reopened the extensive virtual data room previously provided to parties during the SISP;

b) Participated in three site tours;

c) Participated in multiple calls with possible bidders to respond to queries and facilitate discussions with key stakeholders; and

d) Compiled various financial models and fulfilled significant information requests from the multiple bidders.

96. On January 16, 2023, the Monitor received 6 non-binding LOI's and 2 liquidating proposals.

97. After consultation with the DIP Lenders and the Company, the Monitor selected a proposal submitted via a non-binding LOI and instructed the New Successful Bidder to begin the process of drafting a binding LOI.

98. The Monitor and the New Successful Bidder finalized a binding LOI on February 13, 2023 (dated February 10, 2023 but finalized February 13, 2023).

99. The New Successful Bidder anticipates completing confirmatory due diligence and will work with the Monitor to complete definitive agreements. The Monitor intends to request a subsequent date from this Court to hear the Monitor's requested approval of the Proposed Transaction, once a period of due diligence expires and the Definitive Agreements have been fully executed.

100. The Monitor has disclosed details of the SISP and any revisions to the SISP on its website at www.GrantThornton.ca/CFI.

101. The New Successful Bidder intends to restart the operations of CFI.

102. Details regarding the New Successful Bidder are commercially sensitive at this time as the Monitor and the New Successful Bidder work towards through a due diligence period and negotiations on Definitive Agreements. The Monitor is of the view that sealing the Second Confidential Report will not prejudice any stakeholder and will protect the interests of all stakeholders of the CFI estate if in the unlikely event the transaction proposed by the New Successful Bidder does not close.

103. Extending the proposed stay of proceedings to allow the New Successful Bidder to complete certain due diligence and enter into Definitive Agreements is in the best interest

of the stakeholders and the proceeding. The Monitor supports the extension, which is also supported by the DIP Lenders.

**PROPOSED TRANSACTION**

104. The proposed transaction contemplated by the New Successful Bidder is a Reverse Vesting Order. The proposed transaction contemplates the vesting out of all liabilities except certain Retained Liabilities and the retention of all assets with the exception of certain Excluded Assets. A list of Retained Liabilities and Excluded Assets is currently being developed with the New Successful Bidder, which may differ from those listed in the Fifth Report. The Excluded Liabilities and Excluded Assets are to be vested out to a ResidualCo, at which time the Monitor intends to seek a distribution order.

105. The consideration being provided is insufficient to pay out the secured creditors. The secured creditors will, if the transaction closes, suffer a substantial loss.

106. The effect of the proposed transaction on the stakeholders are as follows:

a) Senior Secured Creditors – The senior secured creditors, should the proposed transaction close, suffer a substantial loss;

b) Unsecured Creditors – The proposed transaction contemplates vesting out all the liabilities of CFI except for the Retained Liabilities. The result being that the unsecured creditor will not recover anything;

c) CRA – The Monitor has withheld funds sufficient to cover any deemed trust claim. In addition, any deem trust claim can be dealt with on distribution; and

d) Other creditors with possible priority claims – these creditors will have an opportunity to advance a priority claim through the Monitor's application for distribution.

107. The New Successful Bidder's offer is the best offer for the creditors and stakeholders in that:

a) The Monitor understands that the New Successful Bidder intends to restart operations and therefore avoids a liquidation. Although unsecured creditors will not recover any money under the proposed transaction, a restarted operation present an opportunity for future

business. A restarted operation will also preserve a number of jobs although unknown at this time as to the degree compared to prior to the insolvency, and achieves the objectives of the CCAA by preserving value as a functioning business greater than in a bankruptcy or liquidation;

b) Provides for the repaying of the DIP on closing; and

c) Provides consideration on closing that is materially greater than any other offer received.

**LEGAL PROCEEDINGS**

108. Other than the CCAA proceeding, the estate provides the following update on one other active legal proceeding:

a) As previously reported, Inaminka Marine Services Limited ("**IMSL**") has the CFI barge under arrest in Marystown. Details on the arrest were provided in the Monitor's Third Report. The Monitor vigorously defending the claim;

b) On September 2, 2022, the principal of IMSL, Mr. Spellacy also filed a claim for unpaid master's wages and filed a caveat release with the Federal Court on the matter. The Monitor is vigorously defending this claim;

c) The Monitor filed an emergency application to have the various orders, and the stay of proceedings, recognized by the Federal Court. The Federal Court scheduled a hearing on September 28 and committed to a decision by October 7, 2022;

d) On October 5, 2022 the Federal Court provided its decision and stayed the IMSL actions to October 17, 2022 or any later date determined by order of this Court. A copy of that decision is attached hereto as **Appendix "P"**; and

e) On November 17, 2022, legal counsel for IMSL filed with the Federal Court a motion to lift the stay of proceedings given the MAC as reported by the Monitor. The Monitor is advised by legal counsel that the matter

has never been properly filed with the Federal Court, and materials not properly served on the Monitor. As such, a date to hear this motion has not been set by the Federal Court. A copy of that filing is attached hereto as **Appendix "Q"**.

109. The Monitor was advised there is an ongoing Labour Relations Board Matter (File 5761) in relation to an Unfair Labour Practice complaint, and a Human Rights Complaint (File 13862). Both matters pre-date the initial order and are not expected to have an impact on the CCAA proceedings.

**ACTIVITIES OF THE MONITOR - OTHER**

110. The Monitor has continued to complete the following:

a) The Monitor has continued to fully fund payroll for the remaining employees to Ceridian Canada Ltd. ("**Ceridian**") and has paid all outstanding wages. Ceridian has remitted all applicable source deductions to the Crown on behalf of the Monitor; and

b) The Monitor has paid all regulatory costs owed to the Mineral Lands Division of the Province of Newfoundland and Labrador under the Mineral Act RSNL 1990, c. M-12 relating to mineral licenses, mine and surface leases, water-use licenses and water monitoring charges.

c) The Monitor, with assistance from CFI Management, has filed all outstanding tax and GST/HST returns for Canada Fluorspar Inc., Canada Fluorspar (NL) Inc. and Newspar.

111. The Monitor was informed on January 12, 2023 by the Department of Digital Government and Service of Newfoundland and Labrador that Canada Fluorspar (NL) Inc. has the following outstanding returns:

a) Return of Income Derived from Mineral Rights for the calendar years of 2018, 2019, 2020, 2021 & 2022; and

b) Return of Income Derived from Mining Operations for the calendar years of 2018, 2019, 2020, 2021 & 2022.

112. The Monitor is currently preparing the above noted returns and this will not have an impact on the CCAA proceeding.

## MATERIAL ADVERSE CHANGE

113. The Monitor is not aware of any issue or condition that could be considered a Material Adverse Change pursuant to s.23(1)(d), or the DIP Financing Agreement.

114. The Monitor continues to be of the opinion that s.23(1)(h) does NOT apply and it would be more beneficial to the Company's creditors to continue with the sale within the CCAA proceeding.

## CASH FLOW UPDATE AND REVISED FORECAST

115. The Monitor has prepared an analysis of budget to actual as of January 22, 2023. This is attached hereto as **Appendix "R"**. Overall, the Monitor is tracking materially on budget with a $1,000 favorable variance on a net basis, being ahead of forecast on the cash inflows by $7,000 and above forecast on expenses by $6,000. In addition, the Monitor has attached hereto as **Appendix "S"** a statement of receipts and disbursements to January 22, 2023.

116. The Monitor has prepared a revised cash flow forecast, attached hereto as **Appendix "T"** (the "**Revised Cash Flow Forecast**") as a result of the Monitor's proposed extension to the SISP. The Cash Flow Forecast covers the period from January 23, 2023 to May 31, 2023 (the "**Revised Cash Flow Period**");

117. The Cash Flow Forecast has been prepared by the Monitor using probable and hypothetical assumptions set out therein (the "**Probable and Hypothetical Assumptions**");

118. The requirement of s. 23(1)(b) of the CCAA states that the Monitor is to review the Revised Cash Flow Forecast for reasonableness. As the Directors of the Company have resigned, the Monitor has prepared the Revised Cash Flow Forecast based on the actual expenses incurred since the date of the Interim Receivership and Initial Order. The Monitor is of the opinion that the Revised Cash Flow is reasonable in all material respects:

    (a) The Probable and Hypothetical Assumptions are consistent with the purpose of the Revised Cash Flow Projection;

    (b) As at the date of this Fifth Report, the Probable and Hypothetical Assumptions developed by the Monitor are suitably supported and consistent with the Company's plans and provide a reasonable basis for the Revised Cash Flow Forecast;

(c) The Revised Cash Flow Forecast reflects the Probable and Hypothetical Assumptions.

119. The Company's cash position, held in trust with the Monitor, as of January 22, 2022 is $1,337,669.42. The Company is forecasting a future cash receipt of $500,000 representing a payment to the Monitor as a deposit from the New Successful Bidder upon acceptance of the binding LOI, and $1,439,000 in future disbursements from the date of this report through to May 28, 2023. This disbursement includes $76,000 to cover the unremitted withholding taxes payable, and an estimated $85,000 WEPP priority claim from Service Canada.

**GENERAL COMMENTS ON THE CASHFLOW**

120. In addition, the Monitor makes the following general comments on the Revised Cash Flow Forecast:

(a) Disbursements appear to be consistent with the level of operations since the date of ARIO – Amendment #3;

(b) The Revised Cash Flow Forecast includes the encumbering of estimated priority claims by the Canada Revenue Agency and Employment and Social Development Canada relating to WEPPA. The Monitor understands a portion of those claims would have priority over the secured creditors in relation to the Company's current assets;

(c) Disbursements include forecast payments to the Company's legal counsel and financial advisors, and the Monitor and its legal counsel.

121. The Monitor has the funds in place to support the requested extension of the Revised SISP and stay of proceedings.

**RECOMMENDATION**

122. For the reasons set out in this Seventh Report, the Monitor respectfully recommends that this Court:

(a) Approve the activities of the Monitor and its legal counsel to the date of this Seventh Report;

(b) Granting a Sealing Order of the Second Confidential Report; and

(c) Grant an extension to the stay of proceedings to May 31, 2023.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 15th day of February 2023.

**GRANT THORNTON LIMITED,**
**SOLELY IN ITS CAPACITY AS MONITOR**
**OF THE COMPANY, AND NOT IN ITS PERSONAL CAPACITY**

Per: _____

Phil Clarke, CPA, CA, CIRP, LIT

Senior Vice-President

# Appendix “A”

**2022 01G 0709**

**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

**AMENDED AND RESTATED INITIAL ORDER – AMENDMENT #3**

**BEFORE THE HONOURABLE JUSTICE MACDONALD**

**THIS APPLICATION**, made by Grant Thornton Limited, in its capacity as Court-Appointed Interim Receiver of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., (the "**Interim Receiver**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form filed with the Application was heard this 11th day of March, 2022.

**ON READING** the affidavit of Phil Clarke sworn the 8th day of March, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of Canada Fluorspar (NL) Inc. Canada Fluorspar Inc., and Newspar (a General Partnership) (in such capacity, the "**Monitor**"), and the Pre-Filing Report of GTL as Interim Receiver;

**ON READING**, the report of GTL as Monitor dated the 15th day of March, 2022;

**ON READING** the affidavits of Phil Clarke sworn the 30th day of May, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and of Melissa Spearns sworn on the 26th day of May, 2022 (the "**Spearns Affidavit**") and the Exhibits thereto, and the Monitors First Second and Third Reports;

**ON READING** the affidavit of Phil Clarke sworn the 24th day of August, 2022 (the "**Clarke Affidavit**") and the Exhibits thereto, and the Monitor's Fourth Report;

Filed Oct 12, 2022

**ON READING** the affidavits of Phil Clarke sworn the 6th day of October 2022 and the 11th day of October 2022 (collectively the "**Clarke Affidavit**") and the Exhibits thereto, the Monitor's First Confidential Report and the Monitor's Fifth Report;

**ON HEARING** the submissions of counsel for the Applicant, legal counsel for the Company (as defined herein), and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 10th day of March, 2022, and on reading the consent of GTL to act as Monitor;

## SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar (a General Partnership) (collectively the "**Company**") is a company to which the CCAA applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in Schedule "A"

## PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall have the authority to file and may, if deemed appropriate and subject to further order of this Court, file with this Court a plan of compromise and arrangement (hereinafter referred to as the "**Plan**".

## POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, save and except the Excluded Property (the "**Property**"). Subject to further Order of this Honourable Court, the Monitor on behalf of the Company, shall continue to carry on business in a manner

consistent with the preservation of its business (the **"Business"**) and Property. The Monitor is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such other persons (collectively **"Assistants"**) currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

   (b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

   (c) in consultation with the DIP Lender, amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Monitor, on behalf of the Company, shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and



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(b) payment for goods or services actually supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, **"Sales Taxes"**) required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Monitor, on behalf of the Company, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Company and the landlord from time to time (**"Rent"**), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Monitor, on behalf of the Company, is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

**RESTRUCTURING**

11. **THIS COURT ORDERS** that the Monitor, on behalf of the Company shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as defined hereinafter), have the right to:

    (a) Permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,500,000 in the aggregate;

    (b) Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

    (c) Pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing.

    All of the foregoing to permit the Monitor, on behalf of the Company, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, shall provide each of the relevant landlords with notice of the Company's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Company's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor, on behalf of the Company, or by further Order of this Court upon application by the Monitor on at least two (2) days notice to such landlord and any

such secured creditors. If the Monitor disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Company's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer [or resiliation], the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Company in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

## NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including the 26th day of February, 2023 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property,(save and except the Excluded Property), except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property (save and except the Excluded Property) are hereby stayed and suspended pending further Order of this Court.

## NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Company or the Monitor, or affecting the Business or the Property, (save and except

the Excluded Property), are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Monitor, on behalf of the Company, to carry on any business which the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

16. **THIS COURT ORDERS** that nothing in this Order shall prevent HSBC from exercising any rights or remedies, taking any enforcement steps, actions or commencing any proceedings against the Company with respect to the Excluded Property.

**NO INTERFERENCE WITH RIGHTS**

17. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

**CONTINUATION OF SERVICES**

18. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and that the Monitor, on behalf of the Company, shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Monitor, on behalf of the Company, in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor and the Company, or as may be ordered by this Court.

## NON-DEROGATION OF RIGHTS

19. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

## APPOINTMENT OF MONITOR

20. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the CCAA, (save and except in relation to the Excluded Property) or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the Company's receipts and disbursements;

    (b) report to this Court at such times and intervals as the Monitor or Court may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

    (c) assist, with consultation with the Company, in its dissemination of reports and other information to the DIP Lender (as defined herein) and their respective counsel, pursuant to and in accordance with the Definitive Documents (as defined herein), or as may otherwise be reasonably requested by the DIP Lender;

(d) execute the DIP Financing Agreement (as defined herein) on behalf of the Company;

(e) advise, in consultation with the Company, in its preparation of the Company's cash flow statements and reporting required by the DIP Lender under the Definitive Documents, which information shall be reviewed with the Monitor and delivered to the DIP Lender and their respective counsel in accordance with the Definitive Documents;

(f) execute any and all documentation, on behalf of the Company, as reasonably necessary or required by the DIP Financing Agreement and the SISP;

(g) run the SISP pursuant to the SISP Order;

(h) advise, in consultation with the Company, in its development of the Plan and any amendments to the Plan, if applicable;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other Persons (as defined below) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Order;

(l) enter into any agreements;

(m) exercise any rights of the Company;

(n) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Company;

(o) take any and all steps of the Company authorized by any Order made in these proceedings, including making distributions or payments;

(p) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof; and

(q) perform such other duties as are required by this Order or by this Court from time to time.

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property but as Monitor shall take part in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business, or any part thereof.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that nothing herein contained shall make the Monitor liable for any mine closure or environmental and land rehabilitation-related liabilities or obligations in respect of or in any way related to the Property (or caused by or resulting from any matter or thing originating on or coming from the Property). For greater certainty:

(a) Notwithstanding anything in any Environmental Legislation, the Monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Monitor's appointment; or

(ii) after the Monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the Monitor's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts the Monitor from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any Environmental Legislation, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Monitor to remedy any environmental condition or environmental damage affecting the Property, the Monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, or during the period of the stay referred to in clause (ii) below, the Monitor:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Monitor, if the order is in effect when the Monitor is appointed, by,



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(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Monitor to contest the order; or

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Monitor had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

25. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company and the DIP Lender with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which charge shall not exceed an aggregate amount of $250,000.00 (which includes the amount provided for in the Interim Receivership Order), as security for their professional fees and disbursements incurred at their respective standard rates and charges of the Monitor and such counsel, both before and after the making of this Order and the Amended and Restated Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 herein.

**ENHANCEMENT OF MONITOR'S POWERS**

30. **THIS COURT ORDERS** that, without in any way limiting the powers and duties of the Monitor, the Monitor is hereby empowered and authorized, but not obligated, to do any of the following in the name and on behalf of the Company, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(i) permanently or temporarily ceasing, downsizing or shutting down any of the Company's operations;

(ii) terminating the employment of or temporarily laying off employees of the Company;

(iii) pursuing all avenues of refinancing the Business or Property, except the Excluded Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

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(iv) preparing a Plan of Compromise and Arrangement on behalf of one or more of the Applicants;

(v) settling, extending or compromising any indebtedness owing to or by the Company;

(vi) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Company, the Business, the Property or the Monitor and to settle or compromise any such proceeding;

(vii) taking any and all corporate governance actions for the Company; and

(viii) providing instruction and direction to the advisors of the Company;

(b) preserve, protect and exercise control over the Property, (with the exception of the Excluded Property), or any parts thereof, including, without in any way limiting the generality of the foregoing:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Company; including any proceeds of the sale of any of the Property (save and except the Excluded Property);

(ii) exercise all remedies of the Company in collecting monies owed or hereafter owing to the Company and to enforce any security held by the Company;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (save and except the Excluded Property) for any purpose pursuant to this Order;

(iv) to market, sell convey, transfer, lease or assign the Property, including running a sales solicitation process, or any part or parts of the Property out of the ordinary course of business;

(A) without the approval of this Court, in respect of any one transaction not exceeding $500,000 or $2,500,000 in the aggregate;

(B) without the approval of this Court in respect of the sale of Fluorspar inventory; and

(C) with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Company in these proceedings, including cash flow statements;

(e) apply to the court for advice and direction or for any further orders in these proceedings, including, without in any way limiting the generality of the foregoing, sale approval and vesting orders and orders extending or terminating the stay of proceedings;

(f) perform such other duties or take any steps reasonably incidental to the exercise of these powers;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Company and without interference from any other person.

**DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR**

31. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

(a) advising the Monitor of the existence of any Property of which such party has knowledge of;

(b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

(c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information ("**Records**") of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor client communication or due to statutory provisions prohibiting such disclosure.

**LIMITATION ON THE MONITOR'S LIABILITY**

32. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

33. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act,* R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

34. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

## DIP FINANCING

35. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, is hereby authorized and empowered to execute, enter into and deliver the DIP Facility Loan Agreement (the "**DIP Financing Agreement**") dated the 7th day of March, 2022 between, the Company, as borrower, and 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 as lender ( collectively the "**DIP Lender**"), and to borrow, in accordance with the terms and conditions of the DIP Financing Agreement, up to Four Million Seven Hundred Thousand ($4,700,000.00) (the "**DIP Facility**") to, among other things, fund the Company's working capital requirements, the SISP and other general corporate purposes of the Company during the Stay Period.

36. **THIS COURT ORDERS** that, in addition to the DIP Financing Agreement, the Company is also hereby authorized and empowered to execute and deliver such other credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Financing Agreement, the "**Definitive Documents**"), as are contemplated by the DIP Financing Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Monitor, on behalf of the Company is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Financing Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

37. **THIS COURT ORDERS** that, as security for the Company's obligations under the Definitive Documents, the DIP Lender shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lender's Charge**") on the Property, (save and except the Excluded Property and Excluded Inventory), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 41 and 43 herein. Notwithstanding the foregoing, the Interim Receiver's Borrowing Charge contained in Paragraph 27 of the Interim Receivership Order, being the 1.8 Million advanced pursuant to the Interim Receivership

Order, shall continue to be in full force and effect during the term of this Order. The Interim Receiver's Borrowing Charge shall rank pari passu with the DIP Lender's Charge.

38. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, upon five (5) days notice to the Monitor and the Company, the DIP Lender may exercise any rights and remedies against the Company or the Property, (save and except the Excluded Property), under or pursuant to the DIP Financing Agreement, the other Definitive Documents and the DIP Lender's Charge, including, without limitation, to cease making advances to the Company and set off and/or consolidate any amounts that may be owing by the DIP Lender against the obligations of the Company to the DIP Lender under the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Company and for the appointment of a trustee in bankruptcy of the Company; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Company or the Property (save and except the Excluded Property).

39. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Company under the CCAA, or any proposal filed by the Company under the BIA, with respect to any advances made under the DIP Financing Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP Financing Agreement, the other Definitive Documents or the DIP Lender's Charge shall

subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP Lender, whether under this Order (as made prior to the Variation), under the DIP Financing Agreement or the other Definitive Documents with respect to any advances made or obligations incurred prior to the DIP Lender being given notice of the Variation, and the DIP Lender shall be entitled to rely on this Order as issued (including, without limitation, the DIP Lender's Charge) for all advances so made and other obligations set out in the DIP Financing Agreement and the other Definitive Documents.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the DIP Lender's Charge, and the Interim Receiver's Borrowing Charge on the Property (save and except the Excluded Property and Excluded Inventory), (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $250,000.00);

Second– the DIP Lender's Charge and the Interim Receiver's Borrowing Charge, on a pari passu basis.

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property, (save and except the Excluded Property and Excluded Inventory), and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any secured creditor of the Company who did not receive notice of the application for this Order. The Company shall be entitled, on a subsequent motion on notice to those Persons likely to

be affected thereby, to seek priority of the Charges ahead of any Encumbrances over which the Charges have not obtained priority pursuant to this Order.

44. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, any of the Charges, unless the Company also obtains the prior written consent of the Monitor and of the applicable chargee(s) entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

45. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Company, and notwithstanding any provision to the contrary in any Agreement:

(a) Neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Financing Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Company of any Agreement to which it is a party;

(b) None of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Company entering into the DIP Financing Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

(c) The payments made by the Company pursuant to this Order, the DIP Financing Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at

undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

46. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Company's interest in such real property leases.

**SERVICE AND NOTICE**

47. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

**GENERAL**

48. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

50. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

Dated this 12th day of October, 2022 in St. John's, Newfoundland Labrador

COURT OFFICER

Schedule "A"

Defined Terms

"**Excluded Inventory**" means inventory representing a value in the amount of USD2,500,000

"**Excluded Property**" means: (i) any and all Receivables and/or Financed Receivables, as such terms are defined pursuant to the RFA, together with all rights and remedies arising thereunder, insurance policies and proceeds resulting therefrom, and proceeds generally, and (ii) all Export Development Canada insurance policies or support in favor of HSBC,

"**HSBC**" means HSBC Bank Canada; and

"**RFA**" means the Trade Invoice Recourse Financing Facility Agreement between HSBC and Canada Fluorspar (NL) Inc., dated May 25, 2018, as amended.

# Appendix “B”

*Companies Creditors Arrangement Regulations, SOR/2009-219*

**Form 4**

## Notice by Debtor Company to Disclaim or Resiliate an Agreement

**To:**
Caterpillar Financial Services Limited
1122 International Blvd., Suite 400
Burlington, ON L7L 6Z8
Attention: Sherry Pottie – Sherry.Pottie@cat.com

**And with a Copy to:**
The Monitor, Grant Thornton Limited
*via email*

**TAKE NOTICE THAT:**

1. Proceedings under the *Companies' Creditors Arrangement Act* (the "**Act**") in respect of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) (collectively referred to as "**CFI**") were commenced on the 11th day of March, 2022.

2. In accordance with subsection 32(1) of the Act, the debtor company gives you notice of its intention to partially disclaim or resilitate the following agreement (the "**Agreement**"):

   A. Lease Agreement 104-50006760 dated March 17, 2020 for the following equipment:
      i. 2019 Caterpillar 950M Medium Wheel Loader (CAT0950MPJ1S01994);
      ii. 2019 Caterpillar 349 FL Large Hydraulic Excavator (CAT0349FLHPD20437);
      iii. 2019 Caterpillar 349 FL Large Hydraulic Excavator (CAT0349FCHPD20619); and
      iv. 2019 Caterpillar 323-07 Hydraulic Excavator (CATCS66BC48700145).
   B. Lease Agreement 104-50007164 dated June 3, 2020 for a 2016 Caterpillar CS66B Vibratory Single Drum Soil Compactor (CATCS66BC48700145).
   C. Lease Agreement 104-50013863 dated July 16, 2021, substituted with different equipment on September 24, 2021, for a 2015 Caterpillar 972M Wheel Loader (CAT0972MEA8P00936).

3. As such, you are entitled to retrieve the property, as described above, at your own convenience.

4. The equipment noted above under Lease Agreements 104-50006760 and 104-50007164 is located at CFI

5. The equipment noted above under Lease Agreement 104-50013863 is in possession by Toromont Cat at 82 Kenmount Road, St. John's, NL, A1B 3S4.

6. In accordance with subsection 32(2) of the Act, any party to the agreement may, within 15 days after the day on which this notice is given and with notice to the other parties to the agreement and to the Monitor, apply to the court for an order that the agreement is not to be disclaimed or resiliated.

7. In accordance with paragraph 32(5)(a) of the Act, if no application for an order is made in accordance with subsection 32(2) of the Act, the agreement is disclaimed or resiliated on the 5th day of December, 2022, being 30 days after the day on which this notice has been given.

Dated at the Town of St. Lawrence, in the Province of Newfoundland and Labrador, on the 14th day of November, 2022.

_____

Phil Clarke, CPA, CA, CIRP, LIT for Grant Thornton, Monitor of
Canada Fluorspar (NL) Inc.
Canada Fluorspar Inc.
Newspar (a General Partnership)

The Monitor approves the proposed disclaimer or resiliation.

Dated at the City of Halifax, in the Province of Nova Scotia, on the 14th day of November, 2022.

_____

Phil Clarke, CPA, CA, CIRP, LIT
Senior Vice President
Grant Thornton Limited on Behalf of the Monitor

CANADA POST POSTES CANADA

# Xpresspost™/MC

Tracking Number **1614 9495 2527 4531** Numéro de repérage

## Instructions

1. Choose a box designed for shipping.
2. Wrap your items so that they are secure in the box and seal the box using proper shipping tape.
3. Cut the label on the dotted line and retain this half for tracking purposes.
4. Tape the label so it appears squarely on the largest side of the box (**do not bend it around sides or end of box).** Do not tape over any part of the barcode on the label.
5. Take the parcel to a Canada Post retail outlet for shipping. All items except Priority™ may also be deposited in a Street Letter Box.

1. Choisissez une boîte conçue pour l'expédition.
2. Empaquetez solidement vos articles dans la boîte et scellez le tout avec du ruban d'expédition.
3. Découpez l'étiquette le long du pointillé et conservez cette partie pour suivi.
4. Apposez l'étiquette pour qu'elle paraisse entièrement sur le côté le plus grand de la boîte **(ne pas la replier sur les côtés)** . Ne recouvrez aucune partie du code à barres de l'étiquette.
5. Apportez le colis à un comptoir postal de Postes Canada pour expédition. Tous les envois sauf ceux utilisant Priorité^MC peuvent aussi être déposés dans une boîte aux lettres publique.

To: / À: SHERRY POTTIE
Order No.: / N° d'commande: P271667455

### Customer Supplier Account Receipt / Reçu de compte fournisseur

The online transaction has been approved by the account issuer / La transaction en ligne a été approuvée par le fournisseur du compte

| | |
|---|---|
| Transaction type: / Type de transaction: | Sale / Vente |
| Vendor: / Fournisseur: | QUADIENT CANADA LTD |
| Order Sub-Total: / Total partiel de la commande: | $20.35 CAD |
| GST / TPS: | $0.00 CAD |
| PST / TVP: | $0.00 CAD |
| HST / TVH (#119321495): | $2.65 CAD |
| Total Transaction Amount: / Montant total de la transaction: | $23.00 CAD |
| Authorization Code: / Code d'autorisation: | NSA0000000465802 |
| Date and Time: / Date et heure: | 2022 11 07 09:57 EST |
| Merchant Name: / Nom du commerçant: | Canada Post Postes Canada |
| Merchant Online Address: / Adresse Web du commerçant: | www.canadapost.ca www.postescanada.ca |

A barcode should be printed on the label because Delivery Confirmation is selected. If no bar code is visible, please contact the help desk at 1-877-376-1212 for assistance.
Un code à barres devrait etre imprimé surl'étiquette lorsque la confirmation de livraison est choisie. Si le code à barres n'apparaît pas, veullez communiquer avec le service d'assistance au 1-877-376-1212.

CUT HERE / DÉCOUPER ICI

CANADA POST POSTES CANADA

**1**

# Xpresspost™/MC

TO: / À:

SHERRY POTTIE
CATERPILLAR FINANCIAL SERVICES LTD
1122 INTERNATIONAL BLVD SUITE 400
BURLINGTON ON L7L 6Z8

# L7L 6Z8

**TRACKING NUMBER** **1614 9495 2527 4531** **N° DE REPÉRAGE**

Sender warrants that this item does not contain non-mailable matter.
L'expéditeur garantit que cet envoi ne contient pas d'objet inadmissible.

**FROM: / DE**

CAPSERVCO LIMITED PARTNERSHIP
1675 GRAFTON ST SUITE 1000
HALIFAX NS B3J 0E9

**0.024** KG VE/EV

**MANIFEST NOT REQ**
**MANIFESTE NON REQ**

EST/OÉE V2209.0.821 SPEC 3696 V5

P/F: 1614949 **SA/CF**

PIN / NIP: 1614 9495 2527 4531

Order No.: / N° d'commande: P271667455
Auth Number / N° d'authorisation: NSA0000000465802

In case of non-delivery, return at sender's expense at counter rates.
En cas de non-livraison manquée, renvoyer aux frais de l'expéditeur aux tarifs du comptoir.

## Hines, Corey

**From:** Clarke, Phil
**Sent:** November 14, 2022 8:33 AM
**To:** Sherry Pottie
**Cc:** Hines, Corey
**Subject:** CFI - Lease Disclaimer
**Attachments:** Caterpillar Disclaimer.pdf

Sherry:

Please find attached a disclaimer of the remaining Caterpillar leases in the CFI matter. You can coordinate the pick up of the equipment with Corey Hines, copied here.

Let me know if you need any additional information or assistance.

Original to follow my mail.

Cheers,

**Phil Clarke | Partner**
Grant Thornton LLP
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
**T** +1 902 420 7191 | **F** +1 902 420 1068 | **C** +1 902 293 9119

**E** Phil.Clarke@ca.gt.com | **W** http://www.grantthornton.ca/

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# Appendix “C”

**Caterpillar Financial Services Limited**
**Les Services Financiers Caterpillar Limitée**
1122 International Boulevard
4th Floor
Burlington, Ontario L7L 6Z8

**NOTICE OF DISPOSITION**

***PERSONAL PROPERTY SECURITY ACT***

RN 659 521 776 CA

TO: **Grant Thornton LLP**
**Monitor of Canada Fluorspar Inc.** **(the "Debtor")**
**Suite 1000, 1675 Grafton Street**
**Halifax, NS B3J 0E9**

AND TO: The Persons referred to in Schedule "A" hereto.

**YOU ARE HEREBY NOTIFIED THAT:**

1. Caterpillar Financial Services Limited (the "**Creditor**") holds a security interest (the "**Security Interest**") under the *Personal Property Security Act*, SNL 1998, c. P-7.1 (the "**PPSA**") in **[SEE THE ATTACHED SCHEDULE B]** (the "**Collateral**") pursuant to the **Direct Finance Leases** **[SEE THE ATTACHED SCHEDULE B]** made by the Debtor in favour of the Creditor (the "**Security Agreement**") in respect of which a financing statement was registered under the PPSA.

2. The amount required to satisfy the obligations secured by the Security Interest is **$[SEE THE ATTACHED SCHEDULE B]** as of **December 8, 2022,** together with interest accruing thereon at the applicable rates from **December 9, 2022** to the date of payment (the "**Redemption Amount**").

3. The amount actually in arrears, exclusive of the operation of the acceleration clause in the Security Agreement, is **$172,113.81** (the "**Arrears**").

4. The expenses of preparing the Collateral for disposition and disposing of the Collateral and the other expenses incurred and to be incurred by the Creditor in connection with the disposition of the Collateral (the "**Costs**") are reasonably estimated to be **$85,245.42** on the basis of the information currently available to the Creditor.

5. Upon payment to the Creditor of the Redemption Amount and the Costs, any person entitled to receive this notice may redeem the Collateral.

6. Upon payment to the Creditor of the Arrears and the Costs, and upon the curing of all other defaults under the Security Agreement, the Debtor may reinstate the Security Agreement.

7. If payment of the Redemption Amount and the Costs are not received by the Creditor or the Security Agreement is not reinstated by **January 8, 2023**, the Collateral will be disposed of after such date by private sale or public sale and the Debtor may be liable for any deficiency.

8. This notice is served upon you pursuant to the provisions of the PPSA.

Caterpillar: Confidential Yellow

**DATED AT BURLLINGTON, ONTARIO, THIS 8TH DAY OF DECEMBER 2022.**

**CATERPILLAR FINANCIAL SERVICES LIMITED**

PER: _____

**SHERRY POTTIE**
**SPECIAL ACCOUNTS REPRESENTATIVE**

**CATERPILLAR: CONFIDENTIAL YELLOW**

*The address of Caterpillar Financial Services Limited is:*

**1122 International Boulevard**
**4th Floor**
**Burlington, Ontario L7L 6Z8**

| | |
|---|---|
| **Main Phone:** | **1-800-651-0567** |
| **Direct Phone:** | **1-289-291-2072** |
| **Main Fax:** | **1-289-291-2234** |

**SCHEDULE "A"**

**to the Notice given by Caterpillar Financial Services Limited**

TO:

**Government of Newfoundland and Labrador**
**Department of Tourism, Culture, Industry, and Innovation**
**P.O. Box 8799 2nd Floor**
**Confederation Building (West Block)**
**St. John's NL A1B 4J6**

**HSBC Bank Canada**
**James C. Bowne**
**Assistant Vice President, Corporate Banking**
**205 Water Street**
**St. John's NL A1C 1B4**

**Meridian OneCap Credit Crop.**
**Suite 1500, 4710 Kingsway**
**Burnaby, BC V5H 4M2**

**Bank of Montreal/Banque de Montreal**
**100 King Street, West 11th Floor**
**Toronto, ON M5X 1A1**

**Bank of Montreal**
**5750 Explorer Drive**
**Mississauga ON L4W 0A9**

**De Lage Landen Financial Services Canada Inc.**
**5046 Mainway, Unit 1**
**Burlington, ON L6L 5Z1**

**SCHEDULE "B"**

| Customer Name | MODEL | Contract | Description | Serial # | Buyout 12/08/2022 | Per Diem |
|---|---|---|---|---|---|---|
| Canada Fluorspar Inc. | 349FL | 104-50006760 | Large Hydraulic Excavator | CAT0349FLHPD20437 | $96,248.43 | $14.73 |
| Canada Fluorspar Inc. | 323-07 | 104-50006760 | Hydraulic Excavator | CAT00323CRAZ10565 | $99,236.33 | $15.19 |
| Canada Fluorspar Inc. | 349FL | 104-50006760 | Large Hydraulic Excavator | CAT0349FCHPD20619 | $186,269.99 | $14.73 |
| Canada Fluorspar Inc. | 950M | 104-50006760 | Medium Wheel Loader | CAT0950MPJ1S01994 | $55,464.35 | $8.48 |
| Canada Fluorspar Inc. | CS66B | 104-50007164 | Vibratory Single Drum Soil Compactor | CATCS66BC48700145 | $80,385.25 | $12.21 |
| Canada Fluorspar Inc. | 972M | 104-50013863 | Medium Wheel Loader | CAT0972MEA8P00936 | $334,849.82 | $47.21 |
| | | | | **TOTAL** | **$852,454.17** | |



Caterpillar: Confidential Yellow

# Appendix “D”

## Hines, Corey

**From:** Natalie Coombs <ncoombs@canadafluorspar.com>
**Sent:** October 8, 2022 6:42 AM
**To:** Hines, Corey; Patrick Gannon; Jacinta Loder
**Subject:** SLA

CAUTION: EXTERNAL EMAIL. DO NOT CLICK ON LINKS OR OPEN ATTACHMENTS YOU DO NOT TRUST
***NEW*** DO NOT ENTER YOUR GT PASSWORD ON ANY EXTERNAL EMAIL REQUEST

Corey ,

As discussed SLATA came to site yesterday to collect the remaining smaller items like solar panels etc that they wanted . There are some boxes of items left that they did not want. I made them aware that yesterday was the final day to visit . They will send an email confirming that the remaining items can be disposed of .

Natalie

St. Lawrence Area Trail Association
PO Box 445
St. Lawrence, NL A0E 2V0

**Grant Thornton Ltd**
Nova Centre, North Tower
Suite 1000, 1675 Grafton Street
Halifax, NS
B3J 0E9

T +1 902 421 1734
F +1 902 420 1068

September 20, 2022

Attention: Cass Clarke

**Re: In the Matter of the Companies' Creditors Arrangement Act proceedings of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) ("CFI") – Property Claim of St. Lawrence Area Trail Association ("SLATA")**

Mr. Clarke:

We are in receipt of SLATA's property claim dated August 26, 2022. We have fully accepted your claim as described below.

The claim has been accepted in full and all items can be retrieved from site at your own expense. The Monitor is requesting that the items be removed from site no later than October 7, 2022.

Please contact Corey Hines at 902-491-7704 or at Corey.Hines@ca.gt.com if you would like to arrange to retrieve the items as described in your claim.

Yours truly,

**GRANT THORNTON LIMITED**
In its Capacity as Monitor of
Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership)

Per:
Phil Clarke, CPA, CA, CIRP, LIT
Senior Vice President

CANADA POST POSTES CANADA

# Expedited Parcel™ | Colis accélérés^MC

Tracking Number **1614 9495 3719 0515** Numéro de repérage

## Instructions

1. Choose a box designed for shipping.
2. Wrap your items so that they are secure in the box and seal the box using proper shipping tape.
3. Cut the label on the dotted line and retain this half for tracking purposes.
4. Tape the label so it appears squarely on the largest side of the box (**do not bend it around sides or end of box).** Do not tape over any part of the barcode on the label.
5. Take the parcel to a Canada Post retail outlet for shipping. All items except Priority™ may also be deposited in a Street Letter Box.

1. Choisissez une boîte conçue pour l'expédition.
2. Empaquetez solidement vos articles dans la boîte et scellez le tout avec du ruban d'expédition.
3. Découpez l'étiquette le long du pointillé et conservez cette partie pour suivi.
4. Apposez l'étiquette pour qu'elle paraisse entièrement sur le côté le plus grand de la boîte **(ne pas la replier sur les côtés)** . Ne recouvrez aucune partie du code à barres de l'étiquette.
5. Apportez le colis à un comptoir postal de Postes Canada pour expédition. Tous les envois sauf ceux utilisant Priorité^MC peuvent aussi être déposés dans une boîte aux lettres publique.

To: / À: CASS CLARKE
Order No.: / N° d'commande: P268804003

### Customer Supplier Account Receipt / Reçu de compte fournisseur

The online transaction has been approved by the account issuer / La transaction en ligne a été approuvée par le fournisseur du compte

| | |
|---|---|
| Transaction type: / Type de transaction: | Sale / Vente |
| Vendor: / Fournisseur: | QUADIENT CANADA LTD |
| Order Sub-Total: / Total partiel de la commande: | $18.59 CAD |
| GST / TPS: | $0.00 CAD |
| PST / TVP: | $0.00 CAD |
| HST / TVH (#119321495): | $2.79 CAD |
| Total Transaction Amount: / Montant total de la transaction: | $21.38 CAD |
| Authorization Code: / Code d'autorisation: | NSA0000000459581 |
| Date and Time: / Date et heure: | 2022 09 22 14:11 EDT |
| Merchant Name: / Nom du commerçant: | Canada Post Postes Canada |
| Merchant Online Address: / Adresse Web du commerçant: | www.canadapost.ca www.postescanada.ca |

A barcode should be printed on the label because Delivery Confirmation is selected. If no bar code is visible, please contact the help desk at 1-877-376-1212 for assistance.
Un code à barres devrait etre imprimé surl'étiquette lorsque la confirmation de livraison est choisie. Si le code à barres n'apparaît pas, veullez communiquer avec le service d'assistance au 1-877-376-1212.

CUT HERE / DÉCOUPER ICI

CANADA POST POSTES CANADA

**2**

# Expedited Parcel™ | Colis accélérés^MC

TO: / À:

CASS CLARKE
ST LAWRENCE AREA TRAIL ASSOCIATION
PO BOX 445
ST LAWRENCE NL A0E 2V0

# A0E 2V0

**TRACKING NUMBER** **1614 9495 3719 0515** **N° DE REPÉRAGE**

Sender warrants that this item does not contain non-mailable matter.
L'expéditeur garantit que cet envoi ne contient pas d'objet inadmissible.

**FROM: / DE**

CAPSERVCO LIMITED PARTNERSHIP
1675 GRAFTON ST SUITE 1000
HALIFAX NS B3J 0E9

**0.019** KG VE/EV

**MANIFEST NOT REQ**
**MANIFESTE NON REQ**

EST/OÉE V2208.0.819 SPEC 3696 V5

P/F: 1614949 **SA/CF**

PIN / NIP: 1614 9495 3719 0515

Order No.: / N° d'commande: P268804003
Auth Number / N° d'authorisation: NSA0000000459581

In case of non-delivery, return at sender's expense at counter rates.
En cas de non-livraison manquée, renvoyer aux frais de l'expéditeur aux tarifs du comptoir.

# Appendix “E”

## Hines, Corey

**From:** Paul Hughes <Paul.Hughes@mail.weir>
**Sent:** November 30, 2022 7:01 AM
**To:** Hines, Corey
**Cc:** Shane Kearney
**Subject:** RE: WEIR Consignment recovery - CFI - Site pick up Tuesday Nov 28th.

**CAUTION: EXTERNAL EMAIL. DO NOT CLICK ON LINKS OR OPEN ATTACHMENTS YOU DO NOT TRUST**
*****NEW*** DO NOT ENTER YOUR GT PASSWORD ON ANY EXTERNAL EMAIL REQUEST**

Corey

I am confirming with you that WEIR was at CFI yesterday and we do collect the consignment parts we had in the warehouse.

Thank you for working with WEIR to make this arrangement.

FYI… I wanted to collect a trial part that was left up in the Maintenance office but someone else came to help us other then Shane so I unfortunately ended up driving away before I even thought that I did not collect it. Shane was going to bring it down but that changed with someone else helping us so I mentioned in an email to Shane that at some time I would like to recover this part or if there were a way to send it to me, it would be appreciated. I am thinking this is most likely not possible.

Regards

**Paul Hughes**

Account Manager - Atlantic Canada
**Weir Minerals**

(902) 297-0711

paul.hughes@mail.weir

---

**From:** Paul Hughes
**Sent:** October 31, 2022 10:27 AM
**To:** Hines, Corey <Corey.Hines@ca.gt.com>
**Cc:** Shane Kearney <skearney@canadafluorspar.com>
**Subject:** RE: WEIR Consignment recovery - CFI - Site pick up Tuesday Nov 28th.

Corey

My goof……Tuesday Nov 29th is the day I would be at the warehouse.

Thanks

**Paul Hughes**

Account Manager - Atlantic Canada
**Weir Minerals**

(902) 297-0711

paul.hughes@mail.weir

---

**From:** Hines, Corey <Corey.Hines@ca.gt.com>
**Sent:** October 31, 2022 10:19 AM
**To:** Paul Hughes <Paul.Hughes@mail.weir>
**Cc:** Shane Kearney <skearney@canadafluorspar.com>
**Subject:** [EXTERNAL] RE: WEIR Consignment recovery - CFI - Site pick up Tuesday Nov 28th.

Paul,

This is fine with me.

Shane – Can you please confirm if November 28th will work for you?

Thanks,

**Corey Hines, CPA | Senior Associate**
Grant Thornton Limited
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
**T** +1 902 491 7704 | **F** +1 902 420 1068
**E** Corey.Hines@ca.gt.com | **W** http://www.grantthornton.ca/

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---

**From:** Paul Hughes <Paul.Hughes@mail.weir>
**Sent:** October 31, 2022 10:12 AM
**To:** Hines, Corey <Corey.Hines@ca.gt.com>
**Cc:** Shane Kearney <skearney@canadafluorspar.com>
**Subject:** RE: WEIR Consignment recovery - CFI - Site pick up Tuesday Nov 28th.

**CAUTION: EXTERNAL EMAIL. DO NOT CLICK ON LINKS OR OPEN ATTACHMENTS YOU DO NOT TRUST**
*****NEW*** DO NOT ENTER YOUR GT PASSWORD ON ANY EXTERNAL EMAIL REQUEST**

Corey

Before I make travel arrangements, I am proposing the following travel plans to CFI to collect the WEIR Consignment Inventory.

Tuesday Nov 28th arrive on site early am and organize all parts for afternoon pick up by trucking company.

I would require Shane's support to pull some of the larger parts our of C Cans and we could then organize for placing on Transport Truck when it arrives.

Would this work for you/CFI?

FYI… There is one small box with a sealing device in it up in the Maintenance office. I have the paperwork to pick this piece up as well and I could explain what it is to Shane and he could bring it down to the warehouse if that is okay.

Thanks

**Paul Hughes**

Account Manager - Atlantic Canada

**Weir Minerals**

(902) 297-0711

paul.hughes@mail.weir

---

**From:** Hines, Corey <Corey.Hines@ca.gt.com>
**Sent:** October 24, 2022 11:40 AM
**To:** Paul Hughes <Paul.Hughes@mail.weir>
**Cc:** Shane Kearney <skearney@canadafluorspar.com>
**Subject:** [EXTERNAL] Re: WEIR Consignment recovery - CFI - Oct 24 2022

Paul,

November 24th should be fine. We would only be able to provide one person as assistance, Shane Kearney.

He can assist with a forklift for the heavier items, but you will likely need a couple of your own employees as well due to the amount of inventory on site.

Shane - FYI.

Thanks,

**Corey Hines, CPA | Senior Associate**
Grant Thornton Limited
Nova Centre, North Tower | Suite1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
**T**+1 902 491 7704|**F**+1 902 420 1068
**E** Corey.Hines@ca.gt.com| **W** http://www.grantthornton.ca

---

**From:** Paul Hughes <Paul.Hughes@mail.weir>
**Sent:** Monday, October 24, 2022 11:15 AM
**To:** Hines, Corey <Corey.Hines@ca.gt.com>
**Subject:** WEIR Consignment recovery - CFI - Oct 24 2022

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Corey

I have been asked to take care of the recovery of the WEIR Consignment Inventory at CFI. As an FYI, we just recently completed an inventory count at site.

Currently I am working with our Logistics Dept to make arrangements for pick up at site and I am considering the week of November 24th at this time.

Couple of questions:

1. Would we have access to someone at site that could assist in getting the parts gathered and put on pallets with proper strapping etc so the product can be shipped safely?
2. I am assuming there is a fork lift available so we could remove some of the heavier components that are located in Sea Cans.

My plan would be to go to site the day before an actual pick up time so everything is organized for shipment. I will be there the day of actual shipment as well.

Your comments please.

Thanks

**Paul Hughes**

Account Manager - Atlantic Canada

**Weir Minerals**

(902) 297-0711

paul.hughes@mail.weir

global.weir

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Grant Thornton

**Grant Thornton Ltd**
Nova Centre, North Tower
Suite 1000, 1675 Grafton Street
Halifax, NS
B3J 0E9

T +1 902 421 1734
F +1 902 420 1068

Weir Minerals Canada Inc.
c/o Osler, Hoskin & Harcourt LLP
Brookfield Place, Suite 2700, 225 6 Ave SW
Calgary, AB T2P 1N2

September 8, 2022

Attention: Emily Paplawski

**Re: In the Matter of the Companies' Creditors Arrangement Act proceedings of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) ("CFI") – Property Claim of Weir Minerals Canada Inc. ("Weir")**

Ms. Paplawksi:

We are in receipt of Weir's property claim dated June 1, 2022. We have fully accepted your claim as described below.

The claim of the consignment inventory stored at CFI's warehouse has been accepted and can be retrieved from site at your convenience. Additionally, the Monitor is intending to seek approval from the Supreme Court of Newfoundland and Labrador of a sales transaction to the Successful Bidder as per the Sales and Investment Solicitation Process. Weir can opt to leave the consignment inventory on site to hopefully negotiate an agreement with a new purchaser.

The Montior has been informed by the employees of CFI that most of the items listed on Weir's property claim have been located. Certain items were unable to be located due to the boxes being damaged or mislabeled.

Additionally, on June 27, 2022, the Monitor was informed that a part (PDM Part # TRIO17009428) was mistakenely delivered to CFI. CFI has no use for this part and can be retrieved at anytime.

Please contact Corey Hines at 902-491-7704 or at Corey.Hines@ca.gt.com if you would like to arrange to retrieve the consignment inventory or part as described above.

Yours truly,

**GRANT THORNTON LIMITED**
In its Capacity as Monitor of
Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership)

Per:
Phil Clarke, CPA, CA, CIRP, LIT
Senior Vice President

## Hines, Corey

**From:** Paul Hughes <Paul.Hughes@mail.weir>
**Sent:** June 27, 2022 9:34 AM
**To:** Hines, Corey
**Cc:** Patrick Gannon; Shane Williams; Jamie Mullings; Dana Lowry
**Subject:** WEIR Part Shipment in Error

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Corey

As discussed, please find below the paperwork that Pat sent us for the part that arrived at CFI from WEIR Canada by mistake.

We have shared with Pat what the part is and where it is to be used on existing WEIR TRIO equipment at site. CFI PO 21413 was used for the purchase.

It has been decided internally that we will leave the part at CFI versus recovering it at this time. With the hope that CFI will come back on line, we will charge for the part at that time.

Regards

WEIR

# CA2022-053

Country of origin： Made In China

Supplier Name: Weir Group Machinery Ec

Destination: Canada

| Customer PO No. | Sales Order No. | Item/Line | Delivery Number | PDM Part Number | English Description | Chinese Description | Qty | Weight (kg) | Gross Weight (kg) | Pa # |
|---|---|---|---|---|---|---|---|---|---|---|
| 4500815821 | 1000422438 | 10 | 6001278923 | TRIO17009428 | Rubber Plate | 橡胶板 | 1 | 9 | 24 | 1 |

**Paul Hughes**

Account Manager - Atlantic Canada
**Weir Minerals**

(902) 297-0711

paul.hughes@mail.weir

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## Instructions

1. Choose a box designed for shipping.
2. Wrap your items so that they are secure in the box and seal the box using proper shipping tape.
3. Cut the label on the dotted line and retain this half for tracking purposes.
4. Tape the label so it appears squarely on the largest side of the box (**do not bend it around sides or end of box).** Do not tape over any part of the barcode on the label.
5. Take the parcel to a Canada Post retail outlet for shipping. All items except Priority™ may also be deposited in a Street Letter Box.

1. Choisissez une boîte conçue pour l'expédition.
2. Empaquetez solidement vos articles dans la boîte et scellez le tout avec du ruban d'expédition.
3. Découpez l'étiquette le long du pointillé et conservez cette partie pour suivi.
4. Apposez l'étiquette pour qu'elle paraisse entièrement sur le côté le plus grand de la boîte **(ne pas la replier sur les côtés)** . Ne recouvrez aucune partie du code à barres de l'étiquette.
5. Apportez le colis à un comptoir postal de Postes Canada pour expédition. Tous les envois sauf ceux utilisant Priorité℠ peuvent aussi être déposés dans une boîte aux lettres publique.

To: / À: C/O OSLER HOSKIN & HARCOURT LLP
Order No.: / N° d'commande: P267990190

### Customer Supplier Account Receipt / Reçu de compte fournisseur

The online transaction has been approved by the account issuer / La transaction en ligne a été approuvée par le fournisseur du compte

| | |
|---|---|
| Transaction type: / Type de transaction: | Sale / Vente |
| Vendor: / Fournisseur: | QUADIENT CANADA LTD |
| Order Sub-Total: / Total partiel de la commande: | $16.59 CAD |
| GST / TPS (#119321495): | $0.83 CAD |
| PST / TVP: | $0.00 CAD |
| HST / TVH: | $0.00 CAD |
| Total Transaction Amount: / Montant total de la transaction: | $17.42 CAD |
| Authorization Code: / Code d'autorisation: | NSA0000000455943 |
| Date and Time: / Date et heure: | 2022 09 08 14:02 EDT |
| Merchant Name: / Nom du commerçant: | Canada Post Postes Canada |
| Merchant Online Address: / Adresse Web du commerçant: | www.canadapost.ca www.postescanada.ca |

A barcode should be printed on the label because Delivery Confirmation is selected. If no bar code is visible, please contact the help desk at 1-877-376-1212 for assistance.
Un code à barres devrait etre imprimé surl'étiquette lorsque la confirmation de livraison est choisie. Si le code à barres n'apparaît pas, veullez communiquer avec le service d'assistance au 1-877-376-1212.

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# Expedited Parcel™ | Colis accélérés℠

TO: / À:

C/O OSLER HOSKIN & HARCOURT LLP
WEIR MINERALS CANADA INC
225 6 AVE SW
CALGARY AB T2P 1N2

# T2P 1N2

**TRACKING NUMBER** **1614 9498 9494 8507** **N° DE REPÉRAGE**

Sender warrants that this item does not contain non-mailable matter.
L'expéditeur garantit que cet envoi ne contient pas d'objet inadmissible.

**FROM: / DE**

CAPSERVCO LIMITED PARTNERSHIP
1675 GRAFTON ST SUITE 1000
HALIFAX NS B3J 0E9

**0.620** KG VE/EV

**MANIFEST NOT REQ**
**MANIFESTE NON REQ**

EST/OÉE V2208.0.819 SPEC 3696 V5

P/F: 1614949 **SA/CF**

PIN / NIP: 1614 9498 9494 8507

Order No.: / N° d'commande: P267990190
Auth Number / N° d'authorisation: NSA0000000455943

In case of non-delivery, return at sender's expense at counter rates.
En cas de non-livraison manquée, renvoyer aux frais de l'expéditeur aux tarifs du comptoir.

# Appendix “F”

## Hines, Corey

**From:** Fancey, Junior <jfancey@napacanada.com>
**Sent:** February 1, 2023 1:03 PM
**To:** Hines, Corey
**Cc:** Shane Kearney
**Subject:** Re: [EXT] RE: hydraulic press

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Good Day Corey
Yes i can confirm that I got my hydraulic equipment that was on consignment at CFI. I also recieved the empty totes that was up there as well.

Tks Jr.

---

**From:** Hines, Corey <Corey.Hines@ca.gt.com>
**Sent:** Wednesday, February 1, 2023 12:42 PM
**To:** Fancey, Junior <jfancey@napacanada.com>
**Cc:** Shane Kearney <skearney@canadafluorspar.com>
**Subject:** RE: [EXT] RE: hydraulic press

**External Email:** This is an EXTERNAL email do not click links or open attachments unless you know the content is safe. Please use caution with Urgent Requests.

Junior,

For our records, can you please confirm that you retrieved all of your property, consisting of consignment inventory at CFI, on December 21, 2022?

As well, can you please also confirm that you retrieved all of your property, consisting of totes of DEF and windshield washer fluid, on September 9, 2022?

I've attached above the property release letters, in response to both property claims filed with us, as well as email records indicating that the items would be retrieved on or around that above noted dates.

Thanks,

**Corey Hines, CPA | Senior Associate**
Grant Thornton Limited
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
**T** +1 902 491 7704 | **F** +1 902 420 1068
**E** Corey.Hines@ca.gt.com | **W** http://www.grantthornton.ca/

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**From:** Fancey, Junior <jfancey@napacanada.com>
**Sent:** December 19, 2022 11:36 AM
**To:** Hines, Corey <Corey.Hines@ca.gt.com>
**Subject:** Re: [EXT] RE: hydraulic press

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Perfect thanks Corey
I was also hoping to get Mike Emberley to come in with me as he knows where all the equipment is to and I'm going to need a hand?

---

**From:** Hines, Corey <Corey.Hines@ca.gt.com>
**Sent:** Monday, December 19, 2022 11:55 AM
**To:** Fancey, Junior <jfancey@napacanada.com>
**Cc:** Shane Kearney <skearney@canadafluorspar.com>
**Subject:** [EXT] RE: hydraulic press

**External Email:** This is an EXTERNAL email do not click links or open attachments unless you know the content is safe. Please use caution with Urgent Requests.

Junior,

You are correct – all NAPA consignment items were released per the attached letter.

Please coordinate with Shane Kearney on a time that works best for yourself and Shane.

Thanks,

**Corey Hines, CPA | Senior Associate**
Grant Thornton Limited
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
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**E** Corey.Hines@ca.gt.com | **W** http://www.grantthornton.ca/

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**From:** Fancey, Junior <jfancey@napacanada.com>
**Sent:** December 19, 2022 11:20 AM
**To:** Hines, Corey <Corey.Hines@ca.gt.com>
**Subject:** hydraulic press

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Morning Corey
This is Junior Fancey owner of Napa Auto in marystown. I would like to come and get my hydraulics sometime this week.My lawyer was talking to you through email and got this all approved back in June but i decided to leave it there just in case there were new buyers but with the winter coming on i think it would be better for me to have it here, and if there are new buyers in Feb i can reach out to them then.
Any questions or concerns just let me know?

tks Jr.

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General Auto and Industiral (NAPA Auto Parts 6305)
c/o Picco, White, McCarthy
195-197 McGettigan Blvd
PO Box 1176
Marystown, NL A0E 2M0

September 8, 2022

Attention: Jennifer McCarthy

**Re: In the Matter of the Companies' Creditors Arrangement Act proceedings of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) ("CFI") – Property Claim of General Auto and Industrial ("NAPA – Marystown")**

Ms. McCarthy:

We are in receipt of NAPA – Marystown's property claim dated April 29, 2022. We have fully accepted your claim as described below.

The claim of the consignment inventory stored at CFI has been accepted and can be retrieved from site at your convenience. Additionally, the Monitor is intending to seek approval from the Supreme Court of Newfoundland and Labrador of a sales transaction to the Successful Bidder as per the Sales and Investment Solicitation Process. NAPA – Marystown can opt to leave the consignment inventory on site to hopefully negotiate an agreement with a new purchaser.

The Montior has been informed by the employees of CFI that most of the items listed on NAPA – Marystown's property claim have been located. Certain items were unable to be located due to the boxes being damaged or mislabeled.

Please contact Corey Hines at 902-491-7704 or at Corey.Hines@ca.gt.com if you would like to arrange to retrieve the consignment inventory as described above.

Yours truly,

**GRANT THORNTON LIMITED**
In its Capacity as Monitor of
Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership)

Per:
Phil Clarke, CPA, CA, CIRP, LIT
Senior Vice President

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Tracking Number **1614 9499 3033 6503** Numéro de repérage

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2. Wrap your items so that they are secure in the box and seal the box using proper shipping tape.
3. Cut the label on the dotted line and retain this half for tracking purposes.
4. Tape the label so it appears squarely on the largest side of the box (**do not bend it around sides or end of box).** Do not tape over any part of the barcode on the label.
5. Take the parcel to a Canada Post retail outlet for shipping. All items except Priority™ may also be deposited in a Street Letter Box.

1. Choisissez une boîte conçue pour l'expédition.
2. Empaquetez solidement vos articles dans la boîte et scellez le tout avec du ruban d'expédition.
3. Découpez l'étiquette le long du pointillé et conservez cette partie pour suivi.
4. Apposez l'étiquette pour qu'elle paraisse entièrement sur le côté le plus grand de la boîte **(ne pas la replier sur les côtés)** . Ne recouvrez aucune partie du code à barres de l'étiquette.
5. Apportez le colis à un comptoir postal de Postes Canada pour expédition. Tous les envois sauf ceux utilisant Priorité^MC peuvent aussi être déposés dans une boîte aux lettres publique.

To: / À: JENNIFER MCCARTHY
Order No.: / N° d'commande: P268034932

### Customer Supplier Account Receipt / Reçu de compte fournisseur

The online transaction has been approved by the account issuer / La transaction en ligne a été approuvée par le fournisseur du compte

| | |
|---|---|
| Transaction type: / Type de transaction: | Sale / Vente |
| Vendor: / Fournisseur: | QUADIENT CANADA LTD |
| Order Sub-Total: / Total partiel de la commande: | $17.48 CAD |
| GST / TPS: | $0.00 CAD |
| PST / TVP: | $0.00 CAD |
| HST / TVH (#119321495): | $2.62 CAD |
| Total Transaction Amount: / Montant total de la transaction: | $20.10 CAD |
| Authorization Code: / Code d'autorisation: | NSA0000000456245 |
| Date and Time: / Date et heure: | 2022 09 09 10:15 EDT |
| Merchant Name: / Nom du commerçant: | Canada Post Postes Canada |
| Merchant Online Address: / Adresse Web du commerçant: | www.canadapost.ca www.postescanada.ca |

A barcode should be printed on the label because Delivery Confirmation is selected. If no bar code is visible, please contact the help desk at 1-877-376-1212 for assistance.
Un code à barres devrait etre imprimé surl'étiquette lorsque la confirmation de livraison est choisie. Si le code à barres n'apparaît pas, veullez communiquer avec le service d'assistance au 1-877-376-1212.

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# Expedited Parcel™ | Colis accélérés^MC

TO: / À:

JENNIFER MCCARTHY
PICCO WHITE MCCARTHY
197 MCHERRIGAN BLVD
195
MARYSLAND NL A0E 2M0

# A0E 2M0

**TRACKING NUMBER** **1614 9499 3033 6503** **N° DE REPÉRAGE**

Sender warrants that this item does not contain non-mailable matter.
L'expéditeur garantit que cet envoi ne contient pas d'objet inadmissible.

**FROM: / DE**

CAPSERVCO LIMITED PARTNERSHIP
1675 GRAFTON ST SUITE 1000
HALIFAX NS B3J 0E9

**0.043** KG VE/EV

**MANIFEST NOT REQ**
**MANIFESTE NON REQ**

EST/OÉE V2208.0.819 SPEC 3696 V5

P/F: 1614949 **SA/CF**

PIN / NIP: 1614 9499 3033 6503

Order No.: / N° d'commande: P268034932
Auth Number / N° d'authorisation: NSA0000000456245

In case of non-delivery, return at sender's expense at counter rates.
En cas de non-livraison manquée, renvoyer aux frais de l'expéditeur aux tarifs du comptoir.

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Halifax, NS
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T +1 902 421 1734
F +1 902 420 1068

General Auto & Industrial
PO Box 599, 195 McGettigan Blvd
Marystown, NL A0E 2M0

September 9, 2022

Attention: Junior Fancy

**Re: In the Matter of the Companies' Creditors Arrangement Act proceedings of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) ("CFI") – Property Claim of General Auto & Industrial ("NAPA – Marystown")**

Mr. Fancy:

We are in receipt of NAPA – Marystown's property claim dated September 6, 2022. We have fully accepted your claim as described below.

The claim of the 14 totes has been accepted and can be retrieved from site at your convenience.

Additionally, the Monitor has been informed of 6 totes filled with diesel emission fluid and 4 totes of windshield washer fluid. CFI has been invoiced a deposit fee on these totes under the terms of service being the totes will be returned to NAPA – Marystown when empty. These totes are full and will be released to NAPA – Marystown when emptied. We trust this is agreeable.

The Monitor is currently undergoing a process of recommending to the Court to approve a sale transaction to the Successful Bidder selected, as per the Sales and Investment Solicitation Process. NAPA – Marystown can opt to leave the full totes on site to hopefully negotiate an agreement with a new purchaser.

Please contact Corey Hines at 902-491-7704 or at Corey.Hines@ca.gt.com if you would like to arrange to retrieve the consignment inventory as described above.

Yours truly,

**GRANT THORNTON LIMITED**
In its Capacity as Monitor of
Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership)

Per:
Phil Clarke, CPA, CA, CIRP, LIT
Senior Vice President

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# Expedited Parcel™ | Colis accélérés MC

Tracking Number **1614 9499 2951 9504** Numéro de repérage

## Instructions

1. Choose a box designed for shipping.
2. Wrap your items so that they are secure in the box and seal the box using proper shipping tape.
3. Cut the label on the dotted line and retain this half for tracking purposes.
4. Tape the label so it appears squarely on the largest side of the box (**do not bend it around sides or end of box).** Do not tape over any part of the barcode on the label.
5. Take the parcel to a Canada Post retail outlet for shipping. All items except Priority™ may also be deposited in a Street Letter Box.

1. Choisissez une boîte conçue pour l'expédition.
2. Empaquetez solidement vos articles dans la boîte et scellez le tout avec du ruban d'expédition.
3. Découpez l'étiquette le long du pointillé et conservez cette partie pour suivi.
4. Apposez l'étiquette pour qu'elle paraisse entièrement sur le côté le plus grand de la boîte **(ne pas la replier sur les côtés)** . Ne recouvrez aucune partie du code à barres de l'étiquette.
5. Apportez le colis à un comptoir postal de Postes Canada pour expédition. Tous les envois sauf ceux utilisant Priorité MC peuvent aussi être déposés dans une boîte aux lettres publique.

To: / À: JUNIOR FANCY
Order No.: / N° d'commande: P268034249

### Customer Supplier Account Receipt / Reçu de compte fournisseur

The online transaction has been approved by the account issuer / La transaction en ligne a été approuvée par le fournisseur du compte

| | |
|---|---|
| Transaction type: / Type de transaction: | Sale / Vente |
| Vendor: / Fournisseur: | QUADIENT CANADA LTD |
| Order Sub-Total: / Total partiel de la commande: | $17.48 CAD |
| GST / TPS: | $0.00 CAD |
| PST / TVP: | $0.00 CAD |
| HST / TVH (#119321495): | $2.62 CAD |
| Total Transaction Amount: / Montant total de la transaction: | $20.10 CAD |
| Authorization Code: / Code d'autorisation: | NSA0000000456240 |
| Date and Time: / Date et heure: | 2022 09 09 10:07 EDT |
| Merchant Name: / Nom du commerçant: | Canada Post Postes Canada |
| Merchant Online Address: / Adresse Web du commerçant: | www.canadapost.ca www.postescanada.ca |

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A barcode should be printed on the label because Delivery Confirmation is selected. If no bar code is visible, please contact the help desk at 1-877-376-1212 for assistance.
Un code à barres devrait etre imprimé surl'étiquette lorsque la confirmation de livraison est choisie. Si le code à barres n'apparaît pas, veullez communiquer avec le service d'assistance au 1-877-376-1212.

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# Expedited Parcel™ | Colis accélérés MC

TO: / À:

JUNIOR FANCY
GENERAL AUTO & INDUSTRIAL
195 MCGETTIGAN BLVD
PO BOX 559
MARYSTOWN NL A0E 2M0

# A0E 2M0

**TRACKING NUMBER** **1614 9499 2951 9504** **N° DE REPÉRAGE**

Sender warrants that this item does not contain non-mailable matter.
L'expéditeur garantit que cet envoi ne contient pas d'objet inadmissible.

FROM: / DE

CAPSERVCO LIMITED PARTNERSHIP
1675 GRAFTON ST SUITE 1000
HALIFAX NS B3J 0E9

**0.060** KG VE/EV

**MANIFEST NOT REQ**
**MANIFESTE NON REQ**

EST/OÉE V2208.0.819 SPEC 3696 V5

P/F: 1614949 **SA/CF**

PIN / NIP: 1614 9499 2951 9504

Order No.: / N° d'commande: P268034249
Auth Number / N° d'authorisation: NSA0000000456240

In case of non-delivery, return at sender's expense at counter rates.
En cas de non-livraison manquée, renvoyer aux frais de l'expéditeur aux tarifs du comptoir.

# Appendix “G”

Canada Revenue Agency | Agence du revenu du Canada

PROTECTED B

August 8, 2022

Phil Clarke
Monitor
Canada Fluorspar (NL) Inc.
Box 337
St Lawrence, NL A0E 2V0

Dear Phil Clarke:

**Subject: Final change to the goods and services tax / harmonized sales tax (GST/HST) return for the audit period March 1, 2022 to March 11, 2022**
**Account number: 89811 4087 RT0001**

We have completed our audit of the GST/HST return of Canada Fluorspar (NL) Inc. (the "registrant") for the above period. We did not make changes to our proposed adjustment after reviewing your representations and documents dated July 18, 2022.

We reviewed the representation that was provided. We will address each argument below.

**Issue #1 "The use of paragraph 296(1)(b) is not appropriate"**

As you stated in your representation, GST/HST policy statement P-112R states "in circumstances of potential revenue loss, the Minister may exercise its authority under paragraph 296(1)(b) of the ETA and assess a purchaser who is insolvent or bankrupt in respect of the GST/HST not paid to a supplier." The policy states a purchaser who is insolvent. The Companies' Creditors Arrangement Act (CCAA) states that this Act applies in respect of a debtor company, it then defines a debtor company as a company that is bankrupt or insolvent. When the debtor company seeks protection under the CCAA it is determined that they are insolvent. Our use of 296(1)(b) is considered to be correct as this company, although not bankrupt, is insolvent.

**Issue #2 "Reporting period under audit is not valid"**

We determined that the date that the registrant received protection under CCAA on March 11, 2022 is an insolvency date. In order to maintain a separation of transactions prior to the insolvency date and after the insolvency date we have created a split period to ensure that the proper reporting is completed for each period.

**Issue #3 "Proposed amount to be assessed is incorrect"**

In our proposal letter dated June 1, 2022, we indicated that we only had the combined list of creditors and requested unsecured creditor listings for each registrant. We did not receive this documentation even though we extended the deadline by 30 days to provide representation from July 4, 2022 to July 18, 2022. The insolvency website "**www.grantthornton.ca/service/advisory/creditor-updates/#Canada-Fluorspar-NL-Inc-and-Canada-Fluorspar-Inc**" was reviewed regularly to update any changes to the creditor listing, however, as of the date of this letter the latest update to the creditor listing was March 15, 2022. As we have not received the required documentation to allocate accordingly, we will assess the full amount to this registrant as stated in the proposal.

Under section 165 of the Excise Tax Act, every recipient of a taxable supply made in Canada is required to pay the GST/HST payable for that supply. Under paragraph 296(1)(b) of the Act, we increased the registrant's tax payable by the amount of GST/HST owed on taxable supplies that they received before March 11, 2022, where the tax was not paid to their suppliers.

| Period ending | Description | Final change |
|---|---|---|
| 2022-03-11 | Increase to tax payable under 296(1)(b) | **$ 4,020,621.71** |

The final amount of **$4,020,621.71** is based on calculations that we provided with the proposal letter dated June 1, 2022. Our calculations are based on the list of creditors dated March 15, 2022, which was the most recent list available to us.

A notice of (re)assessment will be sent to you separately.

You have the right to object if you disagree with a (re)assessment. For more information on how to file an objection, go to **canada.ca/cra-complaints-disputes**. The time limit for filing an objection is 90 days from the date of your notice of (re)assessment.

The completion of our audit should not be considered as permission to destroy any books and records. Go to **canada.ca/taxes-records** for more information about keeping records.

We did not audit the full scope of your operation. We did not review the completeness or accuracy of your sales and other revenue in the above period. We did not review the completeness or accuracy of any GST/HST collected or that became collectible in the above period. We did not verify the existence or eligibility of any input tax credits (ITCs) claimed in the above period.

10 – 9700 Jasper Avenue
Edmonton AB
T5J 4C8

Phone: 587-338-8789
Fax: 403-292-5731
Internet: **canada.ca/taxes**

A future audit might cover the same period. Changes are generally not made more than four years after the later of when a return was required to be filed or when the return was actually filed.

For general information on examinations and audits, search our publications at **canada.ca/cra-forms** for Pamphlet RC4188, What You Should Know About Audits. To help you understand your rights as a taxpayer, we recommend you review Guide RC17, Taxpayer Bill of Rights, which can be found at **canada.ca/taxpayer-rights**.

We recommend that you explore our e-services for businesses. These services will allow you, your employees, or your representatives to interact electronically with us. Go to **canada.ca/taxes-business-online** to see which service is right for you and how to sign up.

If you have any questions or concerns, please call me at **587-338-8789**. My team leader, Rachael Simpson, can be reached at 587-341-7644 if I am not available.

Sincerely,

Carla Navarro

Carla Navarro
GST/HST Desk Audit Program
Alberta Tax Services Office

10 – 9700 Jasper Avenue
Edmonton AB
T5J 4C8

Phone: 587-338-8789
Fax: 403-292-5731
Internet: **canada.ca/taxes**

# Appendix “H”

**HP LaserJet MFP M426fdw**

# Fax Confirmation

8-Nov-2022 9:04AM

| Job | Date | Time | Type | Identification | Duration | Pages | Result |
|---|---|---|---|---|---|---|---|
| 14628 | 8/11/2022 | 9:01:28AM | Send | 17056706649 | 3:15 | 5 | OK |

Grant Thornton

## FAX COVER SHEET

| | | | |
|---|---|---|---|
| **TO:** | Chief of Appeals Appeals Intake Centre | **FROM:** | Corey Hines |
| **COMPANY:** | Canada Revenue Agency | **COMPANY:** | Grant Thornton Limited |
| **FAX#:** | ~~1 (905) 442-4955~~ 1 (705) 670-6049 | **FAX#** | 1 (902) 420-1068 |
| **PHONE#** | | **PHONE#** | 1 (902) 491-7704 |
| **DATE:** | November 8, 2022 | **NUMBER OF PAGES** (including cover page): | 5 |
| **RE:** | In the Matter of the Companies' Creditors Arrangement Act Proceedings of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) – Notice of Objection | | |

Grant Thornton Limited
Nova Centre, North Tower
Suite 1000-1675 Grafton St
Halifax, Nova Scotia
B3J 0E9

T (902) 421-1577
F (902) 420-1068
www.GrantThornton.ca

Please find attached Notice of Objection against the GST/HST Notice of Assessment Reference Number 22217000152370001 in regards to Canada Fluorspar (NL) Inc, Business Number 89811 4087 RT0001.

If you have any questions, please contact either of the below listed individuals.

**Corey Hines | Senior Associate**
**Grant Thornton Limited**
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T +1 902 491 7704 | F +1 902 420 1068
E Corey.Hines@ca.gt.com | W http://www.grantthornton.ca/

**Phil Clarke | Partner**
Grant Thornton LLP
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
T +1 902 420 7191 | F +1 902 420 1068 | C +1 902 293 9119
Phil.Clarke@ca.gt.com | W http://www.grantthornton.ca/

# FAX COVER SHEET

| | | | |
|---|---|---|---|
| **TO:** | Chief of Appeals<br>Appeals Intake Centre | **FROM:** | Corey Hines |
| **COMPANY:** | Canada Revenue Agency | **COMPANY:** | Grant Thornton Limited |
| **FAX#:** | ~~1 (866) 443-4955~~<br>1 (705) 670-6049 | **FAX#** | 1 (902) 420-1068 |
| **PHONE#** | | **PHONE#** | 1 (902) 491-7704 |
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Phil.Clarke@ca.gt.com | **W** http://www.grantthornton.ca/

Canada Revenue Agency / Agence du revenu du Canada

Protected B when completed

# Notice of Objection (GST/HST)

Before completing this form, read the instructions on the back.

| Name | Telephone number |
|---|---|
| Canada Fluorspar (NL) Inc. | 709-873-3331 |

Mailing address

Box 337
St. Lawrence, NL
A0E 2V0

If possible, enclose a copy of the notice of assessment or notice of reassessment that you are objecting to, otherwise, give the following information.

☑ Tick here if notice is attached

| | |
|---|---|
| Notice Number | |
| Amount in dispute | $2,405,592.59 |
| Date the notice was sent | 2022-08-10 |
| Social Insurance number or Business Number | 89811 4087 RT0001 |

Please state the facts and reasons for your objection (if you need more room, add a separate sheet).

See attached

☑ Tick here if a separate sheet is attached .

Name and address of authorized representative (if applicable):

Grant Thornton Limited
Nova Centre, North Tower
Suite 1000 - 1675 Grafton Street
Halifax, NS
B3J 0E9

Telephone number
902-420-7191

| Signature | Position or Office | Year Month Day |
|---|---|---|
| | Senior Vice President | 11 07 2022 |

for Grant Thornton Limited in its capacity as Monitor of Canada Fluorspar(NL) Inc.

For a corporation, we need the signature of an authorized person.

Privacy Act, Personal Information Bank number CRA PPU 005

Form prescribed by the Minister of National Revenue under the Excise Tax Act



Canada

Canada Fluorspar (NL) Inc.

Notice of Objection against GST/HST Notice of Assessment Reference Number 22217000152370001

Statement of Facts and Reasons

***Background***

1. Canada Fluorspar (NL) Inc. operates a fluorspar mine in the province of Newfoundland and Labrador; it is registered for GST/HST under account number 89811 4087 RT0001 as a monthly filer.

2. Canada Fluorspar (NL) Inc. is wholly owned by Canada Fluorspar Inc.[1]

3. Both Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc. became insolvent. Grant Thornton Limited (**"GTL"**) was appointed Interim Receiver of both companies pursuant to an order dated February 21, 2022 granted by the Supreme Court of Newfoundland and Labrador – General Division (the "**Court**").

4. New GST/HST reporting periods commencing February 22. 2022 were created for these entities because they entered Interim Receivership on February 21, 2022. All GST/HST returns for reporting periods ended on or before the date GTL was appointed interim receiver have been filed.

5. On March 11, 2022, the Court granted an initial order pursuant to the *Companies Creditors Arrangement Act* ("CCAA") over Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar[2], a General Partnership (known collectively as "**CFI**") with GTL being appointed as Monitor.

6. GTL issued a notice to creditors on March 15, 2022. The notice contained a list of creditors as well as amounts owing to them from the books and records of CFI.

7. On March 18, 2022, the Court granted an Amended and Restated Initial Order ("**ARIO**"), as well as granted an order authorizing the Monitor, among other things, to conduct a Sales and Investment Solicitation Process ("**SISP**") for the sale of CFI's business, property, assets and undertakings.

8. Ms. Carla Navarro of the Canada Revenue Agency ("**CRA**") issued a letter dated June 1, 2022 in which $4,020,621.71 tax payable was proposed to be assessed under paragraph 296(1)(b) of the *Excise Tax Act* ("ETA"), on the basis that Canada Fluorspar (NL) Inc. claimed input tax credits ("ITCs") for tax that was never paid to suppliers. The proposed amount was calculated based on the notice to creditors issued on March 15, 2022. Furthermore, the CRA had bifurcated the month of March 2022 into two separate reporting periods for Canada Fluorspar (NL) Inc.: with one reporting period ending on March 11, 2022, and the other commencing March 12, 2022.

9. On June 29, 2022, Ms. Navarro granted GTL an extension to respond to the above noted letter from the original deadline of July 4, 2022 to July 18, 2022.

10. GTL issued a letter to the CRA on July 18, 2022 in response, stating the proposed audit assessment in Ms. Navarro's letter is incorrect because the amount owing to the creditors of Canada Fluorspar (NL) Inc. were on hold per the ARIO. A claims process for the creditors of CFI to participate in a distribution, if any, would be decided by the Court on completion of the SISP.

---

[1] Canada Fluorspar Inc. is registered for GST/HST as a quarterly filer under account number 83297 1568 RT0001.
[2] Newspar is registered for GST/HST as a monthly filer under account number 85178 5105 RT0001.

11. Ms. Navarro issued the CRA's final letter dated August 8, 2022, stating Canada Fluorspar (NL) Inc. will be assessed $4,020,621.71 tax owing for the reporting period from March 1 to March 11, 2022 as initially proposed. The CRA issued its assessment on August 10, 2022.

12. On July 15, 2022, Mr. Darrin Kitchen, the controller for CFI, filed Canada Fluorspar (NL) Inc.'s GST/HST return for the following periods:

    i. December 1, 2021 to December 31, 2021 ("**December 2021**");

    ii. January 1, 2022 to January 31, 2022 ("**January 2022**"); and

    iii. February 1, 2022 to February 21, 2022 ("**Partial February 2022**").

13. On the December 2021 return, a total of $1,268,611.63 ITCs were claimed. Of this amount, $1,074,030.63 of GST/HST remains unpaid to suppliers.

14. Both of the January 2022 and Partial February 2022 returns were subsequently amended on September 15, 2022 by Mr. Darrin Kitchen. The CRA has not processed these returns as of the filing date of this objection.

15. On the January 2022 return, a total of $653,946.58 ITCs were claimed. Of this amount, $528,252.74 of GST/HST remains unpaid to suppliers.

16. On the Partial February 2022 return, a total of $14,382.96 ITCs were claimed. Of this amount, $12,745.75 of GST/HST remains unpaid to suppliers.

17. Mr. Darrin Kitchen has also filed all outstanding GST/HST returns for both Canada Fluorspar Inc. and Newspar. All returns were filed as NIL due to no activity in the applicable reporting periods.

18. GTL, in its capacity as Monitor has filed CFI's GST/HST returns for all reporting periods commencing on or after February 22, 2022. All amounts claimed as ITCs on these returns have been paid to suppliers.

***Analysis and Request***

Paragraph 296(1)(b) of the ETA allows the Minister to assess tax payable to a purchaser in unusual circumstances such as, where the person has claimed ITCs with respect to a purchase, did not pay the tax to the supplier, becomes insolvent or bankrupt, and the supplier writes amounts off on account of bad debt. Although Canada Fluorspar (NL) Inc. is insolvent, it has filed under the CCAA seeking protection from its creditors and to devise a plan of restructuring and/or compromise for the purpose of avoiding bankruptcy or receivership. In fact, some of the GST/HST claimed as ITCs has been paid by the Monitor during the CCAA process. As well, pending the outcome of the SISP, the Court may issue a distribution order to the creditors of CFI, resulting in a payment on the amounts which are currently unpaid.

From the list of creditors sent by notice from GTL on March 15, 2022, the amount of GST/HST claimed as ITCs by Canada Fluorspar (NL) Inc. but not paid to suppliers is $1,615,029.12, which is calculated as follows:

| **Reporting Period** | **ITCs Not Paid** |
|---|---|
| December 2021 | $1,074,030.63 |
| January 2022 | 528,252.74 |
| Partial February 2022 | 12,745.75 |
| **TOTAL** | **$1,615,029.12** |

Based on the foregoing, we respectfully request that the amount of tax payable assessed against Canada Fluorspar (NL) Inc. be reduced by $2,405,592.59 to $1,615,029.12 because this is the correct amount of ITCs claimed but not paid as of the date of this objection that should be assessed under paragraph 296(1)(b) of the ETA. As part of this request, we also ask that the returns amended on September 15, 2022 for the periods of January 2022 and Partial February 2022 be accepted and assessed as filed as Mr. Darrin Kitchen has already included the unpaid ITCs on these returns, which were included in the amount assessed for the reporting period beginning March 1, 2022.

Moreover, the month of March 2022 should never have been bifurcated into two reporting periods because Canada Fluorspar (NL) Inc. was neither bankrupt nor placed in receivership during that month. As such, the reporting periods of March 1-11, 2022 and March 12-31, 2022 should be combined into its original single monthly reporting period from March 1, 2022 to March 31, 2022.

Yours sincerely,
**Grant Thornton Limited**

Phil Clarke
Senior Vice President

**HP LaserJet MFP M426fdw**

# Fax Confirmation

8-Nov-2022 9:08AM

| Job | Date | Time | Type | Identification | Duration | Pages | Result |
|---|---|---|---|---|---|---|---|
| 14630 | 8/11/2022 | 9:06:27AM | Send | 14032925731 | 2:04 | 6 | OK |

GrantThornton

## FAX COVER SHEET

| | | | |
|---|---|---|---|
| **TO:** | Carla Navarro | **FROM:** | Corey Hines |
| **COMPANY:** | Canada Revenue Agency | **COMPANY:** | Grant Thornton Limited |
| **FAX#:** | 1 (403) 292-5731 | **FAX#** | 1 (902) 420-1068 |
| **PHONE#** | 1 (587) 338-8789 | **PHONE#** | 1 (902) 491-7704 |
| **DATE:** | November 8, 2022 | **NUMBER OF PAGES** (including cover page): | 6 |
| **RE:** | In the Matter of the Companies' Creditors Arrangement Act Proceedings of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) – Notice of Objection | | |

Grant Thornton Limited
Nova Centre, North Tower
Suite 1000-1675 Grafton Street
Halifax, Nova Scotia
B3J 0E9

T (902) 421-1673
F (902) 420-1068
www.GrantThornton.ca

Please find attached Notice of Objection against the GST/HST Notice of Assessment Reference Number 2221700015237000 1 in regards to Canada Fluorspar (NL) Inc, Business Number 89811 4087 RT0001.

A copy of this notice was faxed to the Chief of Appeals, Appeals Intake Centre. The fax confirmation is attached as page 6.

If you have any questions, please contact either of the below listed individuals.

**Corey Hines | Senior Associate**
Grant Thornton Limited
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
T +1 902 491 7704 | F +1 902 420 1068
E Corey.Hines@ca.gt.com | W http://www.grantthornton.ca/

**Phil Clarke | Partner**
Grant Thornton LLP
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
T +1 902 420 7191 | F +1 902 420 1068 | C +1 902 293 8119
Phil.Clarke@ca.gt.com | W http://www.grantthornton.ca/

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| **COMPANY:** | Canada Revenue Agency | **COMPANY:** | Grant Thornton Limited |
| **FAX#:** | 1 (403) 292-5731 | **FAX#** | 1 (902) 420-1068 |
| **PHONE#** | 1 (587) 338-8789 | **PHONE#** | 1 (902) 491-7704 |
| **DATE:** | November 8, 2022 | **NUMBER OF PAGES** (including cover page): | 6 |
| **RE:** | In the Matter of the Companies' Creditors Arrangement Act Proceedings of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) – Notice of Objection | | |

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Nova Centre, North Tower
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Halifax, Nova Scotia
B3J 0E9

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Grant Thornton Limited
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
**T** +1 902 491 7704 | **F** +1 902 420 1068
**E** Corey.Hines@ca.gt.com | **W** http://www.grantthornton.ca/

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Canada Revenue Agency | Agence du revenu du Canada

Protected B when completed

# Notice of Objection (GST/HST)

Before completing this form, read the instructions on the back.

| Name | Telephone number |
|---|---|
| Canada Fluorspar (NL) Inc. | 709-873-3331 |

Mailing address

Box 337
St. Lawrence, NL
A0E 2V0

If possible, enclose a copy of the notice of assessment or notice of reassessment that you are objecting to, otherwise, give the following information.

☑ Tick here if notice is attached

| | |
|---|---|
| Notice Number | |
| Amount in dispute | $2,405,592.59 |
| Date the notice was sent | 2022-06-10 |
| Social insurance number or Business Number | 89811 4087 RT0001 |

Please state the facts and reasons for your objection (if you need more room, add a separate sheet).

See attached

☑ Tick here if a separate sheet is attached .

Name and address of authorized representative (if applicable):

Grant Thornton Limited
Nova Centre, North Tower
Suite 1000 - 1675 Grafton Street
Halifax, NS
B3J 0E9

Telephone number
902-420-7191

| Signature | Position or Office | Year Month Day |
|---|---|---|
| | Senior Vice President | 11 07 2022 |

for Grant Thornton Limited in its capacity as Monitor of Canada Fluorspar(NL) Inc.

For a corporation, we need the signature of an authorized person.

Privacy Act, Personal Information Bank number CRA PPU 005

Form prescribed by the Minister of National Revenue under the Excise Tax Act

Canada Fluorspar (NL) Inc.

Notice of Objection against GST/HST Notice of Assessment Reference Number 22217000152370001

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***Background***

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14. Both of the January 2022 and Partial February 2022 returns were subsequently amended on September 15, 2022 by Mr. Darrin Kitchen. The CRA has not processed these returns as of the filing date of this objection.

15. On the January 2022 return, a total of $653,946.58 ITCs were claimed. Of this amount, $528,252.74 of GST/HST remains unpaid to suppliers.

16. On the Partial February 2022 return, a total of $14,382.96 ITCs were claimed. Of this amount, $12,745.75 of GST/HST remains unpaid to suppliers.

17. Mr. Darrin Kitchen has also filed all outstanding GST/HST returns for both Canada Fluorspar Inc. and Newspar. All returns were filed as NIL due to no activity in the applicable reporting periods.

18. GTL, in its capacity as Monitor has filed CFI's GST/HST returns for all reporting periods commencing on or after February 22. 2022. All amounts claimed as ITCs on these returns have been paid to suppliers.

***Analysis and Request***

Paragraph 296(1)(b) of the ETA allows the Minister to assess tax payable to a purchaser in unusual circumstances such as, where the person has claimed ITCs with respect to a purchase, did not pay the tax to the supplier, becomes insolvent or bankrupt, and the supplier writes amounts off on account of bad debt. Although Canada Fluorspar (NL) Inc. is insolvent, it has filed under the CCAA seeking protection from its creditors and to devise a plan of restructuring and/or compromise for the purpose of avoiding bankruptcy or receivership. In fact, some of the GST/HST claimed as ITCs has been paid by the Monitor during the CCAA process. As well, pending the outcome of the SISP, the Court may issue a distribution order to the creditors of CFI, resulting in a payment on the amounts which are currently unpaid.

From the list of creditors sent by notice from GTL on March 15, 2022, the amount of GST/HST claimed as ITCs by Canada Fluorspar (NL) Inc. but not paid to suppliers is $1,615,029.12, which is calculated as follows:

| **Reporting Period** | **ITCs Not Paid** |
|---|---|
| December 2021 | $1,074,030.63 |
| January 2022 | 528,252.74 |
| Partial February 2022 | 12,745.75 |
| **TOTAL** | **$1,615,029.12** |

Based on the foregoing, we respectfully request that the amount of tax payable assessed against Canada Fluorspar (NL) Inc. be reduced by $2,405,592.59 to $1,615,029.12 because this is the correct amount of ITCs claimed but not paid as of the date of this objection that should be assessed under paragraph 296(1)(b) of the ETA. As part of this request, we also ask that the returns amended on September 15, 2022 for the periods of January 2022 and Partial February 2022 be accepted and assessed as filed as Mr. Darrin Kitchen has already included the unpaid ITCs on these returns, which were included in the amount assessed for the reporting period beginning March 1, 2022.

Moreover, the month of March 2022 should never have been bifurcated into two reporting periods because Canada Fluorspar (NL) Inc. was neither bankrupt nor placed in receivership during that month. As such, the reporting periods of March 1-11, 2022 and March 12-31, 2022 should be combined into its original single monthly reporting period from March 1, 2022 to March 31, 2022.

Yours sincerely,
**Grant Thornton Limited**

Phil Clarke
Senior Vice President

**HP LaserJet MFP M426fdw**

# Fax Confirmation

8-Nov-2022 9:04AM

| Job | Date | Time | Type | Identification | Duration | Pages | Result |
|---|---|---|---|---|---|---|---|
| 14628 | 8/11/2022 | 9:01:28AM | Send | 17056706649 | 3:15 | 5 | OK |

Grant Thornton

## FAX COVER SHEET

| | | | |
|---|---|---|---|
| TO: | Chief of Appeals Appeals Intake Centre | FROM: | Corey Hines |
| COMPANY: | Canada Revenue Agency | COMPANY: | Grant Thornton Limited |
| FAX#: | ~~1 (905) 442-4056~~ 1 (705) 670-6649 | FAX# | 1 (902) 420-1068 |
| PHONE# | | PHONE# | 1 (902) 491-7704 |
| DATE: | November 8, 2022 | NUMBER OF PAGES (including cover page): | 5 |
| RE: | In the Matter of the Companies' Creditors Arrangement Act Proceedings of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) – Notice of Objection | | |

Grant Thornton Limited
Nova Centre, North Tower
Suite 1000-1675 Grafton St
Halifax, Nova Scotia
B3J 0E9

T (902) 421-1677
F (902) 420 1068
www.GrantThornton.ca

Please find attached Notice of Objection against the GST/HST Notice of Assessment Reference Number 2221700015237000 1 in regards to Canada Fluorspar (NL) Inc, Business Number 89811 4087 RT0001.

If you have any questions, please contact either of the below listed individuals.

**Corey Hines | Senior Associate**
Grant Thornton Limited
Nova Centre, North Tower | Suite 1000 – 1675 Grafton Street | Halifax | NS | B3J 0E9
T +1 902 491 7704 | F +1 902 420 1068
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**Phil Clarke | Partner**
Grant Thornton LLP
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T +1 902 420 7191 | F +1 902 420 1068 | C +1 902 293 9119
Phil.Clarke@ca.gt.com | W http://www.grantthornton.ca/

# Appendix “I”

Canada Revenue Agency
Agence du revenu du Canada

Sudbury ON P3A 5C1

| | |
|---|---|
| **Date** | Dec 8, 2022 |
| **Account Number** | 89811 4087 RT0001 |
| **Case number** | GB2231 9083 6313 |

CANADA FLUORSPAR (NL) INC.
BOX 337
ST LAWRENCE NL A0E 2V0

Subject: Notice of objection for the period of March 1, 2022, to March 11, 2022

Dear Sir or Madam:

We received your objection dated November 15, 2022.

Your objection was filed by your representative, Grant Thornton LTD. Since we currently do not have written authorization from you to discuss your tax matters with this representative, we are replying directly to you.

You can authorize a representative in one of the following ways:

1) Fill out the Form AUT-01, Authorize a Representative for Access by Phone and Mail, and send it to the tax centre indicated on the form. You can find the form at **canada.ca/cra-forms**.

2) You can also add or modify an authorized representative online using our online services at **canada.ca/cra-login-services**.

More information is available at **canada.ca/taxes-authorize-representative**.

The Appeals Division mandate is to fully and impartially review decisions reached by other Canada Revenue Agency divisions.

If further information is required, an officer will contact you, or your authorized representative. Go to **canada.ca/cra-complaints-disputes** for more information or processing times.

Under the Excise Tax Act, any amount assessed is payable as soon as you receive a notice of assessment or reassessment. Filing an objection does not prevent the Canada Revenue Agency (CRA) from collecting unpaid amounts.

We informed collections that you have filed an objection. Note that we charge interest on any unpaid balance, even if you filed an objection. You can reduce or avoid interest charges by making a payment on your account. If your objection is allowed, we will pay interest on the amount we refund to you, if it applies. Go to **canada.ca/cra-collections** if you have a balance that you cannot pay in full now.

If you have not already done so, please send us all the facts and reasons for your objection, and attach any supporting documents to help us resolve it. You can send us this information through My Business Account by selecting "Submit documents" and entering the case number (GBXXXXXXXXXXXX, no spaces) into the Case/reference number box.

You can send documents by fax to **1-866-443-4955** or **705-670-6649**.



Canada

If you send documents by Canada Post, send them to:

Appeals Intake Centre
PO BOX 2006 STN MAIN
NEWMARKET ON L3Y 0E9

If you send documents by courier service, send them to:

Eastern Appeals Intake Centre
1050 Notre Dame Avenue
SUDBURY ON P3A 5C1

Indicate the case number (GBXXXXXXXXXXXX) at the top of the documents so we can attach them to the file.

If you have not already done so, please provide us with a current telephone number where we can reach you about your objection.

If you have any questions, please call us from Monday to Friday, 7 am to 4:30 pm, Eastern time.
Public enquiries lines: **1-800-959-5513** or **613-940-8563**
Fax numbers: **1-866-443-4955** or **705-670-6649**

To help us serve you better, contact us online using My Business Account at **canada.ca/my-cra-business-account**. Also, sign up to receive email notifications. Email notifications from the Canada Revenue Agency will let you know when you have mail to view in My Account or My Business Account and when important changes are made on your account. This will allow us to communicate more quickly with you.

Appeals Division

# Appendix “J”

June 8th, 2022

Canada Fluorspar (NL) Inc.
C/O Darrin Kitchen
595 Old Sackville Road
Lower Sackville, NS B2K 2K4

**File Number 79117741**

Dear Darrin Kitchen:

**Subject: Part XIII, Regulation 105 and Regulation 102 tax audit for the years 2016 to 2020**
**Account 89811 4087 RC0001**

Your income tax returns from January 1, 2016 to December 31, 2020 were selected for audit.

Subsection 230(1) of the *Income Tax Act* (the Act) states that every person carrying on business and every person required to pay or collect taxes or other amounts must keep books and records with information to allow the Canada Revenue Agency (CRA) to determine the person's tax liabilities and obligations under this Act.

Under subsection 231.1(1) of the Act, officers of the CRA may inspect, audit, and examine your books and records.

Please send us all of the following documents along with any other important information to complete our audit for the 2016 - 2020 tax years mentioned above:

- general ledger for the years 2016-2020
- organization chart;
- list of all employees and subcontractors, along with their addresses, Social Insurance Numbers and/or their Temporary Tax Numbers;
- list of all payments made to any non-resident individuals, businesses and/or corporations for work completed in Canada;
- Royalty Contracts/Agreements.
- There are indications of payments made to the following vendors. Please include all invoices, Purchase Orders and agreements with these vendors:
    - AnG Africa Procurement (Pty) Ltd.
    - Lindsay Gorrill
    - Peter Kiewit Infrastructure Co.
    - Immersive Technologies
- Explanation of the difference in amount claimed as salaries expense on the T2 returns and amounts reported on T4 slips.

The length of the audit will depend on the condition of your accounting records, the size and complexity of your business, and your co-operation. We will keep you informed of the progress of the audit throughout the process.

We will inform you of any proposed changes and give you 30 days to send a response along with your documents. If you disagree with any points, we will be available to discuss them with you.

If your accounting books and records are in electronic format, you or your authorized representative can submit them electronically through the CRA's **My Account**, **My Business Account**, or **Represent a Client** portals. These services offer a secure, quick and easy way to manage your tax information online.

If you want to submit your books and records electronically, your case number is 79117741. For more information on how to register, to submit documents, or to authorize a representative, go to **https://www.canada.ca/en/revenue-agency/services/e-services/submit-documents-online.html.**

To help you prepare for the audit, please read Pamphlet RC4188, *What you should know about audits*, at **https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4188-what-you-should-know-about-audits.html**. You can also read (or: refer to) the *Taxpayer Bill of Rights*, a set of 16 rights, a set of 16 rights confirming that the CRA will serve taxpayers with a high degree of accuracy, professionalism, courtesy, and fairness. For more information, go to **https://www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/taxpayer-bill-rights.html**

If you want to use the services of your representative, you can authorize them online using the "Authorize my representative" service in **My Account** or **My Business Account**. This will grant your representative instant access to your information and the online services to easily manage your account. You can also fill in Form AUT-01, *Authorize a Representative for Access by Phone and Mail*, and have it available when we meet. This will allow your representative to discuss your information with us during the audit.

You can find more information about non-resident tax on our website at **https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/non-residents-canada.html.**

You can get our forms and publications at **https://www.canada.ca/en/revenue-agency/services/forms-publications.html** by typing the publication number or name in the search box. You may also call us at the numbers shown on our website at **https://www.canada.ca/en/revenue-agency/corporate/contact-information.html**.

Please provide the documents we asked for by July 8th, 2022. If you have questions, please call me at 709-691-9234. You can also reach my team leader, *Kimberly Sheppard* at 709-730-8324.

Your prompt reply is appreciated.

Sincerely,

Kelsey Foley
Non-Resident Audit Section
NL Tax Services Office

| | |
|---|---|
| Fax: | 1-709-772-5136 |
| Address: | 165 Duckworth Street<br>St. John's, NL A1B 4R5 |
| Website: | https://www.canada.ca/en/revenue-agency.html |

# Appendix “K”

Grant Thornton

Grant Thornton Ltd
Nova Centre, North Tower
Suite 1000, 1675 Grafton Street
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B3J 0E9

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F +1 902 420 1068

Canada Revenue Agency
Non-Resident Audit Section – NL Tax Services Office
165 Duckworth Street
St. John's, NL A1B 4R5

December 9, 2022

Attention: Taylor White

**Re: In the Matter of the Companies' Creditors Arrangement Act proceedings of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) ("CFI") – CRA Regulation 105 and 102 Tax Audit**

Mr. White:

Grant Thornton Limited is the court appointed Monitor ("**Monitor**") for CFI. The date of the appointment was March 11, 2022.

In response to the letter from the Canada Revenue Agency ("**CRA**") dated June 8, 2022, the Monitor in conjunction with CFI Management have compiled most of the requested items, as described below:

1. **General ledger for the years 2016-2020** – Included on the flash drive provided.

2. **Organization chart** – Included charts available to the Monitor on the flash drive.

3. **List of all employees and subcontractors** – CRA has conducted a payroll audit for the beginning part of 2022. CRA has determined there is no claim forthcoming. As well, the subcontractors would be included in the list of payments provided on the flash drive (see below: "*Payments made to non-resident individuals")*

4. **Payments made to non-resident individuals** – Included on the flash drive is the list of payments to companies and individuals with foreign addresses in CFI's Sage 350 books and records. We have also provided the source documents which include all payments to vendors from 2016-2020.

5. **Royalty contracts/agreements** – The Monitor is aware of 1 Royalty Agreement with NSR Royalty for the AGS North mineral deposit. AGS North has not been developed so there have been no payments under this agreement.

6. **Invoices for specific vendors** – Included on the flash drive all invoices located by the Monitor and CFI management.

Grant Thornton

7. **Explanation of the difference in salaries expense and T4 slips** – CFI management has explained the following to the Monitor:

   *Included in salaries expense on the T2, but not on the T4's submitted, is as follows:*

   i. Amounts paid to subcontractors who do not receive T4's (non-residents, etc.);
   ii. Payroll administration costs paid to service providers; and
   iii. Salary allocations from expense accounts to capitalized costs.

Regards,

**GRANT THORNTON LIMITED**
In its Capacity as Monitor of
Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership)

Per:
Phil Clarke, CPA, CA, CIRP, LIT
Senior Vice President

Encl.

June 8th, 2022

Canada Fluorspar (NL) Inc.
C/O Darrin Kitchen
595 Old Sackville Road
Lower Sackville, NS B2K 2K4

**File Number 79117741**

Dear Darrin Kitchen:

**Subject: Part XIII, Regulation 105 and Regulation 102 tax audit for the years 2016 to 2020**
**Account 89811 4087 RC0001**

Your income tax returns from January 1, 2016 to December 31, 2020 were selected for audit.

Subsection 230(1) of the *Income Tax Act* (the Act) states that every person carrying on business and every person required to pay or collect taxes or other amounts must keep books and records with information to allow the Canada Revenue Agency (CRA) to determine the person's tax liabilities and obligations under this Act.

Under subsection 231.1(1) of the Act, officers of the CRA may inspect, audit, and examine your books and records.

Please send us all of the following documents along with any other important information to complete our audit for the 2016 - 2020 tax years mentioned above:

- general ledger for the years 2016-2020
- organization chart;
- list of all employees and subcontractors, along with their addresses, Social Insurance Numbers and/or their Temporary Tax Numbers;
- list of all payments made to any non-resident individuals, businesses and/or corporations for work completed in Canada;
- Royalty Contracts/Agreements.
- There are indications of payments made to the following vendors. Please include all invoices, Purchase Orders and agreements with these vendors:
    - AnG Africa Procurement (Pty) Ltd.
    - Lindsay Gorrill
    - Peter Kiewit Infrastructure Co.
    - Immersive Technologies
- Explanation of the difference in amount claimed as salaries expense on the T2 returns and amounts reported on T4 slips.

The length of the audit will depend on the condition of your accounting records, the size and complexity of your business, and your co-operation. We will keep you informed of the progress of the audit throughout the process.

We will inform you of any proposed changes and give you 30 days to send a response along with your documents. If you disagree with any points, we will be available to discuss them with you.

If your accounting books and records are in electronic format, you or your authorized representative can submit them electronically through the CRA's **My Account, My Business Account**, or **Represent a Client** portals. These services offer a secure, quick and easy way to manage your tax information online.

If you want to submit your books and records electronically, your case number is 79117741. For more information on how to register, to submit documents, or to authorize a representative, go to **https://www.canada.ca/en/revenue-agency/services/e-services/submit-documents-online.html.**

To help you prepare for the audit, please read Pamphlet RC4188, *What you should know about audits*, at **https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4188-what-you-should-know-about-audits.html**. You can also read (or: refer to) the *Taxpayer Bill of Rights*, a set of 16 rights, a set of 16 rights confirming that the CRA will serve taxpayers with a high degree of accuracy, professionalism, courtesy, and fairness. For more information, go to **https://www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/taxpayer-bill-rights.html**

If you want to use the services of your representative, you can authorize them online using the "Authorize my representative" service in **My Account** or **My Business Account**. This will grant your representative instant access to your information and the online services to easily manage your account. You can also fill in Form AUT-01, *Authorize a Representative for Access by Phone and Mail*, and have it available when we meet. This will allow your representative to discuss your information with us during the audit.

You can find more information about non-resident tax on our website at **https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/non-residents-canada.html.**

You can get our forms and publications at **https://www.canada.ca/en/revenue-agency/services/forms-publications.html** by typing the publication number or name in the search box. You may also call us at the numbers shown on our website at **https://www.canada.ca/en/revenue-agency/corporate/contact-information.html**.

Please provide the documents we asked for by July 8th, 2022. If you have questions, please call me at 709-691-9234. You can also reach my team leader, *Kimberly Sheppard* at 709-730-8324.

Your prompt reply is appreciated.

Sincerely,

Kelsey Foley
Non-Resident Audit Section
NL Tax Services Office

| | |
|---|---|
| Fax: | 1-709-772-5136 |
| Address: | 165 Duckworth Street<br>St. John's, NL A1B 4R5 |
| Website: | https://www.canada.ca/en/revenue-agency.html |

Canada Revenue Agency | Agence du revenu du Canada

November 29, 2022

Grant Thornton LLP
Nova Centre, North Tower
Suite 1000 – 1675 Grafton Street
Halifax, NS
B3J 0E9

---

**Subject: Request for information**

As discussed by telephone on November 28, 2022, we are requesting information in regard to your court-appointed monitoring agreement for Canada Fluorspar (NL) Inc. Please provide the following:

a) Payroll data for all non-resident employees, including payments and deductions made to employees, for the period of January 1, 2016 to March 11, 2022;
b) List of all non-resident employees and subcontractors, along with their addresses, Social Insurance Numbers and/or their Temporary Tax Number, for the period of January 1, 2016 to March 11, 2022;
c) List of all payments made to non-resident individuals, businesses and/or corporations for work completed in Canada, for the period of January 1, 2016 to March 11, 2022; and
d) All contracts with non-resident individuals, vendors and subcontractors.

We are requesting this information under subsection 231.1 of the Income Tax Act (ITA). Under subsection 231.1 of the ITA, officers of the Canada Revenue Agency (CRA) are authorized to inspect, audit, and examine documents; unless the documentation is subject to solicitor-client or litigation privilege.

Please forward the requested information by December 14, 2022 to the attention of the undersigned either by fax or mail at the address indicated below.

If you have any questions or concerns, please call me at the number indicated below, or my team leader, Alex Crawley, at (709) 631-8649.

Yours truly,

Taylor White
Income Tax Auditor
Non-Resident Audit Section
Audit Division
Tax Services Office: Newfoundland & Labrador

Telephone: 709-730-8143
Facsimile: 709-772-5263
Mailing Address: P.O. Box 12075 Stn A
St. John's NL A1B 4R5
Courier Address: 290 Empire Avenue
St. John's NL A1C 3J1

Service Alert due to Situation in Ukraine ... More (/ca/en/service-alerts.page?id=alert1)



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12/14/2022 15:31

**Delivered To**
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**Received By**

MCDONNAUGH

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Receiver

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Sincerely,

UPS

Tracking results provided by UPS: 02/01/2023 11:50 EST

# Appendix “L”

Canada Revenue Agency | Agence du revenu du Canada

November 29, 2022

Grant Thornton LLP
Nova Centre, North Tower
Suite 1000 – 1675 Grafton Street
Halifax, NS
B3J 0E9

---

**Subject: Request for information**

As discussed by telephone on November 28, 2022, we are requesting information in regard to your court-appointed monitoring agreement for Canada Fluorspar (NL) Inc. Please provide the following:

a) Payroll data for all non-resident employees, including payments and deductions made to employees, for the period of January 1, 2016 to March 11, 2022;
b) List of all non-resident employees and subcontractors, along with their addresses, Social Insurance Numbers and/or their Temporary Tax Number, for the period of January 1, 2016 to March 11, 2022;
c) List of all payments made to non-resident individuals, businesses and/or corporations for work completed in Canada, for the period of January 1, 2016 to March 11, 2022; and
d) All contracts with non-resident individuals, vendors and subcontractors.

We are requesting this information under subsection 231.1 of the Income Tax Act (ITA). Under subsection 231.1 of the ITA, officers of the Canada Revenue Agency (CRA) are authorized to inspect, audit, and examine documents; unless the documentation is subject to solicitor-client or litigation privilege.

Please forward the requested information by December 14, 2022 to the attention of the undersigned either by fax or mail at the address indicated below.

If you have any questions or concerns, please call me at the number indicated below, or my team leader, Alex Crawley, at (709) 631-8649.

Yours truly,

Taylor White
Income Tax Auditor
Non-Resident Audit Section
Audit Division
Tax Services Office: Newfoundland & Labrador

Telephone: 709-730-8143
Facsimile: 709-772-5263
Mailing Address: P.O. Box 12075 Stn A
St. John's NL A1B 4R5
Courier Address: 290 Empire Avenue
St. John's NL A1C 3J1

# Appendix “M”

Grant Thornton

Grant Thornton Ltd
Nova Centre, North Tower
Suite 1000, 1675 Grafton Street
Halifax, NS
B3J 0E9

T +1 902 421 1734
F +1 902 420 1068

Canada Revenue Agency
Non-Resident Audit Section – NL Tax Services Office
165 Duckworth Street
St. John's, NL A1B 4R5

January 11, 2023

Attention: Taylor White

**Re: In the Matter of the Companies' Creditors Arrangement Act proceedings of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) ("CFI") – CRA Regulation 105 and 102 Tax Audit**

Mr. White:

In response to the letter from the Canada Revenue Agency ("**CRA**") dated November 29, 2023 and subsequent requests via phone, the Monitor in conjunction with CFI Management have compiled the requested items, as described below:

1. **General ledgers from January 1, 2021, to March 11, 2022** – Included on the flash drive provided. General ledgers provided from CFI and the Monitor's books and records.

2. **Listing of all vendor transactions** – Source excel workbooks provided from January 1, 2016 to March 11, 2022 included on the flash drive provided.

3. **Payments made to non-resident individuals** – Source excel workbooks provided from January 1, 2016 to March 11, 2022 included on the flash drive provided.

4. **Non-resident employees** – As far as the Monitor is aware, the only non-resident employee was the former CEO, Bill Dobbs. The 2021 T4 and T4 Summary is attached for that individual.

Regards,

**GRANT THORNTON LIMITED**
In its Capacity as Monitor of
Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership)

Per:
Phil Clarke, CPA, CA, CIRP, LIT
Senior Vice President

Encl.

# View/Print Label

1. **Ensure there are no other shipping or tracking labels attached to your package.** Select the Print button on the print dialogue box that appears. Note: If your browser does not support this function, select Print from the File menu to print the label.

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   - To Schedule a pickup or find a UPS location, visit ups.com

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40 ALDERNEY DR
DARTMOUTH NS B2Y2N5

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SHP DWT: 1 LBS

**SHIP TO:**
NON-RESIDENT AUDIT SECTION - NL TAX
CANADA REVENUE AGENCY -TAYLOR WHITE
165 DUCKWORTH STREET
**ST JOHN S NL A1C4R5**

**CAN 033 9-00**

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BILLING: P/P

XOL 23.01.06 NV45 2.0A 01/2023*

Service Alert due to Situation in Ukraine ... More (/ca/en/service-alerts.page?id=alert1)



Your shipment
**1ZX03R002093058152**

Delivered On
Thursday, January 19 **at 13:06 at Front desk**

**Delivered To**
ST. JOHN'S CA

**Received By:**
NOONAN
Proof of Delivery

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**Tracking Number**
1ZX03R002093058152

**Weight**
1.00 LBS

**Service**

UPS Standard®

**Shipped / Billed On**
01/13/2023

**Delivered On**

01/19/2023 13:06

**Delivered To**
ST. JOHN'S, CA

**Received By**

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**Left At**
Front desk

Please print for your records as photo and details are only available for a limited time.

Sincerely,

UPS

Tracking results provided by UPS: 02/01/2023 11:49 EST

# Appendix “N”

PROTECTED B

Canada Revenue Agency | Agence du revenu du Canada

January 13, 2023

Canada Fluorspar (NL) Inc.
P.O. Box 337
Clarke's Pond Road
St. Lawrence, NL A0E 2V0

**Subject: Request for Additional Information**
**Account Number 89811 4087**

To whom it may concern:

After reviewing the non-resident transactions in the data available to us, we will undertake a review of supporting documentation of a sample of those transactions. Please provide all invoices, contracts, any payment details, and any other supporting documents pertaining to the items listed in the attached documents. Please provide this documentation by January 27, 2023. Please note that for the credit amounts in the sample, support for the actual expense can be provided in those situations.

If you want to submit your documents electronically, your case number is **79117741**. For more information on how to register, or to submit documents, go to **https://www.canada.ca/en/revenue-agency/services/e-services/submit-documents-online.html**.

If you would like to discuss or clarify our request for information, please contact me at 709-730-8143. You can also reach my team leader, Alex Crawley, at 709-631-8649.

Sincerely,

Taylor White

Taylor White
Income Tax Auditor
Non-Resident Audit Section
Audit Division
Newfoundland and Labrador Tax Services Office

| | |
|---|---|
| Telephone: | 709-730-8143 |
| Facsimile: | 709-772-5263 |
| Mailing Address: | P.O. Box 12075 Stn A<br>St. John's NL A1B 4R5 |
| Courier Address: | 290 Empire Avenue<br>St. John's NL A1C 3J1 |


Canada

Canada Revenue Agency / Agence du revenu du Canada

# Working Paper #0860-2A

| Name of Taxpayer: Canada Fluorspar (NL) Inc. | Account No.: 89811 4087 | Taxation year(s) 2016 |
|---|---|---|
| Auditor: Taylor White | Date: 2023-01-11 | Case: 79117741 |
| | | WP No.: 0860-2A |

2016 Sample

| Vendor Name | Currency | Document No. | Document Date | Amount |
|---|---|---|---|---|
| ADP Marine and Modular (PTY) Ltd. | ZAR | 300822 | 2016-04-06 | $ 3,109,725.20 |
| ADP Marine and Modular (PTY) Ltd. | ZAR | 300972 | 2016-09-28 | $ 4,664,587.80 |
| A.M. King Industries, Inc. | USD | PP00000055 | 2016-02-19 | -$ 150,000.00 |
| Bill Dobbs | USD | BDOBBSCONSULTFEB2016 | 2016-02-29 | $ 6,162.34 |
| FLSmidth Inc. - Salt Lake City Operations | CAD | 923604494 | 2016-10-05 | $ 155,973.95 |
| FLSmidth Inc. - Salt Lake City Operations | CAD | 923604495 | 2016-10-05 | $ 207,965.26 |
| FluorOne Management | USD | F0119 | 2016-10-04 | $ 29,308.54 |
| Inspectorate America Corporation | USD | IMAR160105624 | 2016-01-28 | $ 15,536.90 |
| LBP Management Services, LLC | USD | 0001-2016 | 2016-01-31 | $ 30,862.00 |
| Pack Leader Services LLC | USD | 2016-01 | 2016-01-05 | $ 15,000.00 |
| Yantai Fulin Mining Machinery Co., Ltd. | USD | FL20161111 | 2016-11-18 | $ 377,050.20 |

Canada Revenue Agency / Agence du revenu du Canada

Working Paper #0860-2B

| Taxation year(s) |
|---|
| 2017 |

| Name of Taxpayer: | Account No.: | Case: |
|---|---|---|
| Canada Fluorspar (NL) Inc. | 89811 4087 | 79117741 |
| Auditor: | Date: | WP No.: |
| Taylor White | 2023-01-11 | 0860-2B |

2017 Samples

| Full Account No. | Account Name | Transaction Amount | Journal Entry Date | Journal Entry No. | Reference | Vendor |
|---|---|---|---|---|---|---|
| 20030-002-000 | Accounts Payable - Received but not invoiced | $ 39,857.35 | 2017-03-09 | 7 | 301096 | ADP Marine and Modular (PTY) Ltd. |
| 17550-050-001 | Vendor Reps | $ 28,862.95 | 2017-01-26 | 28 | ADPMAR-RCP0002749 | ADP Marine and Modular (PTY) Ltd. |
| 20005-002-000 | Accounts Payable - Accrued Trade | $ 5,667.48 | 2016-12-31 | 10 | REVERSING ENTRY | ADP Marine and Modular (PTY) Ltd. |
| 17550-050-001 | Vendor Reps | $ 5,540.80 | 2017-01-26 | 28 | ADPMAR-RCP0002749 | ADP Marine and Modular (PTY) Ltd. |
| 70010-150-000 | Marketing | $ 20,372.47 | 2017-08-01 | 1 | BDOBBSEXPJUNE2017 | Bill Dobbs |
| 70010-150-000 | Marketing | $ 13,599.02 | 2017-06-22 | 1 | BDOBBSEUROPETRIP | Bill Dobbs |
| 20030-002-000 | Accounts Payable - Received but not invoiced | $ 11,385.91 | 2017-05-09 | 1 | DOBBIL-RCP0004061 | Bill Dobbs |
| 70010-150-000 | Marketing | $ 7,339.47 | 2017-12-07 | 1 | BDOBBSOCTEXPENSES | Bill Dobbs |
| 18500-050-050 | Filter | $ 207,965.26 | 2017-01-24 | 32 | FLSLTDCAD-RCP0002693 | FLSmidth Inc. - Salt Lake City Operations |
| 18500-050-050 | Filter | $ 155,973.95 | 2017-01-24 | 33 | FLSLTDCAD-RCP0002694 | FLSmidth Inc. - Salt Lake City Operations |
| 20030-002-000 | Accounts Payable - Received but not invoiced | $ 142,633.95 | 2017-04-04 | 3 | 923605554 | FLSmidth Inc. - Salt Lake City Operations |
| 18500-050-050 | Filter | $ 77,986.97 | 2017-04-19 | 33 | FLSLTDCAD-RCP0003780 | FLSmidth Inc. - Salt Lake City Operations |
| 18500-050-050 | Filter | $ 51,991.32 | 2017-04-19 | 33 | FLSLTDCAD-RCP0003780 | FLSmidth Inc. - Salt Lake City Operations |
| 18500-050-050 | Filter | $ 25,995.66 | 2017-04-19 | 33 | FLSLTDCAD-RCP0003780 | FLSmidth Inc. - Salt Lake City Operations |
| 20030-002-000 | Accounts Payable - Received but not invoiced | $ 45,677.48 | 2017-06-14 | 3 | F0130 | FluorOne Management |
| 20030-002-000 | Accounts Payable - Received but not invoiced | $ 34,320.84 | 2017-05-18 | 1 | F0129 | FluorOne Management |
| 16150-050-001 | Consultants | $ 31,344.00 | 2017-07-06 | 16 | FLUMAN-RCP0005500 | FluorOne Management |
| 16150-050-001 | Consultants | $ 20,364.98 | 2017-06-09 | 7 | FLUMAN-RCP0004841 | FluorOne Management |
| 20030-002-000 | Accounts Payable - Received but not invoiced | $ 62,879.75 | 2017-03-31 | 4 | 1800000474 | Gardner Denver NASH LLC |
| 18475-050-050 | Blowers | $ 52,810.51 | 2017-03-16 | 49 | GARDEN-RCP0003209 | Gardner Denver NASH LLC |
| 18475-050-050 | Blowers | $ 51,937.58 | 2017-02-13 | 53 | GARDEN-RCP0002917 | Gardner Denver NASH LLC |
| 60010-150-000 | Salaries - salaried employees | $ 47,263.62 | 2017-01-12 | 1 | 0013-2016 | LBP Management Services, LLC |
| 70270-150-000 | Professional Services - Outside Consultants | $ 21,600.00 | 2017-06-05 | 3 | PACLEA-RCP0004710 | Pack Leader Services LLC |
| 70270-150-000 | Professional Services - Outside Consultants | $ 7,938.86 | 2017-04-04 | 1 | PACLEA-RCP0003507 | Pack Leader Services LLC |
| 20030-002-000 | Accounts Payable - Received but not invoiced | $ 15,472.13 | 2017-11-20 | 1 | CFI008 | RMG, LLC |
| 70270-150-000 | Professional Services - Outside Consultants | $ 10,314.93 | 2017-11-20 | 4 | RMG-RCP0008892 | RMG, LLC |

Canada Revenue Agency / Agence du revenu du Canada

| Working Paper #0860-2C | | Taxation year(s): 2018 |
|---|---|---|
| Name of Taxpayer: Canada Fluorspar (NL) Inc. | Account No.: 89811 4087 | Case: 79117741 |
| Auditor: Taylor White | Date: 2023-01-11 | WP No.: 0860-2C |

| Full Account No. | Account Name | Transaction Amount | Journal Entry Date | Journal Entry No. | Reference | Vendor |
|---|---|---|---|---|---|---|
| 20030-002-000 | Accounts Payable - Received but not invoicad | $ 15,382.00 | 2018-06-30 | 1 | 301353 | ADP Marine and Modular (PTY) Ltd. |
| 18625-050-050 | DMS | $ 13,375.65 | 2018-07-06 | 4 | ADPMARCAD-RCP0012195 | ADP Marine and Modular (PTY) Ltd. |
| 60180-150-610 | Travel & accomodations G & A Corporate | $ 12,036.44 | 2018-10-22 | 38 | BDOBBSEXPSEPT2018 | Bill Dobbs |
| 20005-002-000 | Accounts Payable - Accrued Trade | -$ 9,068.01 | 2018-11-14 | 42 | DOBBIL-A/P Batch November 2018 | Bill Dobbs |
| 20005-002-000 | Accounts Payable - Accrued Trade | -$ 13,090.93 | 2018-10-22 | 38 | DOBBIL-Bill Dobbs Sept Expenses | Bill Dobbs |
| 20030-002-000 | Accounts Payable - Received but not invoiced | $ 84,712.80 | 2018-10-31 | 45 | 1802028 RE-AZ51552 | Dorfner Analysenzentrum und Anlagenplanungsgesellschaft mbH |
| 65006-130-200 | Consumables, R&M, Direct Costs Mine Geology | $ 58,818.32 | 2018-10-31 | 7 | DORANZEUR-RCP0014374 | Dorfner Analysenzentrum und Anlagenplanungsgesellschaft mbH |
| 60025-150-600 | Salaries - Consultants G & A General | $ 12,800.00 | 2018-10-28 | 4 | DORANZ-RCP0014261 | Dorfner Analysenzentrum und Anlagenplanungsgesellschaft mbH |
| 20030-002-000 | Accounts Payable - Received but not invoiced | $ 47,289.88 | 2018-05-31 | 2 | 923608215 | FLSmidth Inc. - Salt Lake City Operations |
| 17550-050-001 | Vendor Reps | $ 46,699.40 | 2018-05-16 | 17 | FLSLTD-RCP0011357 | FLSmidth Inc. - Salt Lake City Operations |
| 70270-150-000 | Professional Services - Outside Consultants | $ 25,151.13 | 2018-04-30 | 13 | FLSLTD-RCP0011143 | FLSmidth Inc. - Salt Lake City Operations |
| 70270-150-000 | Professional Services - Outside Consultants | $ 20,952.75 | 2018-04-16 | 33 | NOVEMBER2017 | FluorOne Management |
| 19900-040-040 | Wharf/Berge Capital Project | $ 29,853.54 | 2018-12-31 | 22 | 10849 | LKL Oceantrade B.V |
| 70160-150-650 | Concentrate to Dock (Marine & Logistics) G & A Procurement | $ 422,843.85 | 2018-12-31 | 38 | MIDGRO-RCP0016157 | Mid-Ship Group LLC |
| 20030-002-000 | Accounts Payable - Received but not invoiced | $ 15,004.28 | 2018-02-27 | 40 | CFI0011 | RMG, LLC |
| 70270-150-000 | Professional Services - Outside Consultants | $ 10,000.00 | 2018-03-31 | 5 | JE 03-002A Project Accrual | RMG, LLC |
| 70010-150-610 | Marketing G & A Corporate | $ 6,571.00 | 2018-11-07 | 42 | RMG-RCP0014858 | RMG, LLC |
| 70160-150-650 | Concentrate to Dock (Marine & Logistics) G & A Procurement | $ 23,180.25 | 2018-12-31 | 7 | ROBROT-RCP0016050 | RoBulog, Rotterdam Bulk Logistics |
| 10550-002-000 | Prepaid AGS Project | $ 70,230.85 | 2018-11-02 | 2 | YANFUL-Yantai Fulin Mining Machinery Co., Ltd. | Yantai Fulin Mining Machinery Co., Ltd. |

Canada Revenue Agency / Agence du revenu du Canada

| Working Paper #0860-2D | | Taxation year(s) 2019 |
|---|---|---|
| Name of Taxpayer: Canada Fluorspar (NL) Inc. | Account No.: 89811 4087 | Case: 79117741 |
| Auditor: Taylor White | Date: 2023-01-11 | WP No.: 0860-2D |

| Full Account No. | Account Name | Transaction Amount | Journal Entry Date | Journal Entry No. | Reference | Vendor |
|---|---|---|---|---|---|---|
| 60025-140-600 | Salaries - Consultants Mill General | $ 36,039.00 | 2019-09-30 | 60 | ADPMARCAD-RCP0024205 | ADP Marine and Modular (PTY) Ltd. |
| 20005-002-000 | Accounts Payable - Accrued Trade | $ 32,594.25 | 2019-09-30 | 83 | 301635 | ADP Marine and Modular (PTY) Ltd. |
| 10550-002-000 | Prepaid AGS Project | $ 435,805.94 | 2019-09-09 | 15 | AYDENI-Ay Denizcilik A.S - The Marshall Islands | Ay Denizcilik A.S - The Marshall Islands |
| 70160-150-650 | Concentrate to Dock (Marine & Logistics) G & A Procurement | $ 301,300.24 | 2019-02-13 | 23 | 015437FINV | BBC Chartering Carriers GmbH & Co. KG |
| 10550-002-000 | Prepaid AGS Project | $ 65,435.57 | 2019-09-18 | 1 | DOBBIL-Bill Dobbs | Bill Dobbs |
| 60180-150-600 | Travel & accomodations G & Ageneral | $ 52,203.35 | 2019-09-30 | 1 | BDOBBSEXPOCT18/JULY19 | Bill Dobbs |
| 10550-002-000 | Prepaid AGS Project | $ 38,188.34 | 2019-11-08 | 57 | DOBBIL-Bill Dobbs | Bill Dobbs |
| 60180-150-610 | Travel & accomodations G & A Corporate | $ 36,600.91 | 2019-10-31 | 1 | BDOBBSOCT2019 | Bill Dobbs |
| 60220-150-610 | Meals G & A Corporate | $ 9,154.94 | 2019-09-30 | 1 | BDOBBSEXPOCT18/JULY19 | Bill Dobbs |
| 20005-002-000 | Accounts Payable - Accrued Trade | $ 249,489.72 | 2019-10-28 | 8 | 1909211 | Celtic Marine Corporation |
| 10550-002-000 | Prepaid AGS Project | $ 424,491.66 | 2019-12-20 | 10 | CSMEOSUSD-CSMT EOS Ltd. | CSMT EOS Ltd. |
| 10550-002-000 | Prepaid AGS Project | $ 108,935.43 | 2019-10-17 | 38 | DAMSHI-Damen Shiprepair Harbour & Voyage | Damen Shiprepair Harbour & Voyage |
| 19900-040-040 | Wharf/Barge Capital Project | $ 44,367.97 | 2019-10-18 | 49 | DAMSHI-RCP0024531 | Damen Shiprepair Harbour & Voyage |
| 18342-500-081 | Blue Beach-Wharf Project Permitting, Regulatory Fees,Inspect | $ 36,521.67 | 2019-12-31 | 26 | DAMSHI-RCP0026756 | Damen Shiprepair Harbour & Voyage |
| 19900-040-040 | Wharf/Barge Capital Project | $ 11,290.52 | 2019-10-18 | 49 | DAMSHI-RCP0024531 | Damen Shiprepair Harbour & Voyage |
| 19900-040-040 | Wharf/Barge Capital Project | $ 8,301.85 | 2019-10-18 | 49 | DAMSHI-RCP0024531 | Damen Shiprepair Harbour & Voyage |
| 19900-040-040 | Wharf/Barge Capital Project | $ 5,469.11 | 2019-10-18 | 49 | DAMSHI-RCP0024531 | Damen Shiprepair Harbour & Voyage |
| 60025-140-600 | Salaries - Consultants Mill General | $ 25,600.00 | 2019-09-30 | 8 | DORANZ-RCP0024292 | Dorfner Analysenzentrum und Anlagenplanungsgesellschaft mbH |
| 65006-130-200 | Consumables, R&M, Direct Costs Mine Geology | $ 12,411.72 | 2019-02-28 | 7 | RE-AZ52792 | Dorfner Analysenzentrum und Anlagenplanungsgesellschaft mbH |
| 65006-140-535 | Mill Consumables, R&M, Direct Costs - Laboratory | $ 11,088.38 | 2019-09-30 | 7 | DORANZEUR-RCP0024290 | Dorfner Analysenzentrum und Anlagenplanungsgesellschaft mbH |
| 20005-002-000 | Accounts Payable - Accrued Trade | $ 16,437.63 | 2019-08-15 | 5 | 923676767 | FLSmidth Inc. - Salt Lake City Operations |
| 20030-002-000 | Accounts Payable - Received but not invoiced | $ 13,478.24 | 2019-12-01 | 34 | FLSLTD-RCP0011058 | FLSmidth Inc. - Salt Lake City Operations |
| 65006-140-530 | Mill Consumables, R&M, Direct Costs - Drum Filter | $ 10,747.20 | 2019-07-30 | 57 | 923674172DR | FLSmidth Inc. - Salt Lake City Operations |
| 65006-140-500 | Mill Consumables, R&M, Direct Costs - Mill Operations | $ 10,619.43 | 2019-03-11 | 74 | FLSLTD-RCP0017931 | FLSmidth Inc. - Salt Lake City Operations |
| 20005-002-000 | Accounts Payable - Accrued Trade | $ 80,618.21 | 2019-07-12 | 8 | 900847227 | Gardner Denver NASH LLC |
| 65006-140-400 | Mill Consumables, R&M, Direct Costs - Mill Maintenance | $ 75,479.27 | 2019-07-08 | 96 | GARDEN-RCP0021494 | Gardner Denver NASH LLC |
| 10405-005-000 | Stock Inventory | $ 44,594.46 | 2019-07-04 | 44 | GARDEN-RCP0021351 | Gardner Denver NASH LLC |
| 10550-002-000 | Prepaid AGS Project | $ 191,907.57 | 2019-09-30 | 26 | INTSCH-Interscan Schiffahrtsgesellschaft mbH | Interscan Schiffahrtsgesellschaft mbH |
| 65006-140-535 | Mill Consumables, R&M, Direct Costs - Laboratory | $ 8,939.03 | 2019-11-30 | 37 | INSAME-RCP0026162 | Inspectorate America Corporation |
| 19900-040-040 | Wharf/Barge Capital Project | $ 31,797.93 | 2019-04-26 | 4 | 11033 | LKL Oceantrade B.V |
| 19900-040-040 | Wharf/Barge Capital Project | $ 30,308.15 | 2019-08-30 | 175 | 11188 | LKL Oceantrade B.V |
| 19900-040-040 | Wharf/Barge Capital Project | $ 24,774.43 | 2019-09-18 | 21 | 11319 | LKL Oceantrade B.V |
| 19900-040-040 | Wharf/Barge Capital Project | $ 14,110.11 | 2019-07-10 | 34 | 11216 | LKL Oceantrade B.V |
| 10550-002-000 | Prepaid AGS Project | $ 517,965.43 | 2019-10-15 | 1 | MIDGRO-Mid-Ship Group LLC | Mid-Ship Group LLC |
| 70160-150-650 | Concentrate to Dock (Marine & Logistics) G & A Procurement | $ 329,716.00 | 2019-09-20 | 19 | MIDGRO-RCP0023577 | Mid-Ship Group LLC |
| 10550-002-000 | Prepaid AGS Project | $ 44,979.64 | 2019-11-08 | 55 | MIDGRO-Mid-Ship Group LLC | Mid-Ship Group LLC |
| 70160-150-650 | Concentrate to Dock (Marine & Logistics) G & A Procurement | $ 453,535.47 | 2019-08-31 | 24 | MINTRA-RCP0023077 | Minerals & Transport |
| 70160-150-650 | Concentrate to Dock (Marine & Logistics) G & A Procurement | $ 426,578.64 | 2019-08-31 | 23 | NOVSHO-RCP0023076 | Novaalgoma Short-Sea Carriers SA |
| 70160-150-650 | Concentrate to Dock (Marine & Logistics) G & A Procurement | $ 398,670.86 | 2019-05-31 | 39 | NOVSHO-RCP0020215 | Novaalgoma Short-Sea Carriers SA |
| 70010-150-610 | Marketing G & A Corporate | $ 6,821.00 | 2019-01-30 | 334 | RMG-RCP0016810 | RMG, LLC |
| 70160-150-650 | Concentrate to Dock (Marine & Logistics) G & A Procurement | $ 123,722.35 | 2019-08-31 | 17 | ROBROT-RCP0023214 | RoBulog, Rotterdam Bulk Logistics |
| 10550-002-000 | Prepaid AGS Project | $ 81,621.75 | 2019-12-12 | 17 | ROBROT-RoBulog, Rotterdam Bulk Logistics | RoBulog, Rotterdam Bulk Logistics |
| 19900-040-040 | Wharf/Barge Capital Project | $ 44,013.00 | 2019-11-30 | 16 | ROBROT-RCP0026237 | RoBulog, Rotterdam Bulk Logistics |
| 70160-150-650 | Concentrate to Dock (Marine & Logistics) G & A Procurement | $ 25,855.40 | 2019-09-23 | 9 | ROBROT-RCP0023632 | RoBulog, Rotterdam Bulk Logistics |
| 70160-150-650 | Concentrate to Dock (Marine & Logistics) G & A Procurement | $ 357,787.50 | 2019-11-29 | 1 | SPLTRA-RCP0025768 | Spliethoff Transport BV |
| 20005-002-000 | Accounts Payable - Accrued Trade | $ 38,904.65 | 2019-12-19 | 4 | 161901858 | Spliethoff Transport BV |
| 50001-002-000 | Freight on Sales | $ 19,080.58 | 2019-12-19 | 5 | SPLTRA-RCP0026362 | Spliethoff Transport BV |

Canada Revenue Agency / Agence du revenu du Canada

Working Paper #0860-2E

| Taxation year(s) |
|---|
| 2020 |

| Name of Taxpayer: | Account No.: | Case: |
|---|---|---|
| Canada Fluorspar (NL) Inc. | 89811 4087 | 79117741 |
| **Auditor:** | **Date:** | **WP No.:** |
| Taylor White | 2023-01-11 | 0860-2E |

2020 Sample

| Vendor Name | Currency | Document No. | Document Date | Amount |
|---|---|---|---|---|
| A.C. Oerssleff Chartering A/S | USD | MK/171FRT | 2020-01-22 | $ 622,125.00 |
| A.C. Oerssleff Chartering A/S | USD | MK/2120 | 2020-01-02 | $ 197,505.00 |
| Asia Break Bulk (Singapore) Pte. Ltd. | USD | 2020-08-003 | 2020-08-17 | $ 248,763.85 |
| BBC Chartering Carriers GmbH & Co. KG | USD | 019310FINV | 2020-05-07 | $ 132,216.32 |
| Bill Dobbs | USD | BDOBBSAUG2020 | 2020-08-31 | $ 30,104.17 |
| Damen Shiprepair Harbour & Voyage | EUR | CD100001148 | 2020-03-09 | $ 54,298.62 |
| Derpina Denizcilik VE Ticaret Ltd. Sti. | EUR | NA.20.030 | 2020-12-07 | $ 213,621.22 |
| Eggerding B.V. | EUR | 20203158 | 2020-10-01 | $ 29,938.22 |
| Emona Ltd. | USD | N-71-01/10.09.2020 | 2020-09-10 | $ 629,584.38 |
| FLSmidth Inc. - Salt Lake City Operations | CAD | 923805190 | 2020-06-17 | $ 144,948.01 |
| FluorOne Trading, LLC | USD | F0143 | 2020-02-07 | $ 150,000.00 |
| Gardner Denver NASH LLC | USD | 0 | 2020-02-14 | $ 30,160.00 |
| Inspectorate America Corporation | USD | IUSMAR20024116 | 2020-07-01 | $ 17,400.00 |
| Mid-Ship Group LLC | USD | SI-00133183 | 2020-07-15 | $ 26,378.47 |
| MLB Manfred Lauterjung Befrachtung GmbH & Co. KG | USD | 015-01/2020 | 2020-02-17 | $ 557,329.79 |
| Novaalgoma Short-Sea Carriers SA "APP.POOL" | USD | SIDERVENTURESETTLEMENT | 2020-09-23 | $ 75,336.15 |
| Ocean7 Chartering ApS | USD | 003434FINV | 2020-06-30 | $ 259,264.50 |
| Onego Shipping and Chatering bv | USD | -11084 | 2020-10-30 | $ 192,837.29 |
| RoBulog, Rotterdam Bulk Logistics | EUR | 2001206 | 2020-08-27 | $ 66,384.34 |
| Seacontractors/Dian Kingdom B.V | EUR | DIAN20200002 | 2020-03-17 | $ 281,582.50 |
| Spliethoff Transport BV | USD | 162001301 | 2020-08-24 | $ 144,188.44 |
| Wagenborg Shipping B.V. | USD | WAALBORG04/24/20 | 2020-04-24 | $ 202,009.14 |

# Appendix “O”

**HP LaserJet MFP M426fdw**

# Fax Confirmation

1-Feb-2023 8:34AM

| Job | Date | Time | Type | Identification | Duration | Pages | Result |
|---|---|---|---|---|---|---|---|
| 14910 | 1/ 2/2023 | 8:33:02AM | Send | 17097725263 | 0:51 | 2 | OK |

Grant Thornton

## FAX COVER SHEET

| | | | |
|---|---|---|---|
| TO: | Taylor White | FROM: | Corey Hines |
| COMPANY: | Canada Revenue Agency | COMPANY: | Grant Thornton Limited |
| FAX#: | 1 (709) 772-5263 | FAX# | 1 (902) 420-1068 |
| PHONE# | 1 (709) 730-7143 | PHONE# | 1 (902) 491-7704 |
| DATE: | February 1, 2022 | NUMBER OF PAGES (including cover page): | 2 |
| RE: | In the Matter of the Companies' Creditors Arrangement Act Proceedings of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) – Monitor's Response to CRA's Request for Audit Samples | | |

Grant Thornton Limited
Nova Centre, North Tower
Suite 1000-1675 Grafton St
Halifax, Nova Scotia
B3J 0E9

T (902) 421-1577
F (902) 420-1068
www.GrantThornton.ca

Please find attached communication from Phil Clarke, Senior Vice President of Grant Thornton Limited and Monitor in the above noted CCAA proceeding regarding the letter sent by the Canada Revenue Agency on January 13, 2023 requesting audit samples to support the non-resident tax audit of Canada Fluorspar (NL) Inc.

If you have any additional questions, please feel free to reach either myself or Phil Clarke at our contact below.

**Corey Hines | Senior Associate**
**Grant Thornton Limited**
**Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9**
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| **DATE:** | February 1, 2022 | **NUMBER OF PAGES** (including cover page): | 2 |
| **RE:** | In the Matter of the Companies' Creditors Arrangement Act Proceedings of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) – Monitor's Response to CRA's Request for Audit Samples | | |

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Please find attached communication from Phil Clarke, Senior Vice President of Grant Thornton Limited and Monitor in the above noted CCAA proceeding regarding the letter sent by the Canada Revenue Agency on January 13, 2023 requesting audit samples to support the non-resident tax audit of Canada Fluorspar (NL) Inc.

If you have any additional questions, please feel free to reach either myself or Phil Clarke at our contact below.

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February 1, 2023

Attention: Taylor White

**Re: In the Matter of the Companies' Creditors Arrangement Act proceedings of Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership) ("CFI") – CRA Regulation 105 and 102 Tax Audit**

Mr. White:

In response to the letter from the Canada Revenue Agency ("**CRA**") dated January 13, 2023, the Monitor is unable to satisfy CRA's sample request at this time as the books and records are located onsite at CFI. The mine has been put in Cold Idle and the administration buildings have been winterized. There is only security and minimal environmental monitoring staff onsite.

The Monitor will endeavor compile the samples for CRA when next on site. At this time, the Monitor does not have a timeline of when this will occur, likely in the next two months.

Regards,

**GRANT THORNTON LIMITED**
In its Capacity as Monitor of
Canada Fluorspar (NL) Inc., Canada Fluorspar Inc. and Newspar (a General Partnership)

Per:
Phil Clarke, CPA, CA, CIRP, LIT
Senior Vice President

# Appendix “P”

Federal Court Cour fédérale

**Date: 20221005**

**Docket: T-279-22**

**Citation: 2022 FC 1375**

**Ottawa, Ontario, October 5, 2022**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.,**
**a body corporate**

**Plaintiff**

**and**

**CANADA FLUORSPAR (NL) INC., a body corporate**

**Defendants**
**(*In Personam*)**

**and**

**THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
***(In Rem)***

**ORDER AND REASONS**

## I. **Overview**

[1] This motion arises in the context of the within action by the Plaintiff, Inaminka Marine Services Limited [IMS], *in personam* against Canada Fluorspar (NL) Inc. [CFI] and *in rem* against the Ship "Barge H-404" [the Barge]. In the action, IMS claims amounts owing for services alleged to have been provided to these Defendants. The Barge is under arrest in this action, and the Plaintiff's principal, Captain Richard Spellacy, has filed a Caveat against its release.

[2] In this motion, CFI invokes section 50(1) of the *Federal Courts Act*, RSC 1985, c F-7 [Act] to seek a stay of IMS's action and, under Rule 488 of the *Federal Courts Rules*, SOR/98-106 [Rules], seeks release of the Barge from arrest. The motion arises in the context of proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA] in the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency [the Bankruptcy Court] arising out of the insolvency of CFI, in which the Bankruptcy Court has issued a stay of proceedings against CFI. In the alternative, CFI moves to strike the *in rem* portion of IMS's action pursuant to Rule 221, on the basis that IMS's claims do not fall within the scope of section 22(2)(m) of the Act, and release the Barge from arrest pursuant to Rule 488.

[3] As explained in greater detail below, the motion for a stay is granted and the Barge is released from arrest, because CFI has satisfied the Court that, taking into account applicable jurisprudence and the particular circumstances of this matter, the Bankruptcy Court is a more

appropriate forum for adjudication of the Plaintiff's claim. It is therefore unnecessary for the Court to adjudicate CMI's motion for alternative relief.

## II. **Background**

[4] The *in personam* Defendant, CFI, is a corporation incorporated in Newfoundland and Labrador [NL]. It operates a fluorspar mine in St. Lawrence, NL. CFI is the owner of the Barge and employs the Barge to support the loading of cargo ships at the marine terminal at the site of its mine. While there was no evidence before the Court on this point, I understand the parties to agree that the Barge is a foreign vessel, registered in Panama.

[5] The Plaintiff, IMS, is also a corporation incorporated in NL. In this action, it claims for consultation and design services, related to a method and facilities for moving the Barge on and off the loading piers at CFI's marine terminal in response to inclement weather, the cost of which services it says remains owing by CFI.

[6] IMS commenced this action on February 16, 2022 and obtained a Warrant for the arrest of the Barge, which was executed that same day. The Barge was arrested where it was berthed at the Marbase (the former Marystown Shipyard) in Marystown, NL, and currently remains at the Marbase under arrest.

[7] Pursuant to an order dated February 22, 2022 [Interim Receivership Order], the Supreme Court of Newfoundland and Labrador General Division [SCNL] appointed Grant Thornton Limited [GT or Interim Receiver or Monitor] Interim Receiver of all of the property of CFI and

another company, Canada Fluorspar Inc. The Interim Receivership Order identifies such property [Property] to include all current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, except for the Excluded Property (as defined in the Interim Receivership Order). The Barge does not form part of the Excluded Property.

[8] The Interim Receivership Order provides that no proceedings shall be commenced or continued against or in respect of CFI, Canada Fluorspar Inc., or the Property without the consent of GT or leave of the SCNL. It also stays any proceedings currently underway against CFI, Canada Fluorspar Inc., or the Property at the time of the Interim Receivership Order, pending a further order of the SCNL.

[9] The Interim Receivership Order states that the SCNL requests the aid and recognition of any court having jurisdiction either within Canada or abroad to give effect to the order and assist GT, as Interim Receiver, in carrying out the order. It further requests that all other courts make orders and provide assistance to GT as may be necessary or desirable to give effect to the Interim Receivership Order.

[10] Subsequently, pursuant to an initial order dated March 11, 2022, which was amended and restated on March 18, 2022 [CCAA Order], the Bankruptcy Court appointed GT the Monitor for CFI, Canada Fluorspar Inc., and Newspar (a General Partnership), pursuant to the CCAA. To avoid confusion, I note that the Bankruptcy Court, which issued the CCAA Order, is the same

provincial superior court that issued the Interim Receivership Order, although styled differently for purposes of the CCAA proceeding.

[11] The CCAA Order provides that CFI remains in possession and control of its current and future assets, undertakings and property. It also stayed all proceedings against CFI or its property until July 10, 2022 [Stay Period]. Through a series of extensions, the Bankruptcy Court extended the Stay Period, which is currently effective until October 17, 2022. The CCAA Order further provides that either CFI or GT has the ability to apply to any court for the recognition of the CCAA Order and for assistance in carrying out the terms of the order.

[12] By order dated March 18, 2022, as subsequently revised [SISP Order], the Bankruptcy Court approved a Sale and Investment Solicitation Process [SISP] with respect to the assets of CFI. In the SISP Order, the Bankruptcy Court requests the aid in recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or elsewhere, to give effect to the SISP Order and to assist the applicants for the SISP Order (which include CFI acting through GT) and their respective agents in carrying out the terms of the SISP Order.

[13] On August 3, 2022, CFI filed its Notice of Motion in support of the motion now before the Court, seeking the following relief:

A. a stay of IMS's action against it and the Barge, pursuant to section 50(1) of the Act, and release of the Barge from arrest pursuant to Rule 488;

B. in the alternative, that this Court strike the *in rem* portion of IMS's action, pursuant to Rule 221, on the basis that IMS's claims do not fall within the scope of section 22(2)(m) of the Act, and release of the Barge from arrest pursuant to Rule 488;

C. in the further alternative, an extension of time for CFI to file its defence to IMS's action.

[14] On September 2, 2022, Captain Richard Spellacy, IMS's sole shareholder, officer and director, filed a Caveat against the release of the Barge from arrest. I understand from counsel's submissions that the Caveat was filed in support of a claim for master's wages.

[15] CFI subsequently served and filed its full motion record on or about September 20, 2022, and IMS filed its responding materials on September 26, 2022. The parties argued this motion on September 28, 2022. I understand from the parties that a motion to approve a proposed sale of CFI's assets under the SISP had been scheduled to be heard by the Bankruptcy Court on September 27, 2022, the day before the hearing of this motion. CFI's counsel advised at the outset of the hearing of the present motion that the motion before the Bankruptcy Court was being rescheduled and that a new hearing date had not yet been set. However, counsel confirmed that the approval to be sought from the Bankruptcy Court at that motion was in support of the closing of the proposed sale by October 7, 2022, or October 17, 2022 as an outside date.

## III. **Issues**

[16] This motion raises the following two principal issues for the Court's determination:

A. Whether the Court should exercise its discretion pursuant to section 50(1) of the Act to stay the within action commenced by IMS and, as a consequence, release the Barge from arrest; or

B. In the alternative, whether IMS's action should be struck pursuant to Rule 221, because the services alleged to be provided to CFI by IMS fall outside the scope of section 22(2)(m) of the Act and, as such, do not fall within the *in rem* jurisdiction of the Federal Court.

## IV. **Analysis**

### A. *Whether the Court should exercise its discretion pursuant to section 50(1) of the Act to stay the within action commenced by IMS and, as a consequence, release the Barge from arrest*

#### (1) General Principles

[17] In addressing this issue, it is helpful first to review general principles and supporting jurisprudence governing a motion of this nature in the context of an insolvency proceeding underway in a provincial superior court. In formulating the following explanation, I am borrowing liberally from my decision in *RMI Marine Limited v Scotia Tide (Ship)*, 2019 FC 114 [*RMI Marine*], which canvassed many of the same principles.

[18] Section 50 of the Act grants this Court the authority to stay a proceeding in any cause or matter on the ground that the claim is proceeding in another court or jurisdiction or where it is in the interests of justice to do so. The party seeking a stay is required to clearly establish the existence of a more appropriate forum (*Holt Cargo Systems Inc v ABC Containerline NV (Trustee of)*, 2001 SCC 90 [*Holt*] at para 89).

[19] As discussed in *RMI Marine*, the jurisprudential framework applicable to a motion of this sort was discussed in *Holt* and the companion decision in *Antwerp Bulkcarriers, NV (Re)*, 2001 SCC 91 [*Antwerp*]. *Holt* and *Antwerp* were decisions that arose in the context of the bankruptcy of a Belgian container line, which resulted in the arrest of one of its vessels, the "Brussel", at the Port of Halifax through an *in rem* action in the Federal Court.

[20] Following the arrest of the "Brussel", the shipowner was declared bankrupt by the Belgian bankruptcy court, and the trustees in bankruptcy obtained from the Superior Court of Québec an order recognizing the judgment of the Belgian court. The trustees subsequently obtained an order that the proceeds of sale of the vessel or the vessel itself be provided to the trustees for distribution through the Belgian bankruptcy [the Québec Superior Court Order]. This order was contrary to the ongoing procedural framework developed in the Federal Court for sale of the vessel and distribution of its proceeds. Relying in part on the Québec Superior Court Order, the trustees applied to the Federal Court for a stay of its proceedings and to have the proceeds of sale paid out to them. Justice MacKay of the Federal Court ruled against the trustees [the Federal Court Order].

[21] Both the Québec Superior Court Order and the Federal Court Order were appealed, and the Supreme Court of Canada ultimately considered the resulting appellate decisions.

[22] In Antwerp, which considered the appeal from the Québec Superior Court Order, the Supreme Court concluded (at paragraphs 37 and 40) that the Federal Court's maritime jurisdiction, once properly engaged by the commencement of the in rem action and the arrest of the ship, was not lost as a result of the subsequent bankruptcy of the shipowner. The Supreme Court also explained (at paragraphs 37 and 45 to 47) that the bankruptcy court had no power to deal with the vessel, which had already been captured by a competent order of the Federal Court. In essence, the Supreme Court found (at paragraphs 48 to 53) that the bankruptcy court's issuance of what amounted to an anti-suit injunction improperly attempted to restrict the Federal Court's ability to exercise its jurisdiction. The Supreme Court noted (at paragraphs 54 to 55) that it was open to the Federal Court judge to enter a stay if he considered it appropriate to do so, or to decline to accede to the request of the trustees as he did, and that the circumstances would have been the same had the bankruptcy occurred in Canada rather than in Belgium.

[23] In *Holt*, the Supreme Court considered the appeal from the Federal Court Order. The Supreme Court held (at paragraphs 41 to 44) that, pursuant to the applicable Canadian conflict of laws principles, the plaintiff, which had arrested the vessel in the Federal Court, was entitled to have its maritime lien status, conferred under the law of the United States where the plaintiff provided services to the vessel, recognized in the Federal Court proceeding.

[24] Consistent with the decision in Antwerp, the Supreme Court noted in *Holt* (at paragraphs 60 to 66) that the Federal Court did not lose jurisdiction as a result of orders issued by the Superior Court of Québec sitting in bankruptcy. The Supreme Court then considered whether the Federal Court should nevertheless have deferred to the Belgian bankruptcy court on the basis of international comity, concluding (at paragraphs 85 to 87) that international coordination was an important, but not necessarily a controlling, factor. The Federal Court was required to be mindful of the difficulties presented by international bankruptcies, including the desirability of minimizing the multiplicity of proceedings and potentially inconsistent decisions, as well as the need to do justice to the particular litigants before it. No single consideration was to be elevated to a controlling position in the exercise of the Federal Court's discretion whether to stay its own proceedings.

[25] Finally, in considering (at paragraphs 80 to 98) whether the Federal Court erred in the exercise of its discretion to deny the trustees' motion for a stay of proceedings, the Supreme Court noted that the principles on which the discretion should be exercised in this type of matter were authoritatively settled in Amchem Products Inc v British Columbia (Workers' Compensation Board), [1993] 1 SCR 897. That case explained that the relevant question was whether there was a more appropriate jurisdiction based on the relevant factors and that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff (pages 920 to 921). After noting the public policy considerations applicable in the context of an international bankruptcy, the Supreme Court described as follows (at paragraph 91 of *Holt*) the factors to be considered in making the discretionary decision:

> 91. The "natural forum" is the one to which the action has the most real and substantial connection (*Amchem*, at pp. 916 and

> 935). Relevant circumstances include not only issues of public policy (as in this case) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigating in one forum or the other, and the discouragement of forum shopping. In short, within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.

[26] The Supreme Court concluded that the Federal Court had considered the relevant factors in arriving at its decision. Justice MacKay had acknowledged the importance of comity and international coordination in a proper case, but he placed primary emphasis on the fact that he was dealing with an in rem action by secured creditors against the vessel which, at the time of the bankruptcy, the Federal Court had already arrested and, at the time of the interventions of the Canadian bankruptcy court, he had already ordered appraised and sold. The Supreme Court rejected the trustees' argument that the plaintiff was forum shopping by arresting the vessel in Canada and acknowledged that Justice MacKay had appropriately given weight to the juridical advantage afforded to the plaintiff in Canada through recognition of the secured status of its maritime lien.

[27] While there are factors that distinguish the "Brussel" litigation from the circumstances in the case at hand, *Holt* and Antwerp nevertheless provide in significant measure the framework that governs the exercise of discretion in considering CFI's motion for a stay under section 50 of the *Act*.

[28] *One obvious factual difference* is that the bankruptcy in the present case arises in a domestic context, not an international one. As noted in *RMI Marine*, this Court must nonetheless consider the effect of an order of a provincial superior court issued in the context of an

insolvency, which is an important, but not necessarily a controlling, factor (para 39). In that respect, guidance can also be taken from the decision in *Always Travel Inc v Air Canada*, 2003 FCT 707 [*Always Travel*], which also arose in the context of a CCAA proceeding in a provincial superior court.

[29] *Always Travel* involved a proposed class action in the Federal Court against a number of airlines, including Air Canada. At that time, Air Canada was the subject of an order from the Ontario Superior Court of Justice under the CCAA, which protected it against legal proceedings in the context of an intended restructuring. On that basis, Air Canada moved to have the Federal Court stay its proceedings.

[30] Much like the present case, the order of the Ontario Superior Court of Justice in *Always Travel* stayed all proceedings against Air Canada and expressly requested the aid and recognition of any Canadian court in carrying out the terms of the order (at para 8). Justice Hugessen of the Federal Court granted a stay of proceedings for three months, or until such earlier time as the stay by the Ontario Superior Court of Justice was lifted. In addressing the role of the Federal Court in considering a CCAA order from a provincial superior court, Justice Hugessen relied in part on the decisions in *Holt* and Antwerp in providing (at paragraphs 10 to 12) the following explanation:

> 10. Superior courts do not order each other about or make orders interfering with each other's process. Rather, it is essential that they should cooperate. Conflicts between courts, or other bodies having ultimate judicial power, may well have serious results, including perhaps even loss of liberty. In Canada, superior courts do not compete with one another. They accord to one another "full faith and credit," as was said in *Morguard Investments Ltd. v. De Savoye*, and repeated in the Brussel decisions. Justice Farley's order specifically requests that this Court, in comity, and more than that, in recognition of the fact that both courts are engaged in a single legal system in the

> administration of Canadian justice, should lend its aid to the order of the Ontario Superior Court of Justice staying proceedings.
>
> 11. It has been said to me this morning that I should not grant a stay order based on Justice Farley's orders first because I have no evidence before me and second because there has been no attempt to justify a stay in the terms of the classic three part test originally enunciated by the Supreme Court in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, and subsequently in *RJR MacDonald Inc. v. Canada (Attorney General)*. To that I say that this is not an ordinary stay and that a stay granted in comity does not need to meet the requirements of that test and does not need evidence; it is my view that the proper attitude of respectful cooperation which this Court should have and does have to judgments of the Ontario Superior Court of Justice will require that, as a matter of course, in virtually every case where an order is given by a provincial superior court in the exercise of its CCAA jurisdiction, and that order requests this Court's aid, this Court will give such aid on proper application being made.
>
> 12. That is not the end of the matter. If a party to proceedings in this Court thinks that a stay should not be granted in comity and in aid of a provincial superior court order, it is at liberty to oppose the stay or, if the stay is granted, apply to this Court to have it lifted. The plaintiffs would thus have been free to bring evidence today and make representations to me that for some reasons or other these proceedings ought not to be stayed, but matters did not develop in that way. Let me be quite clear. The burden is on a person seeking in this Court to avoid the consequences of this Court acting in aid of a provincial superior court exercising its jurisdiction under the CCAA. The burden is on that person to show this Court that it should not act in aid. Nothing that I say or do today forecloses the plaintiffs from making an application if they so wish. I say that simply because in the way in which these proceedings developed, it was agreed between counsel and the Court that we should deal with this matter today strictly on issues of law, matters of fact being left to another day, if necessary.

[31] I pause to note that the body of jurisprudence explained above is also canvassed in CFI's written representations in support of this motion, and IMS explained in its own written representations that it takes no issue with CFI's explanation of the basis upon which the Federal Court has determined when it is appropriate to impose a stay. However, at the hearing of this

motion, disagreement developed between counsel as to the significance of the above passage from *Always Travel*. CFI's counsel relies on this passage in support of a submission that, in responding to the motion, IMS bears the burden of proving that the Federal Court should not issue the requested stay in aid of the Bankruptcy Court. IMS disputes this position, arguing that, as the moving party, CFI must bear the burden.

[32] As found in *RMI Marine* (at para 42), I regard *Always Travel* as describing the proper attitude of respectful cooperation between courts, an attitude that is consistent with the guidance of the Supreme Court in *Holt* and *Antwerp* as to the importance of comity and cooperation. However, Always Travel should not be interpreted as detracting from the discretion to be exercised by the Federal Court in considering a motion to stay its proceedings or from the requirement to consider the other guidance and factors identified in *Holt*.

[33] As such, I accept IMS's position that CMI, as the moving party seeking a stay of a Federal Court proceeding, bears the burden to clearly establish the existence of a more appropriate forum (see *RMI Marine* at para 86, *Holt* at para 89). However, given the importance of comity and cooperation between courts, I also accept the reasoning in *Always Travel* that, particularly in a circumstance where a provincial superior court has expressly requested the aid of other courts in carrying out the terms of its order, it will typically be difficult for a responding party to resist such a request in the absence of compelling arguments in relation to the factors identified in *Holt*.

(2) Application of Principles

[34] Against that jurisprudential backdrop, I turn to consideration of the parties' arguments as to how the relevant principles should be applied in the case at hand.

[35] First, I note that this is clearly a case where a provincial superior court has issued requests for aid and recognition of its orders, as reflected in the orders canvassed earlier in these Reasons and, in particular, the SISP Order that governs the sale process in support of which CFI is seeking the stay. This is an important factor, complemented by public policy considerations associated with the purpose of the CCAA (see *RMI Marine* at para 86). As CFI submits, the CCAA is broad remedial legislation designed to facilitate a restructuring of debtor corporations in the interest of the company, its creditors and the public (see, *e.g., Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 18).

[36] CFI argues that the SISP, which is being supervised by the Bankruptcy Court, represents a means of achieving an orderly sale of CFI's assets for the general benefit of creditors and stakeholders. CFI submits that such a process cannot proceed efficiently or effectively in separate courts with multiple creditor actions and duplicative motions. I accept the merit of these submissions and afford them weight as relevant public policy considerations.

[37] On the other side of the ledger, IMS argues that it will be prejudiced if it is not permitted to pursue its claim to judgment and satisfaction through sale of the vessel under the Federal Court's *in rem* processes. In support of this position, IMS submits that, in addition to having rights *in rem* under section 22(2)(m) of the Act, it benefits from a maritime lien under section 139(2) of the *Marine Liability Act*, SC 2001, c 6 [MLA], which affords such status to claims that

arise in respect of goods, materials or services supplied to a foreign vessel (within the meaning of section 2 of the *Canada Shipping Act, 2001*, SC 2001, c 26). As previously noted, I understand that it is not disputed that the barge is not registered in Canada and is therefore a foreign vessel for purposes of section 139(2).

[38] IMS takes the position that it requires access to the Federal Court's jurisdiction and processes in order to benefit from the priority afforded by the maritime lien it claims. It also relies on the Federal Court's jurisdiction to use equitable principles of Canadian maritime law to elevate to the equivalent of maritime lien status a claim that may not otherwise benefit from a maritime lien. IMS refers to the explanation of these equitable principles in *Nanaimo Harbour Link Corp v Abakhan & Associates Inc*, 2007 BCSC 109 [*Nanaimo*], in which the Supreme Court of British Columbia [BCSC] considered an application by maritime claimants for an order under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA] that the statutory stay of proceedings conferred by the BIA did not apply to the claimants' Federal Court proceedings. The claimants asserted that their claims benefited from secured status as maritime liens or were entitled to equivalent status pursuant to equitable principles and that the Federal Court had jurisdiction to apply said principles.

[39] *Nanaimo* referred to these equitable principles at paragraphs 21 and 22, explaining that certain of the maritime claimants asserted that they were entitled to elevated status in the Federal Court proceedings as a result of their supply of labour and materials to the ship. The claimants argued that the value of the ship was resultantly enhanced such that it would be inequitable for the mortgagee to be enriched by that enhanced value without credit to the suppliers. Ultimately,

the BCSC granted the claimants' application, concluding that they should have the opportunity to seek maritime lien or equivalent status and that the ranking of priorities and the proof of maritime claims were matters for the Federal Court to determine pursuant to the principles of Canadian maritime law (at para 53).

[40] In the case at hand, IMS similarly argues that the services it provided to the Barge served to enhance its value and that this enhanced value will be realized in any sale of the Barge. As such, in the event it is not successful in arguing entitlement to maritime lien status under section 139(2) of the MLA, it will be seeking equivalent status through an equitable adjustment of priorities in accordance with Canadian maritime law principles.

[41] CFI disputes IMS's claimed entitlement to maritime lien status. Indeed, as it argued under the alternative issue presented in its motion, CFI takes the position that IMS does not qualify as an *in rem* necessaries claimant under section 22(2)(m) of the Act. However, the Court need not reach a conclusion on any of those disputes for the purposes of the present issue, which is whether to grant the requested stay. Importantly, CFI acknowledges that IMS has the right to assert its claim (including its claim for maritime lien or equivalent priority status) in the CCAA proceeding against the proceeds of sale that will result from the SISP. CFI also acknowledges that, as a superior court with inherent jurisdiction and concurrent jurisdiction over Canadian maritime law, the Bankruptcy Court would be in a position to adjudicate IMS's claims and associated arguments for priority.

[42] IMS argues that, as the Federal Court has experience with the adjudication of maritime claims and the application of the principles of maritime law it wishes to invoke, it should not be deprived of the opportunity to pursue its claim in this Court. I also understand it to express doubt as to its ability to invoke these maritime law principles in the CCAA proceeding before the Bankruptcy Court. However, IMS has provided no authority or compelling argument in support of this concern. I find no basis to conclude that the Bankruptcy Court lacks the jurisdiction to adjudicate IMS's claims or that the substantive principles of Canadian maritime law or the Bankruptcy Court's application of those principles would differ from what IMS would encounter before the Federal Court.

[43] There is no question that, if the requested stay were to deprive IMS of a juridical advantage that would be available to it in the Federal Court but not in the Bankruptcy Court, that would be a significant factor militating against granting the stay. Such a consideration was a significant factor underlying the reasoning in *Holt* (at paras 46-50). As explained earlier in these Reasons, the plaintiff in *Holt* enjoyed a juridical advantage before the Federal Court that would be in jeopardy if the Federal Court proceedings were stayed in deference to the Belgian bankruptcy court, because Belgian law would not recognize the plaintiff's maritime lien status under US law. In contrast, in the case at hand, there is no evident juridical advantage to IMS in the Federal Court that would not also be available before the Bankruptcy Court.

[44] Before leaving these arguments by IMS, I should also note that the outcome in *Nanaimo* turned significantly on the fact that the provincial superior court proceeding in that case was being conducted under the BIA. As the BCSC observed at paragraph 10, section 136(1) of the

BIA excludes secured creditors from the statute's scheme of distribution of the assets of a bankrupt party. Relying on that provision and its application in *Holt*, the BCSC assessed the applicant's claims for maritime lien or comparable status as secured claims entitled to be adjudicated outside the bankruptcy (*Nanaimo* at paras 10-19, 53). However, as CFI submits, *Nanaimo* is distinguishable from the case at hand, which involves a proceeding not under the BIA, but under the CCAA. Presumably because the objective of the CCAA is to facilitate the restructuring of insolvent companies rather than distributing their assets, the CCAA does not contain a provision comparable to section 136 of the BIA.

[45] I have also considered other arguments advanced by IMS in opposition to the requested stay. These include a submission that CFI comes to the Court without "clean hands" and therefore should not be afforded the relief it seeks. While IMS has not identified any authority supporting its position, I accept that there is potential for a lack of clean hands to be relevant to the Court's willingness to grant the sort of discretionary remedy represented by a stay under section 50(1) of the Act.

[46] In support of this argument, IMS takes issue with the fact that CFI did not file a Statement of Defence to IMS's Federal Court action, in the over seven months since the action was commenced, and then brought what IMS characterizes as a last minute stay motion, with little notice to IMS, in order to support the impending sale of CFI's assets. IMS also argues that, prior to late August 2022, the Monitor and CFI had not included IMS's counsel on the service list for motions in the CCAA proceeding. IMS submits that these circumstances have caused it

prejudice, including incurring legal costs to respond to this motion and irreparable harm that it will suffer if the Barge is released from arrest.

[47] On the subject of the stage to which this proceeding has progressed and the fact CFI has not filed a Defence, CFI relies on the stay of all other proceedings imposed by the provincial superior court orders. Of course, in accordance with the reasoning in *Always Travel*, CFI requires the discretionary order now sought from the Federal Court to implement that stay in the present proceeding. However, in these circumstances, I find no basis to conclude that its failure to file a Defence in this proceeding represents any sort of misconduct.

[48] Indeed, CFI argues that the fact this proceeding has not advanced beyond service of the Statement of Claim and arrest of the Barge militates in favour of granting the stay. This position is consistent with the reasoning in *Holt*, in which Justice MacKay's decision not to stay the Federal Court proceeding turned in part on the fact that proceeding has already advanced to issuance of an order for appraisement and sale of the "Brussel".

[49] Turning to the timing of the present motion, CMI filed its Notice of Motion on August 2, 2022. While it did not serve and file the remainder of its motion materials until Tuesday, September 20, 2022, the timing for the filing of IMS's responding materials on Monday, September 26, 2022 and the hearing of the motion on Wednesday, September 28, 2022, was set by the Court at a case management conference on September 22, 2022, following consultation with counsel. IMS has not advanced a compelling argument that the timing of this motion is

untoward or that it had inadequate time to prepare to respond. In my view, IMS has not established that CFI's approach to this litigation represents a lack of clean hand.

[50] Finally, returning to considerations of public policy, IMS submits that granting the requested stay could cause a loss of confidence on the part of the maritime industry that relies upon the Federal Court's *in rem* jurisdiction and processes. In my view, this argument must be considered in the context of the above analysis of IMS's arguments surrounding the loss of juridical advantage it alleges it would experience as result of the stay. As I have found no basis for a conclusion that IMS would be unable to assert its claims and priority arguments before the Bankruptcy Court through the CCAA process, I place little weight on IMS's public policy argument.

(3) Conclusion on Stay Motion

[51] Based on the above analysis, I am satisfied that CFI has clearly established that the CCAA proceeding before the Bankruptcy Court represents a more appropriate forum than the present proceeding for adjudication of claims against the Barge. I will therefore issue a stay of the present proceeding.

[52] At the hearing of this motion, CMI's counsel explained that it is anticipated that the stay in the CCAA proceeding, which currently expires on October 17, 2022, will be extended potentially to a date in February 2023 to afford time for completion of remaining processes under the CCAA. There is no evidence before the Court on an extension of the CCAA stay or its likely duration. However, I accept the logic of CMI's submission that, under the present circumstances,

the duration of the Federal Court stay should be concurrent with that under the CCAA. My Order will so provide. However, it will also reserve the Plaintiff's right to apply to have the stay of its action lifted at an earlier time in the event of any material change in circumstances.

(4) Release of the Barge from Arrest

[53] It flows from the decision to stay the Plaintiff's action, and the reasoning underlying that decision, that the Barge should be released from arrest to facilitate its sale along with other assets of CFI through the CCAA proceeding. I note IMS's position that, if the Court were to grant CFI's motion, it should order that CFI post bail for the release of the Barge from arrest. However, the reasoning explained above, underlying the decision to grant the stay, turns significantly on IMS's ability to assert its claim against the proceeds of sale of the Barge achieved through the CCAA process. As CFI has satisfied the Court that a stay is warranted, I do not consider it appropriate to also impose a requirement to post bail to achieve release of the Barge from arrest.

[54] Before leaving the subject of the Barge's release, I will briefly address the significance of the Caveat filed by Captain Spellacy. During the hearing of this motion, disagreement developed between counsel surrounding the scope of the motion in relation to the Caveat. IMS's counsel objected to submissions by CFI's counsel related to the Caveat, taking the position that CFI's Notice of Motion was silent on the subject of the Caveat. CFI responded to the objection by pointing out that the Caveat was filed only on September 2, 2022, a month after the Notice of Motion was filed, but that CFI's subsequent written representations in support of the motion spoke to the Caveat and requested relief in relation thereto.

[55] Further exploration of the parties' positions on the objection clarified that IMS's concern was with the possibility that CFI was seeking to strike or dismiss the Caveat, through arguments akin to those advanced in relation to IMS's action under the second, alternative, issue in this motion. While the evidence upon which IMS relies in this motion was provided in an affidavit sworn by its principal, Captain Spellacy, IMS's counsel explained that this evidence did not speak to Captain Spellacy's personal claim in support of which the Caveat had been filed. Indeed, the Court has very little information related to that claim, other than that it has been described as seeking master's wages.

[56] However, IMS's counsel advised that she accepted that, as a matter of law, if the Court decided to stay IMS's action, then that stay would apply to any caveats filed in the action. CFI's counsel in turn clarified that it was not his intention to advance arguments, akin to those under the alternative issue, to strike the Caveat. Rather, CFI's arguments in relation to the Caveat are advanced solely under the first issue. CFI takes the position that the principles and analyses that support its motion for a stay of the Plaintiff's claim apply equally to the Caveat.

[57] As such, the parties appear to agree that a decision to stay the action includes application of that stay to the Caveat filed therein. The Caveat therefore does not represent an impediment to the Court ordering the Barge released from arrest. Regardless of such agreement, I cannot identify any basis to conclude that the Court's analysis, underlying its finding that the Bankruptcy Court is a preferable forum for adjudication of IMS's claim, would not also apply to the claim underlying the Caveat.

[58] Finally, I note that at the hearing I explored with CMI's counsel the concern raised by IMS's counsel that, once the Barge is released from arrest, it is not precluded from departing the jurisdiction. While the SISP Order contemplates the closing of the sale of CFI's assets, including the Barge, by early to mid October, the sale has not yet been approved. However, I accept CFI's submission that GT is pursuing the sale of the business as a going concern and that, as the parties agree, the Barge is a key asset in the operation of the business. I am satisfied that this is not a case where there is an obvious risk of the Barge fleeing the jurisdiction.

B. *In the alternative, whether IMS's action should be struck pursuant to Rule 221, because the services alleged to be provided to CFI by IMS fall outside the scope of section 22(2)(m) of the Act and, as such, do not fall within the in rem jurisdiction of the Federal Court*

[59] Given my decision to grant the stay requested under the first issue in this motion, and as the second issue is advanced in the alternative, the Court will not adjudicate the second issue.

## V. **Costs**

[60] The parties agree that cost should flow to the successful party in this motion. At the hearing, the Court afforded counsel the opportunity to attempt to agree on a lump sum costs figure. While no agreement resulted, CFI's counsel proposed a figure of $3500.00, and IMS's counsel did not make substantive submissions opposing this figure. As CFI's counsel notes, in the somewhat similar motion in *RMI Marine*, I awarded the successful party costs in the all-inclusive amount of $3500.00. I consider that amount appropriate in the case at hand, and my Order will so provide.

**ORDER IN T-279-22**

**THIS COURT ORDERS that:**

1. The Plaintiff's action is stayed, effective until October 17, 2022, or any later date to which the stay issued by the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency may be extended.

2. The Plaintiff shall have leave to apply to have the stay of its action lifted at an earlier time in the event of any material change in circumstances.

3. The Plaintiff shall pay the Defendant, Canada Fluorspar (NL) Inc., costs of this motion in the all-inclusive amount of $3500.00.

"Richard F. Southcott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-279-22 |
| **STYLE OF CAUSE:** | INAMINKA MARINE SERVICES LIMITED., v CANADA FLUORSPAR (NL) INC., and THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404" |
| **PLACE OF HEARING:** | HEARD VIA VIDEOCONFERENCE |
| **DATE OF HEARING:** | SEPTEMBER 28, 2022 |
| **ORDER AND REASONS:** | SOUTHCOTT J. |
| **DATED:** | OCTOBER 5, 2022 |

**APPEARANCES:**

| | |
|---|---|
| Deborah L.J. Hutchings | FOR THE PLAINTIFF |
| William T. Cahill & Allison Philpott | FOR THE DEFENDANTS |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| MacNab Fagan & Murphy<br>St. John's, Newfoundland | FOR THE PLAINTIFF |
| Cox & Palmer<br>St. John's, Newfoundland | FOR THE DEFENDANTS |

# Appendix “Q”

# MACNAB FAGAN & MURPHY

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*Filed Electronically*

November 17, 2022

Federal Court
St. John's Local Office
354 Water Street, 2nd Floor
St. John's, NL A1C 1C4

Dear Madam:

**Re: Court File No. T-279-22**
**Motion by Inaminka Marine Services Limited pursuant to Rule 359 of the *Federal Court Rules* and Section 50 (3) of the *Federal Court Act* dated November 8, 2022**

---

We are legal counsel for the Plaintiff, Inaminka Marine Services Limited, in the above-noted matter. We write this letter, pursuant to Rule 35 of the *Federal Court Rules*, to respectfully request that our client's Motion be heard urgently either by telephone or by videoconferencing at a date and time to be set by the Court. Should the Court wish to hear from us prior to setting a date to hear the Motion, the undersigned can make herself available on or before November 24, 2022 at the Court's convenience. As for scheduling the Motion for hearing, we understand this Court is sitting on December 15, 2022 and we advise that we are available on that date. Opposing counsel will, of course, have to be consulted respecting his availability. In any event, we respectfully ask the Court to set a hearing date for the Motion prior to the Christmas Recess. We expect that the Motion can be heard within 2-4 hours.

To give the Court some context of the urgency, we provide some background information. The Defendant, Canada Fluorspar (NL) Inc. ("**CFI**"), and its related companies of Canada Fluorspar Inc. and Newspar (A General Partnership (collectively the "**Companies**"), were placed into a court appointed receivership on February 21, 2022. By an order dated March 18, 2022, the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency ("**SCNL**") appointed Grant Thornton Limited ("**GTL**") as the Monitor for the Companies pursuant to a *Companies Creditors Arrangement Act* ("**CCAA**") proceeding. CFI is the owner and operator of the fluorspar mine in the Province of Newfoundland and Labrador. By virtue a sale and investment solicitations process (the "**SISP**"), the Monitor was to sell the assets, including the ship, Barge H-404 (the "**Barge**") which was under arrest by the Plaintiff in this matter.

On or about August 2, 2022, CFI, under the direction of the Monitor, filed a Motion with the Federal Court to impose a stay of action of the Plaintiff's action, sought the release of the Barge from arrest and, release of the caveat release which was filed pursuant to a claim for Master's Wages.

In the CFI Motion, the Court was advised that the Monitor had successfully entered into an agreement of purchase and sale ("the **Purchase Agreement**") with a successful bidder (the "**Successful Bidder**"), that was acceptable to the secured creditors, which would allow for the continued operation of the fluorspar mine, and continued employment of several hundred employees at the mine.

The Court was also advised that SCNL had set a date of September 27, 2022, for its approval of the Purchase Agreement. The proposed closing date of the said sale was October 7, 2022, with an alternate outside date of October 17. The Court, on CFI's Motion, was told that the structure of the sale would avoid delay in the closing of the sale. The Federal Court heard CFI's Motion on an urgent basis on September 28, 2022 with the Honourable Mr. Justice Richard Southcott presiding. Mr. Justice Southcott reserved his decision and filed a written decision on October 5, 2022 (the "**Decision**"). In his decision Mr. Justice Southcott stayed the Plaintiff's action, released the arrest of the Barge, and released the caveat release, thereby freeing the Barge to be sold by the Monitor under the Purchase Agreement; however, Mr. Justice Southcott allowed the Plaintiff leave to apply to have the stay lifted at an earlier time in the vent of any material change in the circumstances.

On October 6, 2022, the firm of McInnes Cooper, acting as counsel for the Monitor, filed an application dated October 5, 2022 (the "**Application**"), and supporting material, seeking an order from the SCNL for approval of the sale of the Companies assets, which included the Barge; however, the Application and materials filed in support thereof described a significant change in the manner in which the sale was to take place than was previously communicated by the Monitor. Rather than selling the assets to the Successful Bidder, the shares of the Companies were to be sold, pursuant to a reverse vesting structure.

On October 12, 2022 the Application was heard by the SCNL and counsel for the Monitor advised the Court that the Successful Bidder had breached conditions of the Purchase Agreement which made the sale uncertain. Upon counsel for the Monitor having advised the Court of this development, counsel for Catepillar Financial Services Limited ("**CAT Financial**") advised the Court that it will now be seeking the return of the equipment situate at the mine and under its security with the Companies. The Court advised CAT Financial that more information needed to be provided to SCNL before a ruling could be made; however, the undersigned was advised earlier this week by CAT Financial that the Monitor provided his Release of the equipment to CAT Financial.

Further, since the hearing of October 12, 2022, the Barge, apparently, was placed for sale with a broker in Nova Scotia for a short period of time.

No defence has yet been filed by either of the Defendants to the Plaintiff's action. As well, it seems that the Monitor will be running out of money to keep the mine operating as a going concern. In his Sixth Report dated October 27, 2022, the Monitor states that it is unlikely the sale pursuant to the Purchase Agreement will proceed; that it will meet with the DIP Lenders and the Stakeholders to re-evaluate the situation to determine the next steps; that the next steps could include re-running the SISP, running a different kind of sales process, closing the transaction pursuant to the Purchase Agreement, or proceed to liquidation; and in order to reduce holding costs for the mine, the Monitor has determined that it is necessary to move the mine into a cold idle mode. We understand that lay-off notices have already been issued to workers at the mine.

It has become apparent, and not long after the Decision was rendered, that the circumstances of the CCAA proceedings have changed considerably such that there is now a material change in the circumstances. This material change now requires urgent action, under the sanction of a Federal Court Order, for the Plaintiff to repossess the Barge and arrange for its sale, pursuant to the *Federal Courts Rules*, in order to satisfy its maritime lien and secured claim. Therefore, the Plaintiff's Motion seeks a lifting of the stay upon the Plaintiff's action and a re-instalment of the Plaintiff's arrest of the Barge.

Thank you for your consideration. The undersigned is available at the convenience of the Court to discuss the foregoing.

Yours very truly,

**DEBORAH L. J. HUTCHINGS, KC**
DLJH/sb

cc: *Electronic Transmission:* wcahill@coxandpalmer.com
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235 Water Street
St. John's, NL A1C 1B6

**Court File No. T-279-22**

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.**, a body corporate

**Defendants**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL INTERESTED IN THE SHIP "BARGE H-404"**

**Defendants**
*(In Rem)*

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**MOTION RECORD OF INAMINKA MARINE SERVICES LIMITED**

---

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St. John's, NL A1C 1C4

**AND TO:** William T. Cahill
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**Court File No.T- 279-22**

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED**

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.**

**Defendants**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL INTERESTED IN THE SHIP "BARGE H-404"**

**Defendants**
*(In Rem)*

---

**NOTICE OF MOTION**

---

**TAKE NOTICE THAT** Inaminka Marine Services Limited will make a motion to the Federal Court to be heard orally under Rules 359 of the *Federal Courts Rules*, section 50 (3) of the *Federal Courts Act,* and pursuant to the Decision of the Honourable Mr. Justice Richard Southcott filed in the within action on October 5, 2022, at a place and time to be determined.

**THIS MOTION IS FOR:**

1. An Order lifting the stay of the within action of the Plaintiff, which action is further defined below, and an Order that the arrest of the Ship "Barge H-404" (the "**Barge**") by the Plaintiff be reinstated;

2. An award to the Plaintiff of its costs of this Motion against the Defendants, and/or party or parties opposing to this Motion; and

3. Such further and other relief as this Honourable Court may deem just.

**THE GROUNDS FOR THE MOTION ARE:**

*Background*

1. On February 16, 2022 the Plaintiff Inaminka Marine Services Limited ("**IMS**") commenced on an *in personam* claim against the Defendant Canada Fluorspar (NL) Inc. ("**CFI**") and an *in rem* claim against the owners and all others interested in the ship, being the Barge, for a debt owed to IMS for certain services it provided to the CFI and the Barge (the "**Action**"). IMS asserts that its claim is for necessaries and, further, that it has a maritime lien against the Barge.

2. Richard A. Spellacy, the sole director, officer, shareholder, and the operator of IMS, ("**Spellacy**") gave an Affidavit to Lead Warrant dated February 16, 2022 in support of the issuance of a Warrant to Arrest the Barge. Service of the Statement of Claim and the Arrest of the Barge were effected by Sheriff's Officers on February 18, 2022. To the date hereof, no defence has been filed to the Action.

3. Without any prior knowledge of IMS, and particularly, Spellacy, by an Order Appointing Interim Receiver dated February 21, 2022 of the Supreme Court of Newfoundland and Labrador ("**SCNL**"), Grant Thornton Limited ("**GTL**"), naming Phil Clarke of GTL, was appointed Interim Receiver (the "**Interim Receiver**") of CFI pursuant to the provisions of the *Bankruptcy and Insolvency Act ("**BIA**").* Then, by application of the Interim Receiver, SCNL granted an initial order dated March 11, 2022, pursuant to the *Companies Creditors Arrangement Act* ("**CCAA**"), that the Interim Receiver be appointed Monitor over CFI (the "**Monitor**").

4. On August 2, 2022, CFI, under the direction of the Monitor, filed a Motion to impose a stay of the Action and sought the release of the Barge from arrest and, in turn, the release of a Caveat filed by Spellacy with the Court on September 2, 2022 for his claim for unpaid master's wages while acting as master of the Barge (the "**CFI Motion**").

5. CFI stated that the CFI Motion was needed to be heard on an urgent basis as the Monitor had successfully negotiated a sale of CFI's assets, which included the Barge, and without the stay upon the Action and release of the Barge from arrest, the sale will likely not be completed. The closing of the sale was imminent, and all parties concerned, including creditors, were awaiting the outcome of the CFI Motion.

6. The CFI Motion was supported by an Affidavit of Phil Clarke in his capacity of Monitor which stated that the Monitor had a purchaser for the assets of CFI ("**Successful Bidder**") and that since the Barge was a "key" component of the sale as a whole, the Monitor required that the Action be stayed and, in turn, the arrest of the Barge be released. This, effectively, would release the Caveat filed by Spellacy.

7. The CFI Motion was subsequently heard on an urgent basis on September 28, 2022 before the Honourable Mr. Justice Richard Southcott ("**Justice Southcott**"), who reserved his decision and later rendered it in writing on October 5, 2022 (the "**Decision**").

8. In the Decision, Justice Southcott stayed the Action, thereby releasing the arrest of the Barge and, in turn, releasing the Caveat; however, Justice Southcott also ordered that IMS "shall have leave to apply to have the stay of its action lifted at an earlier time in the event of <u>any material change in the circumstances</u>." (Our emphasis added)

*<u>Material Change in Circumstances</u>*

9. At paragraph 58 of the Decision, Justice Southcott stated:

"Finally, I note that at the hearing I explored with CMI's [sic] counsel the concern raised by IMS's counsel that, once the Barge is released from arrest, it is not precluded from departing the jurisdiction. While the SISP Order contemplated the closing of the sale of CFI's assets, including the Barge, by early to mid October, the sale has not yet been approved. However, I accept CFI's submission that GLT is pursuing the sale of the business as a going concern and that, as the parties agree, the Barge is a key asset in the operation of the business. I am satisfied that this is not a case where there is an obvious risk of the Barge fleeing the jurisdiction." (Our emphasis added)

10. Further, it was stated to the Court in support of the CFI Motion that while the stay under the CCAA proceedings will expire October 17, 2022, the Monitor seeks an extension of the stay potentially to a date in February 2023. At the surprise of counsel for IMS to this new information, counsel for CFI stated that this extension was to wind up the process under the CCAA and allow creditors, such as IMS, time to argue their respect claims before the CCAA Monitor. At paragraphs 51 and 52 of the Decision, Justice Southcott stated:

"Based on the above analysis, I am satisfied that CFI has clearly established that the CCAA proceeding before the Bankruptcy Court represents a more appropriate forum than the present proceeding for adjudication of claims against the Barge. I will therefore issue a stay of the present proceeding.

At the hearing for this motion, CFI's counsel explained that it is anticipated that the stay in the CCAA proceeding, which currently expires on October 17, 2022, will be extended potentially to a date in February 2023 to afford time for completion of remaining processes under the CCAA. There is no evidence before the Court on an extension of the CCAA stay or its likely duration. However, I accept the logic of CFI's submission that, under present circumstances, the duration of the Federal Court stay should be concurrent with that under the CCAA. My Order will so provide. However, it will also reserve the Plaintiff's right to apply to have the stay of its action lifted at an earlier time in the event of any material change in circumstances." (Our emphasis added)

11. As noted above, the Decision was filed October 5, 2022. On October 6, 2022, the firm of McInnes Cooper, acting as counsel for GTL the Court-Appointed Monitor for CFI and Canadian Fluorspar Inc. (the "**Companies**"), served upon the creditors, which included IMS, the following:

    1. Original Notice of Motion dated October 5, 2022 for Approval of the Sale;
    2. Reverse Vesting Order;
    3. Supporting Affidavit of Phil Clarke (Monitor) dated October 6, 2022;
    4. Order to Enhance the Powers of the Monitor;
    5. Amended ARIO ("Amended and Restated Interim Order") – Amendment #3; and
    6. Memorandum of Fact and Law dated October 5, 2022

    (the "**Monitor's Application**").

    The Monitor's Application was scheduled to be heard at 10:00 a.m. on October 12, 2022.

12. Also filed with the Monitor's Application, but not until October 7, 2022, was the "Fifth Report of Grant Thornton Limited, in its capacity as Monitor" dated October 6, 2022.

13. Upon review of the Monitor's Application, it was evident that there was a significant change in the information concerning the status of the sale, and the circumstances of and manner in which the sale of the assets was to be completed than was previously communicated by the Monitor and communicated by CFI's counsel during the CFI Motion before Justice Southcott. The change in information and circumstances were not made known to IMS, and presumably to the other creditors, prior to receipt of the Monitor's Application on October 6, 2022. The significant change in the information and circumstances are as follows:

    (i) prior to October 6, 2022, it was communicated by the Monitor to the creditors and the SCNL that the transaction expected to be approved by way of the Monitor's Application was the sale of the assets of the Companies to the Successful Bidder, the identity of which Successful Bidder continues to remain undisclosed including to the date hereof;

    (ii) the Monitor's Application laid out a very different and more complicated structure for the sale of the assets of the Companies. First, there is to be a Subscription Agreement to be entered into between the Companies as Vendor and the Successful Bidder, and a

company is to be incorporated ("**Newco**"), as Purchaser for the purchase of the shares of the Companies;

(iii) an extension of the stay of proceedings is to be extended until February 28, 2023 to complete the new arrangement or transaction. At the hearing of the Monitor's Application, counsel for the Monitor indicated to the Court that it would likely take that amount of time to complete the pieces of new sale arrangement. No mention was made of dealing with the creditor's claims as suggested to Justice Southcott during the CFI Motion;

(iv) the new arrangement would result in the Successful Bidder buying only the shares and becoming the sole shareholder of the Companies;

(v) also, all "excluded assets" and "excluded liabilities" of the Companies will be transferred or "vested out" to Newco, a company incorporated by the Monitor (the "**ResidualCo**");

(vi) while the Monitor says that this "reverse vesting" structure will not result in any "material prejudice to the creditors", nor will it "impair any of the creditors' rights that they would otherwise have under the original asset sale", it has not been fully explained by the Monitor or contained in the Monitor's Application or Affidavit of Phil Clarke how this will work. Further, as there is little to no transparency to the creditors under the CCAA proceedings, it is difficult for IMS to have any confidence that it will be paid anything under this new arrangement. Therefore, IMS will be prejudice by this new arrangement as the Barge will be sold to a different entity, other than the Successful Bidder. The third party purchaser of the assets may do with the Barge as it sees fit, including selling it to another third-party buyer or removing the Barge from the jurisdiction. If any of these actions are made, it will be very difficult for IMS to establish its position to the SCNL of being a secured creditor of CFI and holding a maritime lien. Further, any chance IMS previously had to realize its secured claim by way of a maritime lien against the Barge will be lost;

(vii) it is intended by the Monitor to ultimately assign ResidualCo or to cause ResidualCo to be assigned into bankruptcy upon completion of the foregoing transactions, thereby making it all the more difficult for IMS to assert its secured claim by way of a maritime lien over the Barge (all of the foregoing outlined in sub-paragraphs (ii) to (vii) to be referred to as the "**New Transactions**");

(viii) the further details of the New Transactions are contained in the Monitor's First Confidential Report and the Subscription Agreement which the Monitor has submitted to the Court and has requested to the Court that the said Monitor's First Confidential Report and Subscription Agreement be sealed from the public. The Monitor in his Affidavit affirmed that to allow public access to these documents "would pose serious risk to the commercial interests of shareholders and would irreparably harm the Monitor's efforts to maximize realizations from the Company's assets should the Transactions not close."

14. At paragraphs 16, 17, 18 and 29 of his Affidavit given on October 6, 2022 in support of the Monitor's Application, the Monitor, Phil Clarke of GTL, states as follows:

> "16. A plan of arrangement would require the support of CFI's senior secured creditors who are already taking a substantial loss on their security and who would be better off exercising their security to culminate a sale of CFI than supporting a plan that would divert funds away from their security. The Monitor understands that the additional time and cost would negatively impact the Successful Bidder's proposed timelines to restart operations and therefore create additional risk.
>
> 17. The reverse vesting structure will enable the Proposed Transaction to be completed efficiently and expeditiously minimizing risks, costs and delays of having to transfer Permits and Licenses.
>
> 18. The purchase price of the proposed transaction is not sufficient to repay the secured creditors, therefore the majority of creditors, whose claims will be included in the Excluded Liabilities in the Proposed Transaction, will receive no recovery. There is no apparent prejudice to these creditors as there would be no recovery for them had the transaction been structured as a traditional asset sale...
>
> 29. The Revised Cashflow shows that the Monitor has sufficient cash to allow for the extension without an increase to the DIP, or any additional borrowing. The revised Cashflow is attached as Exhibit "C"." (Our emphasis added)

15. It is clear from Phil Clarke's sworn statements that not only are the secured creditors taking a substantial loss under the CCAA proceedings, but they will have little to no recovery under the New Transactions, and the unsecured creditors will receive nothing.

16. In the late afternoon of October 11, 2022, the day preceding the hearing of the Monitor's Application, counsel for IMS received by way of email a copy of a letter of same date from the Monitor addressed to PricewaterhouseCoopers Inc. and to the Government of Newfoundland and Labrador. In the letter the Monitor advised that he would not be seeking approval of the New Transactions the following day as the Successful Bidder had failed to pay the required "top up of the deposit" in the amount of $1,400,000.00 which was to be deposited with the Monitor prior to the October 12, 2022 hearing. Further, the letter states, among other things, that "CFI's cashflow attached to the Monitors 5th Report as Appendix BB covering the period of September 19, 2022, through to February 26, 2023 contemplated that the Successful Bidder...having paid to the Monitor an additional $1,400,000.00... the Monitor's view is that material adverse change has occurred in respect of the CFI's Proposed Transaction and therefore the go forward cashflows are based on the assumption the Proposed Transaction will close no later than November 30, 2022".

17. Therefore, the "Revised Cashflow" set out in Phil Clarke's Affidavit of October 6, 2022 is short by an approximate amount of $1,400,000, being the further funds which was to be deposited by the Successful Bidder before the hearing of October 12, 2022.

18. On October 12, 2022, after repeating the circumstances leading to the failure of the New Transactions, counsel for the Monitor, Geoff Spencer of McInnes Cooper, advised the court that <u>there is sufficient liquidity</u> to get the operation of the mine through to February 28, 2023. No further discussion arose whether counsel was referring to sale of CFI's assets; however, without the sale of some of CFI's assets, it will be difficult for the Monitor to continue with the CCAA proceedings.

19. Caterpillar Financial Services Limited ("**CAT Financial Credit**"), in accordance with documentation filed earlier by the Monitor, is a secured creditor and is owed $705,450.39 from the Companies. CAT Financial Credit has security for the Companies' indebtedness over the Caterpillar construction and mining equipment at the mine site (the "**CAT Equipment**"). During the hearing on October 12, 2022, CAT Financial Credit asked the Court to carve out of its order that day the CAT Equipment since CAT Financial Credit was going to take possession of its security equipment. The Monitor, in reply to CAT Financial Credit's request, stated that the CAT Equipment <u>was necessary and a key component</u> to the completion of the Transactions. The secured CAT Equipment was also necessary for continuing the ongoing operations of the mine. Justice MacDonald of SCNL, who presided over the Monitor's

Application, said that he will need a lot more details from both parties before he makes a decision on the whether CAT Financial Credit can remove the CAT Equipment.

20. Further, during the Monitor's Application, there was an approval of an Interim Distribution Order, and made with the Monitor's approval, which ordered the payment to HSBC Bank Canada of $5.2 million towards debts owing to it by the Companies. A further $1.66 million will be held by the Monitor to deal with agreements reached on settlements negotiated with creditors, but no further details were given.

21. Since the Monitor's Application, Spellacy has been advised by a third party, who was previously interested in purchasing the Barge coincidental with the BIA proceedings, that he was contacted by telephone during the week of October 12, 2022 by a Gordon Buffett of Sydney, Nova Scotia, holding himself out as a ship's broker, who was preparing the Barge for sale. The said Gordon Buffett was wondering if the third party was still interested in purchasing the Barge. Spellacy obtained the telephone number for the said Gordon Buffett from the third party and on Friday October 21, 2022 Spellacy called and spoke with the said Gordon Buffett who confirmed to Spellacy that he was preparing the Barge for sale; however, he has since been told to standdown. Gordon Butler did not disclose for whom he was preparing the Barge for sale.

22. By the Sixth Report of Grant Thornton Limited, in its capacity of Monitor and dated October 27, 2022, the Monitor confirmed,

    (1) that a Material Adverse Change in the CCAA Proceeding has occurred;
    (2) the Successful Bidder has yet to provide the top up deposit to close the New Transaction;
    (3) the Monitor intends to retain the deposit of $750,000 made by the Successful Bidder;
    (4) the "DIP Lenders do not support the Proposed Transaction without the payment of the deposit top up. As a result, the Monitor sought an extension of the stay of proceedings until February 26, 2023. This period will allow the DIP Lenders time to re-evaluate the situation and determine a revised path forward. The Court approved this application and granted the order"; and
    (5) the "DIP Lenders supported the Monitor's application for an extension to the stay of proceeding to give the Monitor, Company, and the DIP Lenders time to re-evaluate their options. Those options could include re-running the SISP, running a different kind of sales

process, closing the Proposed Transaction with the Successful Bidder, or a liquidation. In order to reduce the holding costs for the mine, the Monitor has determined that it is necessary to move the mine into a cold idle mode".

23. On the basis of the forgoing and in recognition of IMS's claim against CFI and the Barge, IMS submits that there has been a material change in the circumstances for this Honourable Court to exercise its jurisdiction over IMS's claim and to lift the stay of its Action, to reinstate the arrest of the Barge, and, since the Defendants have failed to file a Defence to the Action, and to give IMS leave to make a motion to this Court to seek judgment against the Defendants. Once it obtains judgment, IMS intends to proceed with the sale of the Barge under the arrest and sale provisions in the *Federal Courts Rules.*

24. IMS pleads section 50(3) of the *Federal Courts Act* and Rule 359 of the *Federal Courts Rules*.

25. Such other further or other ground as counsel may advise and this Honourable Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

(a) The Affidavit of Richard A. Spellacy; and

(b) Such further other material counsel may deem appropriate and the Court allows.

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

DEBORAH L. J. HUTCHINGS, KC
**MACNAB, FAGAN & MURPHY**
Solicitor for the Plaintiff
Prince Charles Building
120 Torbay Road, Suite W240
St. John's, NL A1A 2G8
Email: dhutchings@yourlegalteam.ca

**TO:** Registry of the Federal Court
354 Water Street, Suite 209
St. John's, NL A1C 1C4

**AND TO:** William T. Cahill
**COX & PALMER**
Solicitor for the Defendant
1100-235 Water Street
St. John's, NL A1C 1B6
Tel: 709-570-5577
Fax: 709-726-3156
Email: wcahill@coxandpalmer.com

**Court File No. 279-22**

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED**

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC. ("CFI")**

**Defendants**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL INTERESTED IN THE SHIP "BARGE H-404"**

**Defendants**
*(In Rem)*

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**AFFIDAVIT**
**OF**
**RICHARD A. SPELLACY**

---

I, Richard A. Spellacy, of the City of St. John's, in the Province of Newfoundland and Labrador, being duly sworn, do depose and say that:

1. I am the sole shareholder, officer and director of the Plaintiff Inaminka Marine Services Limited ("**IMS**") in the within matter and, as such, I am aware of the matters relating to the claim of IMS against the Defendants and the arrest of the ship being CFI Pontoon 1, "BARGE H-404" (the "**Barge**").

2. I have read the within Motion of IMS seeking an order to lift the stay of its action, reinstatement of the arrest of the Barge, and leave to bring a Motion before this Court for

the sale of the Barge pursuant to the Federal Court Rules and I give this Affidavit in support of IMS's Motion.

3. I further state that matters herein disposed to are true, except where I have stated to be based upon information and belief.

4. IMS, through me, provides consultation services to the marine industry in various areas, such as, marine transportation; operation of vessels, including rigs, barges and tug boats, in general; advice on operations and safe movement of rigs and barges; advice on the use of tugs in the movement of rigs and barges; consultation and oversight in the construction, conversion and/or modification of ships (including barges). IMS is well respected in the marine industry and its services are sought after worldwide.

5. The Defendant Canada Fluorspar (NL) Inc. ("**CFI**") operated a fluorspar mine near the Town of St. Lawrence, NL. I understand that for some of the time, it exported and marketed fluorspar from its terminal near the mine, which is known as Blue Beach.

6. Based upon my communications with CFI, I understand that it is the owner of the Barge which is registered in Panama. Attached hereto as Exhibit "A" is a copy of the proof of Registration of the Barge in Panama.

7. I understand through my communications with CFI that it obtained the Barge to use at Blue Beach Terminal (the "**Terminal**"), which is at the site of its mine, to facilitate the loading of fluorspar on cargo ships at its loading pier at the Terminal. I have examined the Terminal, the pier, and the Barge itself, and I am familiar with the same. I, therefore, know that without the use of the Barge, it was impossible to load the cargo ships at the loading pier at the Terminal, particularly during inclement weather. The Barge was purchased by CFI for the express purpose of providing an interface at the Blue Beach Terminal, as shown in the photographs attached to my Affidavit. CFI would often have to engage trucks to transport the fluorspar from the Terminal to awaiting cargo ships at a marine terminal in Marystown, NL. I was advised during my communications with CFI that trucking fluorspar from St. Lawrence to Marystown was a great expense to CFI and this expense could be eliminated if the Barge could be utilized at all times at the Terminal. The Barge in its then current state could not be moored at the Terminal to safely load the cargo ships during any kind of inclement weather. Attached hereto as Exhibit "B" are

photographs which I took of the Barge while moored up to the Terminal and they show the gaps or spacing between the Barge and loading pier which prevented CFI from utilizing the Barge as the Terminal.

8. Further, the Terminal was located on the south coast of the Island of Newfoundland and was open to the North Atlantic with no shelter from inclement weather. Docking the Barge at the Terminal during inclement weather, with high winds and seas, exposed the Barge to the risk of instability and damage. A report showing the damage to the starboard side of the Barge during such weather is attached hereto as Exhibit "L". To move the Barge from the Terminal to a protected location from the weather before the damaging winds and seas arrived could only be done by tugs. Moving the Barge by hiring tugs also increased CFI's expenses at the Terminal.

9. In or about late summer or early fall of 2021, I was consulted by Leo Power, a director of CFI, to engage IMS to assess the marine situation at Blue Beach and to advise the management of CFI on how to deal with and resolve the problems associated with the use of the Barge at the Blue Beach Terminal. I was subsequently asked by Patrick Gannon and others to participate in a conference call that took place on the afternoon of October 27, 2021 among the Vancouver Based Management team of CFI; Jason Flood of CFI in St. Lawrence; and Patrick Gannon of CFI in Montana. Subsequent to this conference call, IMS was approached by Bill Dobbs on behalf of the senior management of CFI seeking a solution to enable it to utilize the Barge at the Terminal to facilitate the loading of cargo ships there, regardless of the weather conditions. Mr. Flood explained that CFI wanted to eliminate the use of tugs to move the Barge to safety and eliminate the use of trucks to transport the fluorspar elsewhere for loading on the cargo ships. To accomplish this, I determined that CFI needed a set of storm moorings that would allow the Barge to move on and off the Blue Beach Terminal without the use of tugs and result in the Barge being safely moored on a set of storm moorings during periods of inclement weather.

10. On or about October 27, 2021 IMS was retained by CFI for the following, and other, services: to provide consultation to CFI on how the Barge could be protected from inclement weather by moving it safely away from the dock at the Terminal (the "**loading piers**") to safety and without using tugs; to design a system and/or process which would enable CFI to move the Barge on and off the loading piers, as needed; to design a set of storm moorings, equipped with storm anchors, where the Barge would be moored safely

during inclement weather; to enable CFI to safely move the Barge on and off the storm moorings, as needed, and return the Barge safely to the loading piers after the inclement weather had passed; to complete sketches/drawings for each component of this system, including for the loading piers, storm moorings, storm anchors, and the necessary modifications to the Barge to accommodate the loading piers and storm moorings; to budget the cost for completing the foregoing and timeline and budget for the construction of this system; to source all contractors to manufacture, fabricate, and install the various components for the loading piers, storm moorings, storm anchors, and the modification to the Barge, itself, to facilitate its movement between the loading piers and storm moorings and to secure the Barge safely to the loading piers and the storm moorings, as needed (the "**Services**").

11. I designed the system and can state that the Services provided by IMS would have made it possible for CFI to use the Barge at the Terminal, eliminating the need to hire tugs to move the Barge from the Terminal to a location protected from the inclement weather and avoid transport of the fluorspar from the Terminal to Marystown by truck to load the fluorspar on awaiting cargo ships. In turn, the Services would have made it possible for CFI to use the Terminal to load cargo ships there, thereby making the overall operation of the fluorspar mine by CFI more commercially efficient, effective, and, in turn, profitable.

12. The Services were necessary to allow the safe and effective utilization of the Barge by CFI to operate the fluorspar mine and its business of marketing, selling and transporting its product around the world to its buyers.

13. The Services were completed and presented in final form to CFI by IMS on or about January 20, 2022 with the final budget, drawings, operating proposals, and timelines completed by IMS on January 30, 2022.

14. Upon retaining IMS for the Services, CFI required IMS to complete a vendor registration form (the "**VR Form**"), which we completed on or about October 28, 2021. In the VR Form, IMS stated that its terms for the Services were 30 days of issuing its invoices (net 30 days) and the contract amount for the Services was $143,000.00 plus tax. CFI issued to IMS two purchase orders to start the Services. Attached hereto as Exhibit "C" to this my

Affidavit is a true copy of the VR Form. Attached hereto as Exhibit "D" is a true copy of the purchase orders issued to IMS from CFI.

15. IMS issued invoices to CFI dated November 30, 2021, December 12, 2021, December 31, 2021, January 15, 2022 and February 1, 2022, respectively, which I prepared. The aggregate amount of the invoices are $146,870.02, including HST. CFI failed to pay the amount owing to IMS for the Services completed and IMS, therefore, commenced its action and caused the Barge to be arrested. Attached hereto as Exhibit "E" are true copies of invoices issued by IMS to CFI for the Services.

16. IMS's Statement of Claim was issued on February 16, 2022 against CFI and against the owners and all others interested in the ship, being the Barge. I gave an Affidavit Lead Warrant dated February 16, 2022 to support the issuance of a Warrant to Arrest the Barge. I understand from IMS' lawyer, Deborah L. J. Hutchings, KC, that the Arrest of the Barge by Sherrif's Officers was effected on February 18, 2022 and service of the Statement of Claim was effected upon the Defendants on the same date. To the date hereof no defence has been filed in the within action. Attached hereto as Exhibited "F" are the Sheriff's documents which I understand confirms the arrest of the Barge and service of the Statement of Claim.

17. Personally, I earn my living through the work of IMS. The principle sum owing by CFI of $143,000.00 plus taxes to IMS is a significant receivable for IMS and has caused my personal income to decrease significantly. This, in turn, has had a negative impact upon my ability to meet the cost of living in Newfoundland and Labrador which has increased exponentially over the last 18 months or so. I am nearly 80 years of age, and I am still reliant upon my earnings of IMS to support myself personally.

18. Without any prior knowledge of IMS or me, and I am advised by solicitor Deborah L. H. Hutchings, KC, and do verily believe, that by an Order Appointing Interim Receiver dated February 21, 2022 of the Supreme Court of Newfoundland and Labrador ("**SCNL**"), Grant Thornton Limited ("**GTL**"), namely Phil Clarke of GTL, was appointed Interim Receiver (the "**Interim Receiver**") of CFI pursuant to the Bankruptcy and Insolvency Act ("**BIA**").

19. I am advised by Deborah L.J. Hutchings KC, and do verily believe, that by application of the Interim Receiver, SCNL granted an initial order dated March 11, 2022, pursuant to the

Companies Creditors Arrangement Act ("**CCAA**") that the Interim Receiver be appointed Monitor over CFI (the "**Monitor**").

20. On August 2, 2022, CFI, under the direction of the Monitor, filed a Motion to impose a stay of the Action and sought the release of the Barge from arrest and, in turn, the release of a Caveat filed by me with the Court on September 2, 2022 for my claim for unpaid master's wages while I was acting as master of the Barge (the "**CFI Motion**").

21. By my Affidavit of September 2, 2022, which I attached to my Proof of Claim, I set out the basis and calculation of my claim for Master's Wages with the Monitor. Attached hereto as Exhibit "H" to this my Affidavit is a true copy of my Proof of Claim and Affidavit attached thereto.

22. The CFI Motion was supported by an Affidavit of Phil Clarke in his capacity of Monitor. The Monitor stated it had a purchaser for the assets of CFI ("**Successful Bidder**") and that since the Barge was a "key" component of the sale, the Monitor required that the Action be stayed and, in turn, the arrest of the Barge be released. This, effectively, would release my Caveat.

23. I attach hereto as Exhibit "G", a true copy of Phil Clarke's Affidavit which was filed in support of the CFI Motion. This Affidavit provides background into the BIA and CCAA proceedings.

24. CFI stated that the CFI Motion was urgent as the Monitor had successfully negotiated a sale of CFI's assets, which included the Barge, and without the stay upon the Action and release of the Barge from arrest, the sale would likely not be completed. The closing of the sale was imminent and all parties concerned, including creditors, were awaiting the outcome of the CFI Motion. Therefore, the hearing of the CFI Motion was urgent.

25. The CFI Motion was heard on an urgent basis on September 28, 2022 before the Honourable Mr. Justice Richard Southcott ("**Justice Southcott**"), who reserved his decision but later rendered it in writing on October 5, 2022 (the "**Decision**"). Attached hereto as Exhibit "I" is a true copy of the Decision.

26. In the Decision of Justice Southcott the Action was stayed, thereby releasing the arrest of the Barge and, in turn, releasing my Caveat; however, Justice Southcott also ordered that IMS "shall have leave to apply to have the stay of its action lifted at an earlier time in the event of any material change in the circumstances."

27. Further, it was stated to the Court in support of the CFI Motion that while the stay under the CCAA proceedings will expire October 17, 2022, the Monitor will be seeking an extension potentially to a date in February 2023. This was the first time that IMS and I had heard of such an extension date. Counsel for CFI stated that this extension period was to be used to wind up the process under the CCAA and allow creditors, such as IMS, time to argue their respective claims before the CCAA Monitor.

28. As noted above, the Decision was filed October 5, 2022. On October 6, 2022, the firm of McInnes Cooper, acting for GTL, the Court-Appointed Monitor for CFI and Canadian Fluorspar Inc. (the "**Companies**") with SCNL, served upon the creditors, which included IMS, through its counsel the following:

1. Original Notice of Motion dated October 5, 2022 for Approval of the Sale;
2. Reverse Vesting Order;
3. Supporting Affidavit of Phil Clarke (Monitor) dated October 6, 2022;
4. Order to Enhance the Powers of the Monitor;
5. Amended ARIO ("Amended and Restated Interim Order") – Amendment #3; and
6. Memorandum of Fact and Law dated October 5, 2022
   (the "**Monitor's Application**").

The Monitor's Application was scheduled to be heard at 10:00 a.m. on October 12, 2022. A true copy of the Monitor's Application is attached hereto as Exhibit "J".

29. Also filed with the Monitor's Application, but not until October 7, 2022, was the "Fifth Report of Grant Thornton Limited, in its capacity as Monitor" dated October 6, 2022. A true copy of this Fifth Report is attached hereto as Exhibit "K".

30. Upon review of the Monitor's Application, it is obvious that there was a significant change in the information of the status of the sale, and the circumstances of and manner in which

the sale of the assets was to be completed than was previously communicated by the Monitor and communicated by CFI's counsel during the CFI Motion before Justice Southcott. This change in information and circumstances were not made known to IMS prior to receipt of the Monitor's Application on October 6, 2022.

31. At paragraphs 16, 17, 18 and 29 of his Affidavit given on October 6, 2022 in support of the Monitor's Application, the Monitor, Phil Clarke of GTL, states as follows:

> "16. A plan of arrangement would require the support of CFI's senior secured creditors who are already taking a substantial loss on their security and who would be better off exercising their security to culminate a sale of CFI than supporting a plan that would divert funds away from their security. The Monitor understands that the additional time and cost would negatively impact the Successful Bidder's proposed timelines to restart operations and therefore create additional risk.
> 17. The reverse vesting structure will enable the Proposed Transaction to be completed efficiently and expeditiously minimizing risks, costs and delays of having to transfer Permits and Licenses.
> 18. The purchase price of the proposed transaction is not sufficient to repay the secured creditors, therefore the majority of creditors, whose claims will be included in the Excluded Liabilities in the Proposed Transaction, will receive no recovery. There is no apparent prejudice to these creditors as there would be no recovery for them had the transaction been structured as a traditional asset sale...
> 29. The Revised Cashflow shows that the Monitor has sufficient cash to allow for the extension without an increase to the DIP, or any additional borrowing. The revised Cashflow is attached as Exhibit "C"."

32. It is clear from Phil Clarke's Affidavit that not only are the secured creditors taking a substantial loss under the CCAA proceedings, but they will have little to no recovery under the new transactions as described in his affidavit (the "**New Transactions**") and the unsecured creditors will receive nothing.

33. In the late afternoon of October 11, 2022, the day preceding the hearing of the Monitor's Application, I understand from Deborah L. J. Hutchings, KC, and do verily believe, that she received by way of email a copy of a letter of same date from the Monitor addressed

to PricewaterhouseCoopers Inc. and to the Government of Newfoundland and Labrador. In the letter the Monitor advised that he would not be seeking approval of the New Transactions the following day as the Successful Bidder had failed to pay the required "top up of the deposit" in the amount of $1,400,000.00 which was to be deposited with the Monitor prior to the October 12, 2022 hearing. Further, the letter states that "CFI's cashflow attached to the Monitors 5th Report as Appendix BB covering the period of September 19, 2022, through to February 26, 2023 contemplated that the Successful Bidder...having paid to the Monitor an additional $1,400,000.00...the Monitor's view is that material adverse change has occurred in respect of the CFI's Proposed Transaction and therefore the go forward cashflows are based on the assumption the Proposed Transaction will close no later than November 30, 2022".

34. I have reviewed the chart attached to Phil Clarke's Affidavit which I attach as a true copy to this my Affidavit as Exhibit "L". The Cashflow chart shows, as sets out in Phil Clarke's Affidavit of October 6, 2022, there is a shortfall of cash flow by an approximate amount of $1,400,000, being the further funds, which was expected to be deposited by the Successful Bidder before the hearing of October 12, 2022.

35. I am advised by Deborah L. J. Hutchings, KC, and do verily believe, that on October 12, 2022, after repeating the circumstances leading to the failure of the New Transactions, counsel for the Monitor, Geoff Spencer of McInnes Cooper, advised the court that <u>there is sufficient liquidity</u> to get the operation of the mine through to February 28, 2023. I am familiar with the Barge and I am aware through my own knowledge of the marketplace for the Barge that the Monitor could sell the Barge and can make up the shortfall of $1,400,000 from its sale.

36. Since the Monitor's Application, I have been in contact with a third party who was previously interested in purchasing the Barge, who advised me that he was contacted by telephone during the week of October 12, 2022 by a Gordon Buffett of Sydney, Nova Scotia, holding himself out as a ship's broker and who was preparing the Barge for sale. This Gordon Buffett, so I am advised, was wondering if the third party was still interested in purchasing the Barge. I obtained the telephone number for the said Gordon Buffett from the third party and on Friday, October 21, 2022, I called and spoke with a person who identified himself as Gordon Buffett who confirmed to me that he was preparing the

Barge for sale; however the person from whom he was taking instruction asked him to discontinue preparing the Barge for sale.

37. On the basis of the forgoing and in recognition of IMS's claim against CFI and the Barge, I support IMS's position that there has been a material change in the circumstances for this Honourable Court to exercise its jurisdiction over IMS's claim and to lift the stay of its Action, to reinstate the arrest of the Barge, and to give IMS leave to make a motion to this Court relating to the sale of the Barge under the arrest and sale provisions in the *Federal Courts Rules.*

38. All facts deposed herein I believe to be true, except where I have stated otherwise. I give this Affidavit knowing that it is a criminal offense to make a false statement.

**SWORN** before me at the City of St. John's, in the Province of Newfoundland and Labrador, this 24th day of October, 2022, before me:

Commissioner for Oaths / Barrister / Notary Public

**RICHARD A. SPELLACY**

# Appendix “R”

**Canada Fluorspar Inc. (CFI)**
**Cash Flow Report (CCAA - Care and Maintenance - Sale and Investor Solicitation Process)**
**For the Period of March 11, 2022 to January 22, 2023 (Weeks 3 to 48)**
**(in 000s CAD)**

| | | Budget to | CCAA | | | | | | | Actual | Variance |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Week No.** | **Notes** | **22-Jan-23** | **Actual** | **43** | **44** | **45** | **46** | **47** | **48** | | |
| Week Start | | | 07-Mar-22 | 12-Dec-22 | 19-Dec-22 | 26-Dec-22 | 02-Jan-23 | 09-Jan-23 | 16-Jan-23 | | |
| Week Ending | | | 11-Dec-22 | 18-Dec-22 | 25-Dec-22 | 01-Jan-23 | 08-Jan-23 | 15-Jan-23 | 22-Jan-23 | | |
| **Cash Inflows** | | | | | | | | | | | |
| Collection of Receivables | | - | - | - | - | - | - | - | - | - | - |
| Other - Sale of Inventory | | 5,759 | 5,759 | - | - | - | - | - | 1 | 5,760 | 1 |
| Other - Sale of Equipment | | 175 | 175 | - | - | - | - | - | - | 175 | - |
| Non-refundable deposit from Ares | | 1,250 | 1,250 | - | - | - | - | - | - | 1,250 | - |
| Offer from Corporate Assets | | - | - | - | - | - | - | - | - | - | - |
| Other | | 671 | 671 | - | - | - | 6 | - | - | 676 | 6 |
| **Total Cash Inflows** | | **7,855** | 7,855 | **-** | **-** | **-** | **6** | **-** | **1** | 7,862 | 7 |
| **Cash Outflows** | | | | | | | | | | | |
| Payroll | | 2,880 | 2,820 | 41 | 43 | 19 | 49 | - | 44 | 3,016 | 136 |
| Security | | - | - | - | - | - | - | - | - | - | - |
| Snow clearing | | 12 | - | - | - | - | 5 | - | - | 5 | (7) |
| Maintenance Costs | | 174 | 169 | 3 | - | - | 1 | - | 2 | 175 | 1 |
| Fuel | | 251 | 217 | - | - | - | - | - | 8 | 225 | (26) |
| Freight | | 5 | 5 | - | - | - | - | - | - | 5 | - |
| Utilities | | 445 | 427 | - | -5 | 0 | 12 | 1 | - | 435 | (10) |
| Insurance | | 1,301 | 761 | -62 | 451 | - | - | - | - | 1,150 | (151) |
| Materials/Supplies | | 76 | 70 | 0 | - | 0 | - | - | - | 70 | (6) |
| Professional Fees - Restructuring | | 2,225 | 2,150 | 5 | 71 | 24 | 3 | - | - | 2,253 | 27 |
| Other/Miscellaneous | | 23 | 22 | - | 0 | - | - | - | - | 22 | (1) |
| Inventory Sale Costs | | 517 | 517 | - | - | - | - | - | - | 517 | - |
| HSBC Inventory Sale Agreement | | 2,732 | 2,732 | - | - | - | - | - | - | 2,732 | - |
| Telephone/Communications | | 107 | 102 | - | 3 | - | - 1 | - | - | 104 | (3) |
| Environmental | | 131 | 131 | 20 | 0 | - | 0 | 0 | 12 | 164 | 33 |
| Logistics/Warehousing | | 5 | 5 | 0 | 1 | - | - | 0 | - | 6 | 1 |
| Contingency | | 6 | 1 | - | - | - | - | - | - | 1 | (5) |
| Equipment Lease Payments/Buyouts | | 213 | 210 | - | 1 | - | 1 | - | 1 | 212 | (0) |
| Barge | | 45 | 41 | - | - | 4 | - | - | - | 45 | (0) |
| Mining Leases / Licenses | | 133 | 133 | - | - | - | - | 17 | - | 150 | 17 |
| SLR/AGP - NI 43-101 Mining Report | | 372 | 372 | - | - | - | - | - | - | 372 | - |
| **Total Cash Outflows** | | **11,652** | **10,884** | **7** | **565** | **46** | **71** | **18** | **67** | **11,657** | **6** |
| **Net Cash Flow** | | **(3,797)** | **(3,029)** | **(7)** | **(565)** | **(46)** | **(65)** | **(18)** | **(66)** | **(3,796)** | **1** |
| **Cash Balance** | | | | | | | | | | | |
| Opening Cash Balance | | 321 | 321 | 1,992 | 1,985 | 1,421 | 1,374 | 1,309 | 1,291 | 321 | - |
| DIP Financing - Bridging Finance (Receiver) | | 1,450 | 1,450 | - | - | - | - | - | - | 1,450 | - |
| DIP Financing - Prov. of Newfoundland | | 3,250 | 3,250 | - | - | - | - | - | - | 3,250 | - |
| Priority Charges | | - | - | - | - | - | - | - | - | - | - |
| Net Cash Flow | | (3,797) | (3,029) | (7) | (565) | (46) | (65) | (18) | (66) | (3,796) | 1 |
| **Closing Cash Balance** | | **1,224** | **1,992** | **1,985** | **1,421** | **1,374** | **1,309** | **1,291** | **1,225** | **1,225** | **1** |

# Appendix “S”

**GRANT THORNTON LIMITED**
**PLAN OF COMPROMISE AND ARRANGEMENT OF CANADA FLUORSPAR INC.**
**INTERIM STATEMENT OF RECEIPTS AND DISBURSEMENTS**
**FROM MARCH 11, 2022 TO JANUARY 22, 2023**

| | | | |
|---|---|---|---|
| **RECEIPTS:** | | | |
| Cash on Hand | $ | 51.60 | |
| Deposit - Successful Bidder | | 1,250,000.00 | |
| DIP Financing | | 4,700,000.00 | |
| HST Collected | | 5,196.59 | |
| HST Refund | | 487,091.37 | |
| Interest | | 27,142.31 | |
| Misc. Refunds | | 67,452.63 | |
| Sale of Assets | | 177,411.65 | |
| Sale of Inventory | | 2,952,295.72 | 1 |
| Scrap Metals | | 12,585.25 | |
| Funds as Awarded by Court of Appeal - Union Dispute | | 24,067.66 | 2 |
| Transfer from Interim Receivership | | 210,124.80 | |
| **TOTAL RECEIPTS** | **$** | **9,913,419.58** | |
| **DISBURSEMENTS:** | | | |
| Advertising | $ | 15,571.58 | |
| Appraisal Fees | | 3,882.50 | |
| Change of Locks | | 562.46 | |
| Commission | | 15,750.00 | |
| Computer Services | | 31,723.87 | |
| Environmental | | 5,155.73 | |
| Equipment Leases / Buyouts | | 240,304.90 | |
| Freight & Shipping | | 456.93 | |
| Fuel | | 188,479.46 | |
| HST Paid (ITC) | | 533,661.06 | |
| Insurance | | 1,148,369.80 | |
| Interest | | 3,266.62 | |
| Inventory Trucking to Ship | | 338,483.00 | 3 |
| Legal Fees | | 524,625.78 | |
| Mining Licenses & Leases | | 165,687.15 | |
| Misc. Fees | | 2,052.47 | |
| Monitor's Fees | | 1,405,579.47 | |
| Motor Vehicle Registrations | | 632.62 | |
| Non-resident Withholding Tax Remitted | | 41,803.65 | |
| Payroll Services | | 12,492.37 | |
| Postage and Courier | | 2,211.87 | |
| Professional Services | | 500,371.54 | 4 |
| Rent Expense | | 47,603.23 | |
| Repairs & Maintenance | | 171,755.63 | |
| Storage | | 2,456.00 | |
| Supplies | | 24,812.26 | |
| Travel | | 54,720.70 | |
| Utilities | | 424,358.75 | |
| WCB Expense | | 27,142.82 | |
| Wages & Benefits | | 2,641,775.94 | |
| | **$** | **8,575,750.16** | |
| **PAYMENTS TO SECURED CREDITORS** | | | |
| **TOTAL DISBURSEMENTS** | **$** | **-** | |
| **FUNDS ON HAND** | **$** | **1,337,669.42** | |

**Note:**

1. Sale of inventory is recorded net of certain disbursements related to brokerage, surveying and shipping, as well as a payment to secured creditor HSBC in the amount of $2,118,000 USD. Also includes small amounts of rejects (processed rock of low fluorspar quantity) sold to local contractors.

2. On April 7, 2022, the Company was awarded costs regarding a legal proceeding with two unions, detailed in the Monitor's Seventh Report. The Monitor received these funds on November 16, 2022.

3. Net of amount recovered from settlement with supplier (Farrell's).

4. Various services related to environmental monitoring, 43-101 mine survey and report, and mining consultants.

# Appendix “T”

**Canada Fluorspar Inc. (CFI)**
**Cash Flow Projection (CCAA - Care and Maintenance - Sale and Investor Solicitation Process)**
**For the Period of Mar 7, 2022 to May 28, 2023**
**(in 000s CAD)**

| Week No. | Notes | Actual | 49 | 50 | 51 | 52 | 53 | 54 | 55 | 56 | 57 | 58 | 59 | 60 | 61 | 62 | 63 | 64 | 65 | 66 | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Week Start | | 07-Mar-22 | 23-Jan-23 | 30-Jan-23 | 06-Feb-23 | 13-Feb-23 | 20-Feb-23 | 27-Feb-23 | 06-Mar-23 | 13-Mar-23 | 20-Mar-23 | 27-Mar-23 | 03-Apr-23 | 10-Apr-23 | 17-Apr-23 | 24-Apr-23 | 01-May-23 | 08-May-23 | 15-May-23 | 22-May-23 | |
| Week Ending | | 22-Jan-23 | 29-Jan-23 | 05-Feb-23 | 12-Feb-23 | 19-Feb-23 | 26-Feb-23 | 05-Mar-23 | 12-Mar-23 | 19-Mar-23 | 26-Mar-23 | 02-Apr-23 | 09-Apr-23 | 16-Apr-23 | 23-Apr-23 | 30-Apr-23 | 07-May-23 | 14-May-23 | 21-May-23 | 28-May-23 | |
| **Cash Inflows** | | | | | | | | | | | | | | | | | | | | | |
| Collection of Receivables | | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| Other - Sale of Inventory | | 5,760 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 5,760 |
| Other - Sale of Equipment | | 175 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 175 |
| Non-refundable deposit | | 1,250 | - | 500 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 1,750 |
| Other | 1 | 676 | - | 5 | 30 | - | - | 4 | - | 25 | - | - | 3 | - | 25 | - | 2 | - | - | - | 770 |
| **Total Cash Inflows** | | **7,862** | **-** | **505** | **30** | **-** | **-** | **4** | **-** | **25** | **-** | **-** | **3** | **-** | **25** | **-** | **2** | **-** | **-** | **-** | **8,456** |
| **Cash Outflows** | | | | | | | | | | | | | | | | | | | | | |
| Payroll | | 3,016 | - | 45 | - | 45 | - | 45 | - | 45 | - | 45 | - | 45 | - | 45 | - | 45 | - | 45 | 3,421 |
| Snow clearing | | 5 | - | - | - | 5 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 11 |
| Maintenance Costs | | 175 | - | - | 5 | - | 66 | - | - | 5 | - | 60 | - | 5 | - | - | - | 5 | - | - | 321 |
| Fuel | | 225 | - | - | - | 10 | - | - | - | - | 10 | 30 | - | - | 10 | - | - | - | 10 | - | 295 |
| Freight | | 5 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 5 |
| Utilities | | 435 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 489 |
| Insurance | | 1,150 | - | - | - | - | - | - | - | - | - | 202 | - | - | - | - | - | - | - | - | 1,352 |
| Materials/Supplies | | 70 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 88 |
| Professional Fees - Restructuring | | 2,253 | - | 25 | - | 25 | - | 35 | - | 25 | - | 25 | - | 50 | - | 25 | - | 35 | - | 25 | 2,523 |
| Other/Miscellaneous | | 22 | - | - | 1 | - | - | - | - | 1 | - | - | - | 1 | - | - | - | 1 | - | - | 26 |
| Inventory Sale Costs | | 517 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 517 |
| HSBC Inventory Sale Agreement | | 2,732 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 2,732 |
| Telephone/Communications | | 104 | - | - | 5 | - | - | - | - | 5 | - | - | - | 5 | - | - | - | 5 | - | - | 124 |
| Environmental | | 164 | - | 3 | - | - | - | 3 | - | - | - | 3 | - | - | - | 3 | - | - | - | 3 | 179 |
| Logistics/Warehousing | | 6 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | | | 6 |
| Contingency | | 1 | - | - | 5 | - | - | - | - | 5 | - | - | - | 5 | - | - | - | 5 | - | - | 21 |
| Equipment Lease Payments/Buyouts | | 212 | 1 | - | 1 | - | 1 | - | 1 | - | 1 | - | 1 | - | 1 | - | 1 | - | - | 1 | 221 |
| Barge | | 45 | - | 4 | - | - | - | - | 4 | - | - | - | 4 | - | - | - | 4 | - | - | - | 61 |
| Mining Leases / Licenses | | 150 | - | - | - | 37 | 10 | 19 | - | - | - | 57 | - | - | - | - | 21 | - | 66 | 35 | 395 |
| SLR/AGP - NI 43-101 Mining Report | | 372 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 372 |
| **Total Cash Outflows** | | **11,657** | **5** | **81** | **21** | **126** | **81** | **106** | **9** | **90** | **15** | **426** | **9** | **115** | **15** | **77** | **30** | **100** | **80** | **113** | **13,157** |
| **Net Cash Flow** | | **(3,796)** | **(5)** | **424** | **9** | **(126)** | **(81)** | **(102)** | **(9)** | **(65)** | **(15)** | **(426)** | **(6)** | **(115)** | **10** | **(77)** | **(28)** | **(100)** | **(80)** | **(113)** | **(4,701)** |
| **Cash Balance** | | | | | | | | | | | | | | | | | | | | | |
| Opening Cash Balance | | 321 | 1,225 | 1,220 | 1,644 | 1,653 | 1,527 | 1,446 | 1,344 | 1,335 | 1,270 | 1,255 | 829 | 823 | 708 | 718 | 641 | 613 | 513 | 357 | 321 |
| DIP Financing - Bridging Finance (Receiver) | | 1,450 | | | | | | | | | | | | | | | | | | | 1,450 |
| DIP Financing - Prov. of Newfoundland | | 3,250 | | | | | | | | | | | | | | | | | | | 3,250 |
| Priority Charges | | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | (76) | (85) | (161) |
| Net Cash Flow | | (3,796) | (5) | 424 | 9 | (126) | (81) | (102) | (9) | (65) | (15) | (426) | (6) | (115) | 10 | (77) | (28) | (100) | (80) | (113) | (4,701) |
| **Closing Cash Balance** | | **1,225** | **1,220** | **1,644** | **1,653** | **1,527** | **1,446** | **1,344** | **1,335** | **1,270** | **1,255** | **829** | **823** | **708** | **718** | **641** | **613** | **513** | **357** | **159** | **159** |

**Notes:**

**1** - Interest earned and HST refunds

**This is Exhibit "I" referred to in the affidavit of Phil Clarke sworn before me this 22nd day of February, 2023.**

Notary Public or Commissioner of Oaths
(affix seal)

GAVIN D. F. MACDONALD
A Notary Public in and for the
Province of Nova Scotia

INAMINKA MARINE LTD.
130 LeMarchant Road, Suite #301
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

November 30th 2021

**Canada Fluorspar (NL) Inc.**
**PO Box 337**
**St. Lawrence, NL**
**A0E2V0**

RQN #N0012966
Inaminka 20209

Attention: Jason Flood

Re Consulting on loading Barge

| | |
|---|---|
| 27.5 days @ C$1,500.00 per day | $41,250.00 |
| HST @15% | $6,187.50 |
| Expences as attached | $894.00 |
| **Total** | **$48,331.50** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #301
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

December 12th 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 20210

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 64.5 hours @$220.00/hour | $14,190.00 |
| A. Barclay 24 hours @$200.00/hour | $4,800.00 |
| HST @15% | $2,848.50 |
| Expences as attached | $539.17 |
| **Total** | **$22,377.67** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

December 31st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202111

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 140.0 hours @$220.00/hour | $30,800.00 |
| A. Barclay 30 hours @$200.00/hour | $6,000.00 |
| HST @15% | $5,520.00 |
| Expences as attached | $606.85 |
| **Total** | **$42,926.85** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

January 15th. 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202201

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 65.0 hours @$220.00/hour | $14,300.00 |
| HST @15% | $2,145.00 |
| **Total** | **$16,445.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

February 1st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202202

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 66.0 hours @$220.00/hour | $14,520.00 |
| Expences as attached | $91.00 |
| HST @15% | $2,178.00 |
| **Total** | **$16,789.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**Appendix O**

Affidavit of Richard A. Spellacy - February 28, 2023

e-document T-279-22-ID 65
FILED / DÉPOSÉ
FEDERAL COURT
COUR FÉDÉRALE
February 28, 2023
28 février 2023
Tanya Smith
STJ 32

**Court File No. T-279-22**

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED**

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC. ("CFI")**

**Defendants**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL INTERESTED IN THE SHIP "BARGE H-404"**

**Defendants**
*(In Rem)*

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**AFFIDAVIT**
**OF**
**RICHARD A. SPELLACY**

---

I, Richard A. Spellacy, of the City of St. John's, in the Province of Newfoundland and Labrador, being duly sworn, do depose and say that:

1. I am the sole shareholder, officer and director of the Plaintiff Inaminka Marine Services Limited ("**IMS**") in the within matter and, as such, I am aware of the matters relating to the claim of IMS against the Defendants and the arrest of the ship being CFI Pontoon 1, "BARGE H-404" (the "**Barge**").

2. Since I started working for Canada Fluorspar (NL) Inc. ("**CFI**") as master of the Barge, which was since about December 17, 2022 I have known James Brennan ("**Brennan**"), who is the Site Manager of Marbase Marystown, formerly the site of Marystown Shipyard, and I have spoken with him frequently both before and after the arrest of the Barge by IMS.

3. I asked Brennan if he would provide an Affidavit to be filed in this matter about what he knows of the state of the Barge and the management of the Barge by CFI and Grant Thornton Limited as Monitor (the "**Monitor**"). I understand from what he said is that CFI and the Monitor are clients of his employer, and he cannot get involved in this matter.

4. Brennan, however, on Friday, February 24, 2023 provided to me with 2 photographs of the Barge. While I have not been to Marystown since the arrest of the Barge, I can verify that the photographs show the Barge. I understand that the location of the Barge is alongside one of the piers at Marbase Marystown (the "**Facility**"). Attached hereto to this my Affidavit as Exhibit "A" and Exhibit "B", respectively, are the 2 photographs which I understand that Brennan took of the Barge using his mobile phone.

5. I know from my personal dealings with CFI that since about October, 2001 the Barge has been moored alongside the Facility, as aforesaid, and while I understand that it was moved on one occasion since to allow for a vessel to tie up nearby.

6. I understand from Brennan that he sees the Barge daily through his work as Site Manager and I understand from Brennan that he believes that no one has been on or inside the Barge to inspect it since at least December 2001, other than a drive by or viewing from shore by CFI.

7. From what Brennan told me, I understand that on or about November 12, 2022, he observed that the Barge had developed a slight list to the port side. This list was not present before. I understand from Brennan that when he observed the list he notified CFI, the owners of the Barge, by telephone and reported to the person he was speaking with what I observed. I also understand from Brennan that he did not know who he spoke with at CFI. As a master mariner, when a vessel is berth alongside of your wharf or pier and

develops a list, the main concern for the owner of the facility is whether the vessel is at risk of sinking at the facility.

8. I understand from Brennan that since his telephone call, aforesaid, that no one, until the week of February 12, 2023, has attended the Barge to investigate the developing list.

9. I further understand that on or about February 24, 2023, and from what I believe to be after the hearing of the Monitor's application before the Supreme Court of Newfoundland and Labrador on February 24, 2023, Brennan received instructions from CFI asking that he tighten the lines to the Barge. I believe that these instructions may have come about as a result of the comments to the Court during the said application from Deborah L.J. Hutchings, IMS's solicitor, about the level of maintenance the Barge has received since the order of Mr. Justice Richard Southcott was filed on October 5, 2022.

10. On February 24, 2023, I asked Brennan if he would take some photos of the Barge showing the list. I refer to the email from Brennan to me, and attached to Exhibit "A", verifying that he took 2 photographs of the Barge from the starboard side. I can verify that these are the photographs I received from Brennan on February 24, 2023.

11. While the photographs may not show a noticeable list, I understand from Brennan that with the naked eye it is easy to observe the list. As I am always on call for my work and can receive a call at any time instructing me to catch the next flight out of St. John's, I did not make the 3 hour drive to Marystown to view the Barge myself but relied upon what Brennan was telling me about the Barge and the developing list. I believe that he would tell me the truth.

12. I refer to the photograph identified as Exhibit "A" and note a water line which extends around the hull and continues to and along the port side, separating the dark color hull above the water line and the lighter color hull below the water line. This appearance, as I understand from Brennan, as shown on the photograph also appears on the port side; however, the amount or portion of the lighter color hull seen on the port side is less than seen on the starboard side because more of the lighter color part of the hull on the port side is beneath the water due to the developing list. As I indicated above, I understood from Brennan that the developing list on the port side of the Barge is more obvious when viewing the Barge in person than on the photographs.

13. This affidavit is given by me in support of IMS's Motion for an order from this Honourable Court that the stay imposed upon IMS's action by an Order of the Federal Court on October 5, 2022 should be lifted since there is a material change in circumstances.

14. I wish to make my position very clear to this Honourable Court and state that the material that was provided and the submissions made CFI/the Monitor's legal counsel at the hearing before Mr. Justice Richard Southcott intimated that the Barge was to be sold with the assets of CFI in the upcoming transaction and that the Barge was needed in that transaction as it was a key component of the said transaction. Further, that the money from the sale, particularly the Barge, could be carved out of the sale proceeds to pay to IMS upon the assessment that IMS has an *in rem* claim and maritime lien by Justice MacDonald of the Supreme Court of Newfoundland and Labrador, who has been assigned to oversee the BIA and CCAA proceedings relating to CFI; however, after the stay was imposed upon IMS's and only a day later, IMS learned that from the materials filed with the Supreme Court of Newfoundland and Labrador, the transaction was not a sale of the assets, as alleged before Justice Southcott, but a Reverse Vesting Order ("RVO") where all CFI's debts and assets that the buyer did not want were transferred to another company which the Monitor would place into bankruptcy, after which the shares of CFI would be transferred to the buyer. In addition, the materials filed by the Monitor with the Supreme Court of Newfoundland and Labrador clearly stated that there would be no money available to pay out to the creditors, which included IMS.

15. As a master mariner, I have sailed all over the world throughout my career and, no matter in what country one would find themselves, I know that a maritime lien under admiralty law is treated as supreme in priority against a vessel and its cargo. Therefore, my personal involvement in this matter has been frustrating since IMS, and me personally, have endured considerable hardship in not being able to recover the amount owing for the work performed for and on behalf of the Barge to improve the owner's usage of the barge, and despite what I believe to be a maritime lien, IMS and I cannot recover thereunder. What has gone on in this matter, and in no disrespect for the Federal Court, has brought the administration of admiralty law in Canada in doubt.

16. All facts deposed herein I believe to be true, except where I have stated otherwise. I give this Affidavit knowing that it is a criminal offense to make a false statement

**SWORN** before me at the City of St. John's, in the Province of Newfoundland and Labrador, this 28th day of February, 2023, before me:

Commissioner for Oaths / Barrister / Notary Public

DEBORAH L.J. HUTCHINGS, KC
Barrister of the Supreme Court of Newfoundland & Labrador

**RICHARD A. SPELLACY**

This is Exhibit "A" referred to in the
Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 28th
day of February, 2023.

DEBORAH L.J. HUTCHINGS, KC
Barrister of the Supreme Court of
Newfoundland & Labrador

# Exhibit "A"

## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Friday, February 24, 2023 5:14 PM
**To:** Deborah Hutchings
**Subject:** FW: Barge pics
**Attachments:** 20230223_155556.jpg; 20230223_155617.jpg

If you check the first photo, you will see that the barge has a slight list to port, James is trying to get better photos and also has to get Pauls's approvals before he sends anything else. All of this information w as relayed to the mine over two months ago and nothing has been done about it

**From:** James Brennan <jbrennan@marbase.ca>
**Sent:** Thursday, February 23, 2023 4:08 PM
**To:** richardspellacy@hotmail.com
**Subject:** Barge pics

Hi Mr. Spellacy

I have attached a couple of pics, there is a small list but times it appears to be more, i dont know if it is tides affecting it.

If you have any questions please let me know.

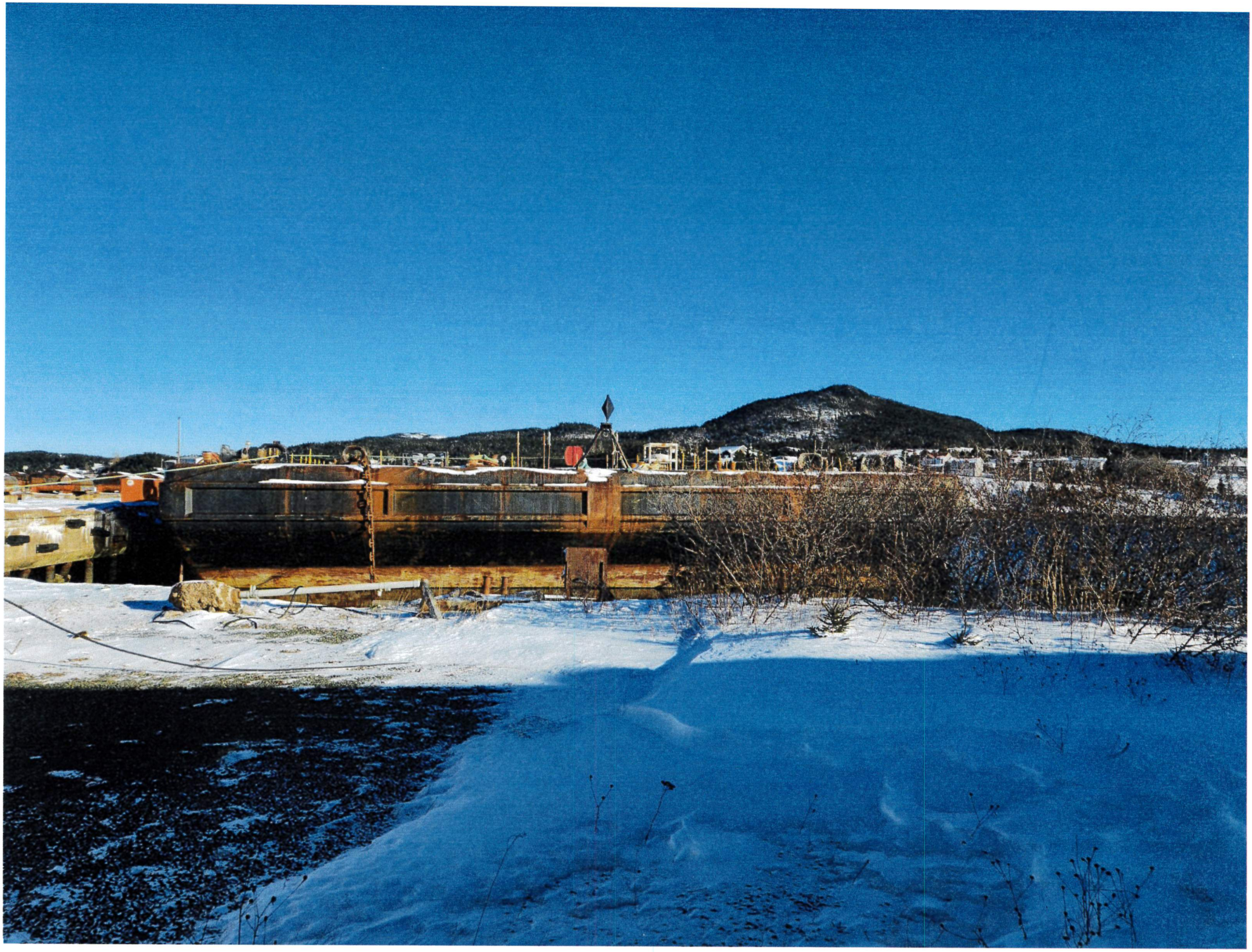
Regards

James Brennan
Marbase Marystown
Site Manager
(709)567-0179

This is Exhibit B referred to in the
Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 28
day of February, 2023.

DEBORAH L.J. HUTCHINGS, KC
Barrister of the Supreme Court of
Newfoundland & Labrador

# Exhibit "B"



**Appendix P**

Supplemental Affidavit of Phil Clarke - March 3, 2023

e-document T-279-22-ID 67
FILED / DÉPOSÉ
FEDERAL COURT
COUR FÉDÉRALE
March 03, 2023
03 mars 2023
Tanya Smith
STJ 34

Court File No. T-279-22

**FEDERAL COURT**

**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.,** a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.,** a body corporate

**Defendants**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

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## SUPPLEMENTAL AFFIDAVIT OF PHIL CLARKE

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I, Phil Clarke, CPA, CA, CIRP, LIT, of the City of Halifax, in the Province of Nova Scotia, MAKE OATH AND SAY AS FOLLOWS:

1. I am a Senior Vice-President with Grant Thornton Limited ("**GTL**" or the "**Monitor**") and have personal knowledge of the matters deposed of herein.

2. This Affidavit is supplemental to the Affidavit sworn on February 22, 2023 and is filed in response to the Affidavit of Richard A. Spellacy ("**Spellacy**") dated February 28, 2023 (the "**Spellacy Affidavit**"). Capitalized terms not otherwise defined herein have the meaning given to them in my previous Affidavit.

3. With respect to paragraph 2 of the Spellacy Affidavit, Spellacy is not an employee of CFI and, to the best of my knowledge, information and belief, there is no agreement, written or otherwise, between CFI and Spellacy in relation to the provision of any services in his personal capacity as master of the Barge nor has the Monitor instructed Spellacy to undertake any duties in relation to the Barge since its appointment in February, 2022. In fact, to the best of my knowledge, information and belief, Spellacy has not personally visited the Barge at any time and, in any event, certainly not since February, 2022. In the event the stay of proceedings is lifted, CFI intends to defend any action brought against CFI and/or the Barge in relation to such claims.

4. With respect to paragraphs 2 and 3 of the Spellacy Affidavit, I do not have knowledge of any alleged conversations between Spellacy and James Brennan or any other representative of Marbase. I can advise that the Monitor has contracted with Marbase and neither CFI nor the Monitor has granted permission for Marbase to discuss the Barge with any third parties, including Spellacy.

5. With respect to paragraph 5 of the Spellacy Affidavit, the Barge has been moored at Marbase, in the Town of Marystown, in the Province of Newfoundland and Labrador, since sometime in 2021 (not 2001 as noted in the Spellacy Affidavit).

6. With respect to paragraph 6 of the Spellacy Affidavit, the Monitor has been conducting regular visual inspections of the Barge since at least the week of May 18-24, 2022. During the summer of 2022, both the Monitor and representatives from Bridging Finance, one of CFI's secured creditors, went aboard the Barge. In addition, the Barge is checked after every major storm including after the storm during the week of September 7-13, 2022 when it was noted that there was a small list.

7. With respect to paragraph 7 of the Spellacy Affidavit, in or around November, 2022, Marbase contacted the General Manager of CFI to advise that the Barge may be listing. A staff member of CFI was dispatched to investigate however, on investigation, it was noted that there was no change to the slight list that was noted in May, 2022. The Monitor

understands that the Barge is currently in the same condition as it was when the Monitor was appointed.

8. With respect to paragraph 8 of the Spellacy Affidavit, the Monitor repeats paragraph 7 above and note that CFI and/or the Monitor have been visually inspecting the Barge since at least May, 2022.

9. With respect to paragraph 9 of the Spellacy Affidavit, Spellacy's understanding is factually inaccurate. The Monitor states that the on February 24, 2023, Marbase advised CFI that the Barge had become unfastened from the wharf due to recent bad weather in Marystown and that various ropes mooring the Barge had snapped. The Monitor attended at Marbase at 5:00pm on February 24, 2023 to assess the situation with Marbase staff. The Monitor, with Marbase, made arrangements to secure the Barge as soon as possible, depending on weather and availability of Marbase Staff. Work to resecure the Barge was completed on February 26, 2023 which included, without limitation, salting and sanding the area around the Barge to allow further inspections, securing four (4) spring lines that had let go due to the strain of the Barge breaking tie downs, re-wrapping two (2) bow lines on the south pier and securing them to them to the new tie downs, and re-tying three (3) stern lines by wrapping lines around two (2) die downs and tightening.

10. Since its appointment in February, 2022, the Monitor has been protecting the Barge in the same condition it was in on appointment. Specifically:

    (a) The monitor has maintained the agreement with Marbase and has paid those costs since the date of the initial insolvency proceeding. Marbase visually checks on the Barge through its normal day-to-day processes. In addition, it has been Marbase's practice to contact CFI should any concerns arise.

    (b) The Monitor, through CFI management, does weekly visual inspections of the Barge. These inspections have been happening weekly since the week of May 18-24, 2022. The inspections are noted in the CFI weekly site review and discussed at the weekly management meeting. The Monitor participates in the weekly

management meeting and the status of the barge is a standing agenda item. No concerns have been raised during these meetings. The weekly operations reports are shared with the DIP lenders.

(c) The Monitor has maintained insurance coverage over the Barge – liability and hull insurance, most recently renewed in November 2022.

(d) The Monitor spoke with Marbase on March 2, 2023. Marbase is not concerned with the small list. The list has been there since at least May, 2022 and based on visual inspections has not changed.

(e) Out of an abundance of caution, the Monitor directed a CFI representative to attend at Marbase on March 3, 2023. The Barge was visually inspected by the CFI representative and no change to the condition of the Barge was noted. Marbase also confirmed to the CFI representative that they are not concerned with the small list.

11. With respect to paragraph 14 of the Spellacy Affidavit, I am informed by counsel to CFI and do verily believe that there was no intentional representation to this Court that the proposed sale to the Initial Successful Bidder was intended to be an asset sale. The form of the sale (asset sale versus reverse vesting order) is not relevant to the priority claim being made by IMSL, as IMSL's claim, and its relative priority (if any), would be treated the same under either structure. Further, given the nature of the business of CFI, the sale by a reverse vesting order will preserve valuable licences, leases, permits, and regulatory authorizations maximizing the sale price and thus the return for the secured and priority creditors.

12. Further, as previously stated, as is normal in a CCAA proceeding, and as noted at paragraph 106 of the Seventh Monitor's Report, after the closing of the proposed transaction with the New Successful Bidder, the Monitor will seek a claims procedure order from the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency. While the proposed transaction will see no recovery for unsecured creditors, that claims procedure will allow any creditor to advance a priority claim over the proceeds from the sale. The Monitor will

review the claims and then seek a further distribution order from the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency for the proceeds from the sale. Any creditor who objects to the proposed distribution will have an opportunity to object and have their claim adjudicated by that Court. The entire process is court supervised. The Monitor expects numerous priority claims including those from lessors, parties with purchase money security interests, Canada Revenue Agency trust claims, secured creditors, and others including IMSL. This process is the same process as was contemplated and communicated to IMSL in September, 2022.

13. With respect to paragraph 15 of the Spellacy Affidavit, the Monitor understands the priority status afforded to maritime lien claimants but also understands that such priority claims must be properly reviewed and, if required, adjudicated by the Bankruptcy Court or risk prejudice to all creditors. As previously noted, in this instance, it is CFI's position that no goods, materials or services were supplied by IMSL to the Barge which could be characterized as necessary for its operation or maintenance and both the Barge and CFI's marine terminal remain operational in the same manner as prior to any consulting services provided by IMSL. In the event the stay of proceedings is lifted by this Court, CFI intends to defend the in rem action against the Barge on the basis that the consulting services provided to CFI by IMS do not constitute "goods, materials or services supplied to a ship" within the meaning of Section 22(2)(m) of the *Federal Courts Act* and, as such, do not fall within the *in rem* jurisdiction of the Federal Court. Alternatively, in the event that the stay of proceedings is continued by this Court and the sale to the New Successful Bidder is completed as contemplated, then IMSL will have the opportunity to have its priority claim reviewed, and if required, adjudicated by the Bankruptcy Court and, should it be determined that its claim has priority at a maritime lien or otherwise, IMSL will be entitled to proceeds from the sale of CFI, which such distribution to be approved by the Bankruptcy Court.

14. I make this Affidavit in good faith and in response to the motion brought by IMSL to lift the stay of proceedings.

**SWORN** before me at the City of Halifax, in the Province of Nova Scotia, on the 3rd day of March, 2023.

Notary Public or Commissioner for Oaths (affix seal)

SARAH J. DOBSON
A Barrister of the Supreme Court of Nova Scotia

**PHIL CLARKE**

## Appendix Q

Cross Examination on Affidavit of Phil Clarke - March 10, 2023

e-document T-279-22-ID 69
RECEIVED / REÇU
FEDERAL COURT
COUR FÉDÉRALE
March 16, 2023
16 mars 2023
Tanya Smith
STJ

# Rosalind Ebsary

Court File No. T-279-22

FEDERAL COURT
ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

**BETWEEN:**

INAMINKA MARINE SERVICES LIMITED — PLAINTIFF

**AND**:

CANADA FLUORSPAR (NL) INC. — DEFENDANTS *(In Personam)*

**AND**:

THE OWNERS AND ALL INTERESTED IN THE SHIP "BARGE H-404" — DEFENDANTS *(In Rem)*

## CROSS EXAMINATION ON AFFIDAVIT

---

Transcript of Evidence taken by way of Cross-Examination on the Affidavit of Mr. P. Philip Clarke, via videoconference, on March 10th, 2022, hosted by the law offices of MacNab, Fagan & Murphy, St. John's, Newfoundland.

---

Ms. Deborah L.J. Hutchings, Counsel for the Plaintiff
Mr. William Cahill, Counsel for the Defendants
Mr. Geoffrey Spencer, Counsel for the Monitor (Grant Thornton Limited)

March 10th, 2023

*(via videoconference)*

MS. HUTCHINGS, K.C.: This is a cross-examination pursuant to an Order of Mr. Justice Zinn, Russel Zinn of the Federal Court, dated, I think, the ... I can't remember now, but in any event, it's in the matter of Court File No. T-279-22. This is an Admiralty Action *In Rem* and *In Personam*, between the Plaintiff, who is Inaminka Marine Services Limited; the Defendants, Canada Fluorspar (NL) Inc.; and the Owners and All Others Interested in the Ship, "Barge H-404".

We have present, if I can get everybody sorted here, Mr. Phil Clarke who is being cross-examined this morning. He is with Grant Thornton, the Monitor for Canada Fluorspar (NL) Inc. et al, and who is currently going through a CCAA proceeding. Also present with him is Will Cahill who is



representing Canada Fluorspar (NL) Inc. in this matter, and I guess, the Owner's and Those Interested in the Barge. Also too we have Geoff Spencer who is representing, I guess, Grant Thornton Limited who is the Monitor here it the CCAA proceeding.

I'm here, Deborah L.J. Hutchings ... I always put in L.J. Hutchings because there's a few Deborah Hutchings around and I want to distinguish myself from the others who are not related to me ... and with me I have Captain Richard Spellacy who is the Owner and Director of the Plaintiff, and Captain Spellacy also has, as we know, a Maritime ... sorry, a Masters' claim against the barge for wages. Okay, are we ready to proceed? David, do you want to proceed with the affirming of Mr. Clarke please?

THE CLERK: Do you promise or affirm that to the best of your knowledge, understanding, and ability, to tell the truth, the whole truth, and nothing but the truth?



MR. CLARKE: I do.

THE CLERK: Can you please state your full name for the record?

MR. CLARKE: Sure, it's Paul Philip Clarke, P-a-u-l, C-l-a-r-k-e.

THE CLERK: Thank you very much.

**MR. P. PHILIP CLARKE, AFFIRMED, XX'D BY MS. HUTCHINGS, K.C.**

MS. HUTCHINGS, K.C.: Okay, so before we started, I think Mr. Clarke and I decided that we'd call each other by our first names and I think that that's pretty appropriate for this setting.

MR. CLARKE: Agreed.

Q. And nobody is here wearing shirts or ties and so everybody is casual so you can call me Debbie and I'll call you Phil, is that okay?

A. Please, yeah, Debbie, please call me Phil.

Q. Okay, so I want to just confirm that you gave two Affidavits in relation to a Motion that was



brought by Inaminka for the lifting of the stay that was imposed by Justice Southcott on October 5, and probably just to help you there is an Affidavit, I think the first one that you gave was dated February 22, 2023?

A. That's correct.

Q. Okay, and then there's a Supplemental Affidavit that's dated March the 3rd, 2023?

A. That is correct.

Q. Okay, so what I'm going to do, I do have a couple of questions on the February 28th Affidavit, or the 23rd Affidavit but I'll save that till the end, there's only a couple of things there I just wanted to cover off. But my questions today, the majority of them are going to be in relation to your Affidavit given on, the Supplemental one on the 3rd of March, so if you could have that, probably that one in front of you and I can refer you to the different things that we'll talk about.

A. Sure, yeah, I have, I have that one in front of me.

Q. Perfect, so I gather that the position of the Monitor, and sometimes I think the "the Monitor" is referred to you personally, but it's not you personally, it is the, the Monitor being Grant Thornton, correct?
A. Yeah, the Monitor is Grant Thornton Limited, and I am the LIT on behalf of Grant Thornton Limited, who is the Monitor for the file.
Q. Okay, so LIT means what?
A. Licensed Insolvency Trustee.
Q. Okay, alright, and the ... okay, so it's my understanding, and correct me if I'm wrong, that the position that's taken by the Monitor in respect of this matter that we're here on today, is that Inaminka does not have an *In Rem* claim against the barge, is that correct?
A. So based on the information that the Monitor has to date, its position is is that based on the information available to it, its position is ... is that the claim, the *In Rem* is stayed, but on preliminary review of the materials filed it would indicate that is not an *In Rem* claim.



So to be clear, our position is that the claims are stayed right now but a preliminary review would, would be that it's not an *In Rem* claim.
Q. Can you just let me know what the materials, just you know, there's no need to go into dates or whatever, I just need to know the materials that you and the Monitor would have to be able to make that preliminary determination of Inaminka's claim?
A. It was based on the materials filed by Inaminka.
Q. And that would have been in relation to the Arrest Warrant?
A. It would be in relation to the Arrest Warrant and other materials filed in the proceeding.
Q. In the proceeding itself, okay, so you can't right off the top of your head right now think about what those materials are, is that fair to say?
A. No, that's not fair, it's the materials that have been filed by IMSL, so it would be the



affidavit on the arrest, and the application to lift the stay ...
Q. Okay.
A. ... and the materials in this proceeding, which is Court File No. T-279-22.
Q. Okay, alright, that's fair enough, and I guess falling out from that, that question, it's also the position of Grant Thornton, or the Monitor I should say, that Inaminka doesn't have a Maritime Lien or a Priority Claim against the barge for the proceeds from the barge if it's sold?
A. That is not true, no, that's not true either. Our position is, is that the Stay of Proceedings has stayed those claims and our initial review of the materials that have been filed in the proceeding would indicate that it's not an *In Rem* claim, but the matter has, you know, the proper place for this to be adjudicated is in a claims process within the CCAA proceeding.
Q. Okay, I'm going to interrupt you there because that's an opinion, that's probably



better stated by your lawyer, okay, but I understand what you're saying, alright?
A. Okay.
Q. Alright, so if I can ask you to turn to paragraph three of your Supplemental Affidavit, please, Phil?
A. Yeah.
Q. Yeah, and ...
A. I'm there.
Q. ... looking at the very last sentence of paragraph three.
A. Yeah.
Q. It says, "In the event the stay is lifted CFI intends to defend any action brought against CFI and/or the barge in relation to such claims." Is that still correct?
A. Yeah, based on the information we have we would be looking to defend the claim.
Q. Okay, would you, or the Monitor, and I guess when I say "you" I'm basically also including the Monitor.

A. You can use that interchangeably if it makes it easier.
Q. Sure, yeah, yeah, and I'm sure you'll speak up and let me know when it's got to be separate, okay, thank you.
A. Yeah, yeah, it will make it easier, just say me and the Monitor is the same thing for now.
Q. Yeah, okay, so were you aware that Captain Spellacy was the Master onboard the barge before, let's say before the February 20th or 23rd, was it, of last year. I think that was the date that the BIA Order came about.
A. Yeah, it was February, sometime in late February, I want to say February, but I have ...
Q. Yeah, I won't hold you to it.
A. Yeah, I have no information to support that claim.
Q. So you have no direct information that he, do you have any information that he was not the Master of the barge?



A. Yeah, the information we have between, on the relationship between CFI and Inaminka was related to the consulting services that were provided, so the purchase order and the consulting services invoices.
Q. Okay, so you don't have any information though to dispute flat out that he was not the Master of the barge, correct?
A. There is no documentation to support that claim that I'm aware of, I haven't seen anything.
Q. Yeah, let me just clarify, sorry about this because that was, I think you misunderstood my question.
A. Okay.
Q. I initially asked you, and you clarified to me at the outset that you have no information to support that he was the Master of the barge. My other question is do you have any information to support that he was not the Master of the barge?
A. I have no information to support that claim.



Q. Okay.
A. I'm not aware of any information at all.
Q. Okay, are you familiar with the term, when I say "ballast tanks"?
A. I am, yeah.
Q. Okay, and there are ballast tanks on the barge, correct?
A. That's correct.
Q. Okay, when there is any, I'll say for lack of a better technical word, when there has to be an adjustment of the ballast tanks who is required, can anybody go aboard the barge to make, to operate the barge to make any kind of change in the ballast system?
A. I don't have any information to answer that.
Q. Okay.
A. I don't know.
Q. So you don't know.
A. No.
Q. Okay, you indicated as well, just bear with me for a moment, in paragraph three, the second last, well, I guess probably it is the last



sentence, it says, "In fact, to the best of my knowledge, information and belief, Spellacy has not personally visited the barge at any time, and in any event, certainly not since February 2022." Is that, that's correct?
A. That's my understanding based on information provided to the Monitor from Marbase.
Q. So it's been Marbase where you got your information that Mr. Spellacy has not been out to see the barge since February of '22.
A. Correct. Marbase is the service provider in the port, the wharf, who is who the Monitor has retained to moor the barge.
Q. They're not shipowners, are they?
A. No, the shipowner is CFI.
Q. Okay, but Marbase you said was a service provider of the port?
A. Well, it is the port at Marystown.
Q. Okay, and but do you know whether or not Marbase is a shipowner itself?

A. I don't have any information on Marbase, you'd have to ask Marbase.
Q. Okay.
A. They would be familiar with ships, it's owned by a fairly well-known shipowner, or facility owner in Newfoundland.
Q. And you're talking about Paul Antle?
A. Correct.
Q. You think that Paul Antle is a shipowner?
A. I don't have any information, I'm just pointing out who is the owner of Marbase.
Q. Yeah, yeah, okay.
A. I don't ... no, I'm not assuming, I don't have any information either way so ...
Q. So if there was any evidence presented which would show that Captain Spellacy has been, has seen the barge physically since February 2022, or is it 2022 you're saying ... yes, that would surprise you, would it not?
A. Well, that wouldn't be the information that was provided to me.
Q. Alright.



A. And I'd also point out, Deborah, that in Mr. Spellacy's own Affidavit, in paragraph four he has pointed out that he has not been to Marystown since the arrest of the barge.
Q. Okay.
A. But part of that foundation of that understanding is from Mr. Spellacy's own Affidavit.
Q. Okay.
A. Dated February 28th.
Q. Okay, thank you.
A. You're welcome.
Q. Okay, can you tell us, when was the first time that you actually physically saw the barge itself?
A. I was on the barge in, I believe, July of 2022.
Q. And I think you refer to that in your Affidavit and we'll come to that in a moment, I guess, but was there anybody else on the barge with you at that time?
A. I was granted access to the Marbase facility by James Brennan but he did not accompany



me on, physically on the barge, not that I recollect.
Q. Did you go on the barge yourself or was there anybody else there?
A. No, I ...
Q. You went on the barge yourself.
A. ... I went on the barge, yeah.
Q. Okay, and how did you get on the barge?
A. I just climbed up on it, up a railing.
Q. Okay.
A. There's a ladder on the side and you just climb up.
Q. What kind of ladder was that?
A. Just a metal ladder built into the side of the barge.
Q. And what was your, what was your purpose for going out to the barge on that date?
A. I was in town to be on the CFI mine site, that period, and I like to see all the assets that are subject to the proceeding with my own eyes, so I went down to look at the barge.
Q. Do you have any shipping experience?



A. I'm an accountant so that's my trade.
Q. Okay, and how long ... were you inside the barge itself?
A. I was not inside the barge.
Q. Now, I assume that this barge was at Marbase, correct?
A. Correct.
Q. And July 22, the arrest by Inaminka was still in place, correct?
A. I'm not sure off the top of my head of the date that the Recognition Order happened but it would be whatever the timelines are in the court orders.
Q. Okay, did you seek permission from Inaminka or any representative of Inaminka to board the barge?
A. No, I did not.
Q. Did you take any photographs when you were on the barge that day?
A. I took some photographs, yeah.
Q. Do you still have them?
A. I believe so, I'm not sure.

Q. Okay, and did you take notice of the, of where the barge was situated, had it been, or whether it had been moved by Marbase at that point in time since the, let's say since the BIA Order was in place?
A. I guess, I don't understand the question, are you asking me ...
Q. Okay, let me just, just come at it another way, when was the last time you were onboard the barge?
A. That was that first and only time I was on the barge.
Q. That was the first and only time you were on the barge, okay, so you don't know if the barge is in the same place as it was ... now as when you were on the vessel, on the barge in July of '22?
A. It's my understanding it's in the same spot but I don't, I'm not aware of it being moved. My understanding is the barge is fairly large so there's really only one spot it can be moored at Marbase, is my understanding.



Q. Okay, when was the, just a second now. So did you note anything, take any notice of anything when you were on the barge that day?
A. Just that the barge is a big barge.
Q. Okay.
A. It's very large, it's very, very large.
Q. I don't think anybody is going to disagree with that, are we?
A. No, the thing I noticed, it was a very large barge and I don't think people appreciate how large it is until you see it with your eyes.
Q. Right on, alright. When did, when was Marbase first contracted by the Monitor in respect to the barge?
A. So the Monitor didn't contract Marbase, CFI had contracted Marbase to store the barge before our appointment and we just continued that relationship.
Q. So basically it's a moorage contract, is it, is that correct, to moor the barge?
A. Yeah, moor, store, and secure it.



Q. And looking at the financials that the Monitor has been, is producing in the various reports for the court, the Supreme Court, the cost of the barge is, I think, a 45 ... fee or something of that nature, is that correct, a monthly fee?
A. The monthly fee from Marbase is around, yeah, is $4,500 or $5,000. I can't remember off the top of my head but it's under $5,000 on average.
Q. Okay, and that's the mooring cost, is it?
A. That's just the mooring cost.
Q. Yeah, okay, so when the, you're out there and you saw the, all of the lines that were tied up securing Marbase in its, at its berth, correct?
A. Yeah, it would have been moored to the wharf.
Q. Okay, alright, just to the wharf?
A. I don't recollect how it was moored other than it was tied up against the wharf.
Q. Is there any objection for us to get a copy of the contract from Marbase, with Marbase?



A. No, no, IMSL is entitled to ask question of the Monitor, just write the Monitor's counsel, McInnes Cooper.
Q. Sure, so I'll keep a list of anything that I'm looking for and I will write to counsel afterwards.
A. Yeah, the Monitor, you know, has to respond to queries from stakeholders.
Q. Okay.
MR. CAHILL: Just a point, that's not an undertaking to provide the contract. I want to be certain, I haven't read that contract and there may be confidentiality provisions, I'm not sure what the content is, but if it's able to be disclosed without breaching any term of the contract ... I don't know, Phil, you may have a better idea than me ... but I'm not sure how it's relevant to this action but if it's something that the Monitor would disclose in any event, I think that's fine but ...
MS. HUTCHINGS, K.C.: Yeah, I think we need to have a copy of the contract, the relevancy,

of course, as you know, Will, is to be determined by the court, and the situation that we are in, I think, and correct me if I'm wrong, Geoff, that this would be a letter directed to yourself?

MR. SPENCER: Yeah, you can send the letter to me, I haven't seen the contract either so we'll have to look at it, I mean if there's any confidentiality terms in there we'll have to consider our ability to disclose it, but certainly, you know, no objection in principle to sharing, you know, some details about the contract, the Monitor would share those details with any creditor that made the inquiry.

MS. HUTCHINGS, K.C.: Alright, and certainly if there's anything that's confidential that doesn't turn on anything before the court, you know, we can always redact it.

MR. SPENCER: There may be some need for redactions, yeah, but I have no idea, I haven't



seen it so we'll have a look at it then we can discuss it.

MS. HUTCHINGS, K.C.: Okay, alright, alright, thanks, Geoff. So if you can have a look at paragraph four, Phil, and the last sentence there, "I can advise that the Monitor has had contact with Marbase and neither CFI nor the Monitor has granted permission for Marbase to discuss the barge with any third parties, including Spellacy." When was this done? Was this done at the outset of the contract?

MR. CLARKE: No, nobody has requested any information on the barge.

Q. Okay.

A. So that statement was responding to paragraph two and three of the Spellacy Affidavit, but just to point out that I have no knowledge of conversations between Spellacy and James Brennan, and nobody has asked the Monitor for permission or any questions on the barge.



Q. Okay, so there's been no discussion, my understanding of what you're saying, there's been no discussion, or instructions is probably better, from the Monitor to Marbase to tell them, do not discuss the barge with anybody including Captain Spellacy, is that correct?

A. No, nobody has asked the Monitor or contacted Marbase to ask questions about the barge and requested the Monitor's assistance or consent to provide that information. Like nobody's has asked any questions about the barge.

Q. Nobody, you know that for a fact?

A. Nobody has sent me any query or questions indicating at the barge.

Q. Okay, it's a little different from what I understand from what you're saying and let's see ...

MR. CAHILL: Debbie, just one point, when you read that to Phil you said that the Monitor, you advised that the Monitor has "contacted"



Marbase, the word they are using is "contracted" not "contacted", so the ... I just want the context to be there because I think, it seems to me that you're suggesting that there was a conversation or direction by the Monitor or CFI with respect to this but it ...

MS. HUTCHINGS, K.C.: Well, that's what I wanted to ... and I can read the whole paragraph.

MR. CAHILL: It's just when you did read it to him you said that, instead of the word "contract", you said "contact".

MS. HUTCHINGS, K.C.: Yes.

MR. CAHILL: But that's not the word that's in the Affidavit.

MS. HUTCHINGS, K.C.: No, I did say the word "contact".

MR. CAHILL: Yes, I know, but you were reading the Affidavit and you misquoted the Affidavit.

MS. HUTCHINGS, K.C.: No, I did not misquote ... I never, the ...

MR. CAHILL: The Affidavit says "contracted".

MS. HUTCHINGS, K.C.: After I quoted the provision or the statement in Phil's Affidavit, I asked him if there was any contact that he had with ...

MR. CAHILL: I understand, I'm sorry, when you read it to him, you misquoted the ... and we can read it, we can have it read back but I understand what you're saying now.

MS. HUTCHINGS, K.C.: That's fine, that's fine, I will read the entire paragraph to him.

MR. CAHILL: I don't know if that's necessary but you did read the last sentence to him, and maybe I misheard you, but I thought you had interchanged that word which changes the context of the sentence so I just want to be sure that we're putting it to him fairly.

MS. HUTCHINGS, K.C.: Okay, Phil, you're correct, it says, "With respect to paragraphs two and three of Spellacy's Affidavit", alright, and then two and three of Spellacy's Affidavit, he goes on talking about his conversations



that he had with James Brennan who works out there with Marbase.

MR. CLARKE: Yeah.

Q. And you go on and state that, "I do not have knowledge of any alleged conversation between Spellacy and James Brennan or any representative of Marbase." So did you, did you, in response, in your drafting of this particular Affidavit did you actually get in touch with or contact Mr. Brennan or anybody else at Marbase to find out if, in fact, Mr. Spellacy, Captain Spellacy had been contacting them to find out information about the barge?

A. So I did contact Marbase for the purposes of responding to the Affidavit, the purpose of that statement was that, I have no information with regards to, and I can't comment with regards to the information on the discussion between Dick Spellacy, Richard Spellacy and James Brennan because I was not party to those correspondences or conversations.



Q. Okay, alright.

A. Yeah.

Q. But you're not denying that there possibly could have been conversations between Dick Spellacy and James Brennan?

A. Oh, that's correct, I just don't have any first-hand knowledge, right.

Q. Okay, correct, and it wouldn't be unusual, would it, for him to, for Mr. Spellacy, or Dick Spellacy to contact Marbase to find out the status of the barge?

A. I would say it's unusual that ... I'm unaware of any other contacts to follow up from the barge, I'm not aware of any other times somebody has ...

Q. Well, do you think it ...

A. Normally ...

Q. Okay, sorry, I cut you off.

A. Yeah, no, it would be unusual because the normal process that stakeholders usually follow in the CCAA proceeding is if they're seeking information on the assets or a



creditor claim, or the proceeding itself, is they would reach out to the Monitor and ask the Monitor to get them information. So I am not aware of any other time of Mr. Spellacy reaching out so it would be unusual, yeah.

Q. It would be unusual, so for a creditor who has an interest in the barge to, by virtue of having had a, or making a Maritime Lien Claim against the barge, you would find that unusual for them to directly contact Marbase to find out the condition.

A. Absolutely, yeah.

Q. Okay, and did you, when did you find out that Mr. Spellacy, Captain Spellacy, was in contact with Marbase and/or James Brennan about the, about the barge?

A. On receipt of his Affidavit.

Q. Okay, and did you instruct Marbase after that to have no further contact with Mr., or Dick Spellacy?

A. What I advised Marbase to do was if there was any queries on the barge to submit them to the Monitor.
Q. So in other words, if anybody contacted them about the barge to inquire about the state of the barge, including Mr., including Dick Spellacy, to refer them over to you.
A. Yeah, that would apply to any stakeholder, if they have any questions, the questions on the proceeding should go to the Monitor so they can be responded to.
Q. Okay, so if the, if Captain Spellacy is found to be the Master of the barge would your answer also apply, what you just gave, that is if he's a Master and he's inquiring he's got to talk to the Monitor?
A. It would be my view that any queries on the proceeding or the asset should be directed to the Monitor, that is normal, that is the normal process in a CCAA proceeding, and the Monitor has a duty to respond to the



stakeholders where it can. That's the Monitor's role.
Q. Just on paragraph four again, is there anything in the contract between the Monitor and Marbase that specifically states that Marbase has no permission to speak with anyone, including Spellacy, Captain Spellacy, about the barge?
A. I don't know that answer to that question.
Q. Okay.
A. I guess what I'm saying is that the normal process is for an stakeholder, if they have any queries on the proceeding, or assets, or claims, or anything thereunder, the normal process is to make the information request through the Monitor and that's how the process should work.
Q. Okay, did you ever have any communication with Captain Spellacy after the arrest of the barge?



A. At the early stages of the interim (inaudible) we had some initial conversations, touch points, yes.
Q. So there were conversations on the phone, in person, how were they ...
A. On the phone and some email correspondence.
Q. Okay, and what was the gist of the conversations, what was the subject matter?
A. My recollection it was questions on the proceeding, the status of the barge, you know, the work that, the consulting work that Mr. Spellacy had done.
Q. Okay, in the early stages of the proceeding you, the monitor would not have had, and this is also in the CCAA because I think there was only a month, or less than a month between when the bankruptcy was filed and then the CCAA was kicked in, that you would not have had any kind of idea how you would have proceeded with the assets and the, I guess,



the plant down there, the mine itself, would that be fair to say?
A. Yeah, so, you know, the proceedings started with the appointment of Interim Receiver and I believe within, you know, definitely less than three weeks the Interim Receiver was converted to a, excuse me, a CCAA proceeding, and the initial, the initial activities of the Interim Receiver and the Monitor would have been moving the mine from an operational status into a "warm idle" status, so part of that role is to sort of get an understanding of the various assets, the status of the assets, an understanding of the various service providers, the creditors, employee issues, things like that, and we would have worked with CFI management to do that. But yeah, that ... you know, it's trying to form an understanding of the various claims and positions of the parties.
Q. Okay, but now isn't it correct to say that at the very, in the early stages that, and I would say

early stages, probably within the first four to six month, that the Monitor was not opposed to selling assets, is that correct?

A. Well, we would have considered all options under *(sic)* the table, on the table subject to like secured creditor approval and the conditions of the court. You know, we were evaluating all the potential options on the table, yeah.

Q. Okay, and isn't it true that you, that at that time you were evaluating the option of selling the barge?

A. There was a point in time where we were evaluating two things with the barge, one is the ownership of the barge and how to deal with the ownership of the barge and we had originally considered potentially selling it at the beginning but that was quickly put to bed.

Q. Okay, why was it put to bed?

A. The barge is, through the, through the process of understanding the mine operations and the proceeding it became abundantly



clear to the Monitor that the barge is critical to the mine operation.

Q. Why is it critical to the mine operation?

A. I believe it's outlined in the various Monitor's reports but Blue Beach is not functional as a port unless the barge is utilized to load vessels, so if you don't have the barge then CFI as a mine, as an entity, can't ship product out through Blue Beach, through the Blue Beach port terminal, so the barge was critical in order to have the capacity to ship off of Blue Beach.

Q. Now, when the Monitor took over, under the CCAA, the mine, so to speak, the mine was operational up until probably the latter part of 2022, correct?

A. Well, when we were appointed Interim Receiver the mine was operational so we went from operational in February to what's called, what we call "warm idle", so the mine ceased operating. The terms of the Interim Receivership Order and then subsequent to



the CCAA prohibited the Monitor or the Interim Receiver from operating the mine, so on appointment the mine went from an operational status to what we call "warm idle", and then in and around October 2022 the mine went from "warm idle" to "cold idle" to help preserve cash.

Q. So how long was the Monitor involved in this process, how long was the ... let me backtrack, during the period that the Monitor has been involved in this matter, and when I say "this matter", the BIA and the CCAA proceedings, how long was the mine operating, that is mining and/or exporting?

A. So that's two different things. So the mine was shut down on appointment by the Interim Receiver so the Interim Receiver couldn't operate, so at the same time the court hearing was happening to appoint the Interim Receiver the company was terminating employees and shutting down the, ceasing operations at the mine. So neither the Interim



*(sic)* or the Receiver ever operated the mine itself or the mill, like there was no mining activities, we were prohibited.

Now, the Monitor did complete a sale of inventory to a third party which was exported during the CCAA proceeding so, but the mine itself has never, hasn't operated within the proceedings, like from an extraction perspective. There's been no extraction of mineral or processing of mineral during the proceeding.

Q. Okay, so this third party buyer, they would have had to come to Newfoundland to pick up the cargo?

A. Correct.

Q. So they would have gone to Marystown?

A. They went to Marystown, correct.

Q. They did not go to Blue Beach?

A. That's correct.

Q. Why did they not go to Blue Beach?

A. The barge was moored at Marbase ... well, I'll back up. The primary reason they didn't go

to Blue Beach is the terms of the sale that, with the terms of the sale that the Monitor negotiated with the purchaser was FOB Newfoundland, so it was up to the purchaser to arrange the shipping, and so they arranged the shipping at the facility they chose.

Q. So the barge as it is now, alright, can that be used now, operating at Blue Beach as it is now?

A. That's a good question, so I'm not sure if I can answer that question right now. My understanding is that for Blue Beach to be functional it needs the barge and it's current configuration, that can only happen in fair weather conditions, effectively during the summer, and so what had happened historically was the barge was moved to Blue Beach during the fair weather months and fair weather conditions and in the winter it was stored elsewhere.

Q. Why can't it operate for the remainder of the year?



A. Because the deficiencies in the construction of Blue Beach is my understanding.

Q. Are you aware of plans that CFI had to make the barge operational year-round?

A. Yeah, yeah, CFI had undertaken to look at options to make the barge and, you know, make the barge and Blue Beach functional year-round.

Q. Okay, and did they not have an option that was feasible that they were going to proceed with?

A. That I am not sure of, I'm not aware of any decision on an option.

Q. Were you aware that CFI had retained Captain Spellacy as a consultant to help them determine what options were feasible?

A. CFI had retained Inaminka as a consultant, yes.

Q. Okay.

A. That was in the materials that are filed in this proceeding. There's a purchase order issued and invoices from Inaminka.



Q. Okay, you're correct, it's Inaminka. Did you see the options that Inaminka had proposed to CFI to make this barge functional twelve months of the year?

A. I recollect seeing a brief or high level summary of the options.

Q. Okay, you haven't come across any, any kind of drawings that were perhaps in the CFI files which shows a drawing from an engineer planning one option of putting in, expanding on the, I guess, the wharf structure, putting in more concrete around the area?

A. I have seen no engineering drawings.

Q. Okay, have you seen any, any documents from, involving Inaminka with respect to types of machinery components that would be required for a particular option?

A. Nothing, no detailed listing or structure, no.

Q. How did you know about the, that there was, that CFI had engaged Inaminka as a consultant on this particular topic?

A. How did I come to discover that?



Q. Yeah.

A. Yeah, Dick Spellacy contacted me at the beginning of the proceeding.

Q. Okay, and did you, what conversations did you have with Dick Spellacy about that particular work that they had done?

A. I just said I would, if he had information he could send it to the Monitor, which he did.

Q. That was information that he had, is this the high level summary that you were ...

A. Correct.

Q. Okay, did you go to CFI to investigate what they knew about the, this work that Inaminka had done?

A. I had inquired of CFI management to get some background on the work done, yes.

Q. And did they provide anything?

A. They didn't provide any, they provided some, some information but no detailed engineering drawings or anything like that ... nor could we find any decision of management to proceed in any direction.

Q. Management would be ...
A. Which makes sense because they didn't have any money.
Q. Exactly.
A. Yeah, it makes sense because they didn't have any money.
Q. Yeah.
A. So I'm not surprised we couldn't find any decisions.
Q. In the ... the Monitor, in the process of selling the company, the assets, whatever, has it been discussed with prospective bidders that there is some work that's been done to be able to utilize the, the barge twelve months of the year?
A. I haven't had any discussions with any bidders on that.
Q. Have you instructed others from, with the Monitor, who was facilitating discussions or trying to market the organization, that there are some, there's been some work that's been done in how to secure the barge at Blue



Beach to allow it to work twelve months in the year?
A. It's possible, I have no direct knowledge but it's possible. You know, the Monitor ran a sales process where interested parties could do due diligence and were given access to CFI's books and records to a certain extent so it's possible.
Q. Do you agree that certainly if prospective buyers come by ... and has the means and wherewithal and so forth that, and talks about the barge, that it would be important for that buyer to know that there has been some preliminary, or work done, whatever you want to call it, to getting that barge situated out there so it can be utilized year-round?
A. So maybe you can repeat the question, are you asking me ...
Q. Yeah, it was a long question. Do you think that it's important for a prospective buyer to know that the barge, as part of the assets, can be utilized, or there has been some work



done to utilize it for twelve months of the year?
A. No, I think it's the Monitor's role to articulate what the company had been doing so, you know, the company would, you know, it's important to, for the Monitor to, when asked to say, for the company to ship product historically what it had been doing was, you know, utilizing the barge at Blue Beach during the fair weather, which is ... let's call it spring and summer, and then it's my understanding the barge was then moored somewhere else during the wintertime at the Kiewit facility in Marystown. So it was important for the parties doing due diligence to understand the historical background of the assets. It's entirely up to the interested parties to determine for themselves if that's important; one, if that's important to them; or two, what they would do differently.
Q. But is this information that the Monitor wouldn't like say, don't tell anybody about



this, you wouldn't withhold that because that could be a very important piece for the buyer to be able to utilize, instead of spending more money and trucking it during the winter months, to utilize the barge year-round?
A. We wouldn't withhold, you know, any reasonable request through a due diligence process, we wouldn't withhold information.
Q. Uh hum.
A. If it was information available in the books and records of CFI, and it was relevant to the query of the party, we would respond to it.
Q. Right, and I would suggest to you, Phil, that, in fact, that that information was disclosed to potential buyers.
A. It very well could be, yeah.
Q. Yeah, were you directly involved with the potential buyers or was that somebody else?
A. Well, I have a supervisory role to the CCAA proceeding so there's a whole variety of people involved in the process but, generally speaking, you know, the Monitor ran the data

room, and then due diligence parties, you know, had access to CFI and CFI management and could ask them questions and entertain conversations with them directly, but I wasn't sort of, you know, I wasn't party to every request or every discussion.

Q. Right.

A. But we would, as a matter of principle, be as open and transparent as we can and help parties doing due diligence to get access to all the information that CFI had.

Q. And that information would be one of the pieces of information that you would have had in your data room to be able to provide to somebody who asked about the barge, correct?

A. It would be, it would be information that CFI had, yeah, so definitely, I'm not, I can't confirm specifically if it was included in the data room but that would be easy to verify.

Q. Yeah, so ...



A. But it would be available, yeah.

Q. Okay, was there like a package that, and I think I've seen this in the, in some of the materials ... not the package itself but the mentioning of the package that would be available to potential purchasers looking to bid on the property, to bid on the whole, you know, the whole kit and kaboodle?

A. I don't understand the question, like the "package", like a ...

Q. Well, would there be, so if I came in and I say, I understand you're ... I gave you a call and said I understand that you are selling the CFI mine, its facility out there, its assets, etcetera, I've got some investors that are potentially interested, what do you have that I can sit down with them and show?

A. Yeah, we had a virtual data room that we populated.

Q. Okay.

A. For interested parties on signing a non-disclosure agreement.



Q. Alright, so that virtual data room, is that something that we can access to to have a look at as it was the first time around when you were getting, trying to solicit interested buyers?

A. So I'm not sure what the question is, are you asking me if Inaminka wants access to the data room?

Q. Well, how about access to the data room to the extent of the barge?

A. I don't know the answer to that mainly because I'm not entirely sure how the technology works.

Q. Well, I ...

A. But listen, if you wrote a question and wanted to know what information is on the data room relative to the barge I could answer that question.

Q. Well, I'm asking, I can even refine it even more, the information that's in the data room on the barge, does that include the information that there has been some work



done on, with the barge, not, not on the barge itself but the preparing of the idea of how to use the barge twelve months of the year?

A. So if you're asking me if the information on the Inaminka consulting services is on the data room, I just can't, I'm just not sure, I could check and give you a definitive answer.

Q. You're not sure.

A. Well, I don't have it in front of me, Deborah, so I just don't, I can't be exactly specific, and I could check, I'm happy to check and confirm.

Q. Alright, I do want you to check and confirm that and provide me with that information please.

A. Yeah.

Q. Thank you.

MR. SPENCER: Yeah, so Debbie, I'll get ... Phil will make that inquiry and we'll check and then I'll send you correspondence with that answer.

MS. HUTCHINGS, K.C.: Okay, thank you, Geoff.

MR. CLARKE: Deborah, I just don't know, I just don't know off the top of my head.

MS. HUTCHINGS, K.C.: Yeah, I'm ... with all due respect, I'm a little bit surprised based upon the, you know, this particular matter here today, I'm a bit surprised that, that, you know, that wouldn't have been in the forefront because it is, it's very related to the matter. Anyway, I'm just ... you don't have to answer that, I'm just making a comment.

MR. SPENCER: Yeah, just for the record though, Debbie, I mean the data room, as you can imagine, is quite large.

MS. HUTCHINGS, K.C.: Oh, I can imagine, it's quite large.

MR. SPENCER: I am not surprised that Phil can't say with certainty if a certain document was included in the data room or not, it's just ...

MR. CLARKE: The sheer volume of data is substantial.

MS. HUTCHINGS, K.C.: I appreciate that.



MR. CLARKE: And I just wouldn't want to give a wrong answer or an inaccurate answer.

Q. Okay, I've got to get back to this ... so I'm just looking at my watch here, I'm a little bit slower than what I thought I was going to be, but anyway, that's okay, I think I may have already got some information that I needed anyway. Yes, just to finish off with conversations that you had with Captain Spellacy that we talked about a few moments ago, did you ask Captain Spellacy to provide you with contact information of any potential purchasers for the barge that he may have known of?

A. Yeah, I advised him if he knew of interested parties he could send me the contact information, correct.

Q. And I don't want to know the details but I just want to know that you did contact those potential buyers?

A. We had been in contact with potential buyers, correct.



Q. That Mr., that Dick Spellacy provided you information on?

A. That's correct.

Q. Okay, alright. Alright, now I want to take you to paragraph six and at the bottom you refer to, towards the end of that paragraph six, you refer to a major storm during the week of September 7th to 13th, is that correct?

A. Correct.

Q. So the storm would have taken place during that week?

A. I believe, if I understand there was a storm that week, correct.

Q. A major storm, do you think that would have been the storm, Fiona, you're talking about, Hurricane Fiona?

A. I'm not sure, I'd have to check, there's been a lot of storms in a year and a half in Newfoundland.

Q. Okay, because I'm just wondering, Fiona was a bit later in the month and I'm not sure if you have your dates correct here in September as



to when that would have happened, because you say there was ... "After every major storm, including after the storm during the week of September 7th to 13th, there was noted a list", and there's no mention made then of inspecting the vessel after Fiona, which would have been later in the month and I'm just wondering if you meant to have, it's Fiona that the storm was and the dates for September are the correct dates.

A. No, I think September would be right, I guess the point is every, you know, the Monitor has been conducting visual inspections of the barge every week since May 18th of 2022.

MR. CAHILL: Yeah, Debbie, just to confirm, I think Fiona was, there were multiple storms that month, including Hurricane Earl which was during the week we're talking about. I don't know if much turns on the date but I think Fiona was more of a weather event on the west coast of Newfoundland whereas Hurricane Earl would have been a weather

event on the Southern and Avalon Peninsula, but I ... you know, I'm not sure if it matters but I don't think, if there's an indication that we, that there was somehow we didn't check on the barge during another storm, I don't think that's the intent of ... you can ask that question but I don't think that's what, what Mr. Clarke is saying.

MS. HUTCHINGS, K.C.: Phil, was there any documentation of these inspections, weekly inspections?

MR. CLARKE: Yeah, yeah, CFI management does a visual inspection every week, as I said, the status of barge is discussed weekly by CFI management which includes the Monitor.

Q. So when you say the Monitor conducted them every week since May 18th, that's CFI is conducting it for the Monitor, is that correct?

A. That's correct, like CFI staff (inaudible) location on site, yeah.



Q. Alright, and is there anybody in particular with CFI who is tasked to do that particular inspection?

A. It probably would have changed over the period of time because we were in "warm idle", then we went to "cold idle", and employment status changes. I don't have the specific individuals off the top of my head who would have went ...

Q. Yeah.

A. ... I just know it's part of the management, the weekly management call with CFI and it's reported on.

Q. Alright, and how would that visual inspection be conducted, what would they do?

A. Pictures would have been taken of the barge, somebody would go down ...

Q. (Inaudible).

A. Yeah, somebody goes down and looks at the barge with their eyes, takes pictures.

Q. So they'd get out of their vehicle, walk down where the barge is moored and take photos?



A. Now, the photos are the same, similar photos as was in Dick Spellacy's Affidavit so, you know, if you get too close to the barge you can't tell anything about the barge because it's too big, so there are photos from a distance.

Q. So they would be from a distance.

A. Yeah.

Q. Okay, is that all the ... so what else would they do during the inspection, anything else?

A. That would be it, the only other thing I can think of is, you know, if a call came from Marbase they would respond to whatever Marbase was calling about.

Q. So what would they do in those situations?

A. Just deal with whatever the question would have been, or the concern raised by Marbase. I'm not sure if it happened too often, I'm just ...

Q. Okay, yeah, okay, so there was a ...

A. The weekly inspections were visual, and pictures, and whatnot.



Q. So how far away would you have to be to get a good photograph of that picture *(sic)*, because I know we've only got, you know, well, you've seen the two photos we put in with Dick's Affidavit ...

A. Yeah.

Q. ... so how far back, because I haven't been down there myself but I will go down if I need to.

A. I wouldn't hazard a guess, you wouldn't be able to get right up near close to the barge you'd have to be pretty ...

Q. Like 50 feet back or 100 feet back.

A. That I don't know, I really don't know.

Q. Okay.

A. You'd have to be back far enough to fit it into whatever device you're using to take a picture.

Q. Okay, and usually, would it be fair that they're using their phones to do that?

A. Yeah, I don't know either way but it would be reasonable to assume that, I think. It would be easy to find out.
Q. Yeah, okay, the other thing that I wanted to discuss is that, you say ... alright, you had the regular ... hold on now, so in there there's discussion that during the week of September 7th to 13th when it was noted that there was a small list, okay, is that the first time that it was discovered that there was a list, in September, that time period?
A. Just bear with me one second. So I guess the question is, is that the first time we noticed the list?
Q. Yes.
A. No, we've known, the list has been known since at least May 18th.
Q. And how did you, how was it discovered that there was a list?
A. I'm just trying to remember off the top of my head. I believe Marbase made a call to the



General Manager of CFI at the time, who then notified the Monitor.
Q. Okay, do you know what was done when the, when it was notified that there was a list on the, on the barge?
A. Yeah, it's about the time we started monitoring the barge every week.
Q. Okay, so anything, was there anything done at that time when it was known that there was a list?
A. No, because nobody was concerned about the list.
Q. Why, how did you determine there was nothing to be worried about?
A. Marbase advised us they weren't concerned about the list.
Q. So you, the Monitor was relying upon Marbase to advise them that the list was nothing to be worried about?
A. That and the weekly inspections, the visual inspections.



Q. Now, in paragraph seven, sorry, paragraph six, it says, "During the summer of 2022 both the Monitor and representatives from bridge financing, one of the CFI security creditors went aboard the barge." Now, you indicated that you and the Monitor are one and the same.
A. That's right.
Q. Yeah, so would it, so you in the summer of 2022 went aboard with the bridge financing people and ...
A. No, that's not accurate.
Q. That's not accurate.
A. No.
Q. So this ...
A. I went aboard the barge once in July.
Q. Yeah.
A. And I understand the representatives of bridging financers *(phonetic)* of secured creditors, they made a visit to St. Lawrence to inspect their security and they would have went to see the barge.



Q. And they went aboard the barge?
A. That's my understanding.
Q. How is it that you understand that?
A. They would have made travel arrangements to come see the mine site and I would have encouraged them to go see the barge.
Q. And how do you know that they went aboard the barge?
A. I believe, my understanding through conversations with them is that they would have went aboard the barge.
Q. You're not sure though?
A. I'm just trying to go off ... no, I'm fairly certain that they went aboard the barge based on discussions with the secured creditor.
Q. Do you know if they went down into the barge itself?
A. That I don't have any information on, no.
Q. Okay, do you know who those individuals are that would have went down to St. Lawrence to see the barge?
A. I think so, yeah.

Q. Okay, and they're still around?
A. I don't know what "are they still around" means.
Q. Are they still, are they still alive, let's be blunt, they're still alive, are they?
A. Yes, they're still ... yeah, they're still alive.
Q. Yeah, okay, I figured as a Nova Scotian you'd understand when I say, "are they still around".
A. Yeah, no, no, I think they're still alive.
Q. Yeah, okay, sorry about that, that's my ... yeah.
A. I just don't know the status of their employment or things like that.
Q. Okay, so there was a list that was noticed in May.
A. Correct.
Q. And then apparently the list was noted again after the storm, the major storm in September that you referred to in paragraph six. Was there anything done to investigate the list in and around September of 2022?



A. No, the list has always been there as far as we're aware, since May, so our visual inspections were meant to make sure the list isn't getting worse or better, and so there's, you know, the Monitor hasn't done any sort of investigation into sort of, quote, unquote, "the cause of the list".
Q. So one of the other CFI ... okay, one of the other CFI creditors went down there as well and boarded the barge, do you know what creditor that was?
A. Bridging finance, yeah.
Q. Okay, it was, so it was only one creditor, not two creditors?
A. No, just bridging finance, the senior secured creditor, the first ranking secured creditor and a DIP lender.
Q. Okay, so are any of the creditors, secured creditors allowed onboard the barge?
A. Are you asking me if anybody is allowed onboard the barge?



Q. Yeah, are any of the secured creditors allowed onboard the barge?
A. No other creditor has asked to inspect the assets subject to its security.
Q. But would they be allowed to go and inspect it?
A. I don't know, I'd have to consider the request when it came.
Q. Okay, so if Captain Spellacy wanted to go aboard to inspect ...
A. We would absolutely consider the request, yeah.
Q. But you're not, are you, would you say that you would grant him permission to go aboard?
A. The request hasn't been made so there's nothing to consider at this point in time but subject to safety considerations and the purpose of the visit, yeah, no, there's ... if a creditor, or if there's a secured creditor with secured interest in an asset then, you know, it's not uncommon for stakeholders to inspect



the value, to inspect their security, it's quite common for secured creditors to inspect the assets subject to their security.
Q. Okay, has the manner in which you can board the barge changed from the time that you boarded the barge, do you know?
A. I don't know, the barge hasn't changed substantially at any point in time as far as I know, it's still just moored to Marbase.
Q. Okay, yes, yeah. So moving on to November, because there was a, you mentioned that there was a list as well noted in November of 2020, and I'm trying to find that there.
A. If you could point me to that, that would be helpful.
Q. Yeah, I'm trying to find it there now.
A. Paragraph seven.
Q. Pardon me?
A. Paragraph seven?
Q. Yes, thank you, right at the very outset, "In and around November 22, Marbase

contacted the General Manager of CFI to advise that the barge may be listing."

A. Correct.

Q. So that would be the third time that they contacted, notified the Monitor that the barge was listing, correct?

A. It's my understanding that's the only time Marbase has called to advise there's a, there's a list.

Q. That's the only time?

A. That's my understanding.

Q. So who would have notified, who would have notified the monitor in May month if there was a listing of the barge, and that's what you indicated in your evidence as to what started the regular inspections by the Monitor, the weekly inspections, was the list that was found or discovered in May month ... who would have notified you then?

A. I might have been mistaken, but it would have to be Marbase because they're the only people who could notify us. The process is,



is if Marbase has any questions they reach out to the Monitor. My understanding, we started the checking of the Monitor in May of 2022 on a weekly basis, it wasn't because of any concern.

If my memory proves right, it wasn't because of any, you know, call from Marbase, it was because, you know, the Monitor has to make sure it has appropriate, it does an appropriate job to preserve and protect the assets, so it was decided in around May or a little earlier that the Monitor would add a weekly visual inspection to the weekly management report that happened so that somebody from, somebody on the ground at CFI would do a visual inspection, take some pictures, and then at the weekly management call, you know, the barge would be an agenda item and then that would be discussed amongst management with a representative of the Monitor, but I think the only call from Marbase would have been in



November. And just as a matter of process, if there's a big storm, you know, the CFI staff and the Monitor, we would sort of ask, you know, is there any issues and to check the assets of the mine to make sure everything was okay, so that's how operationally it works.

Q. So you said that in November you got it, you're sure in November that you were contacted by Marbase about the list, okay?

A. Correct, that I am sure of.

Q. Okay, what, if anything, did the Monitor do to make sure, to check on that list and to make sure that there was nothing to be worried about?

A. So we would have sent, as I said in my Affidavit ...

Q. Not what you would have done, what you did please.

A. We sent, yeah, so we sent somebody down to check and it was determined that there



was no issues, that the barge was in the same condition as before the storm.

Q. And that would have been a visual check?

A. A visual check.

Q. Who would have been the General Manager of CFI at that time?

A. Pat Gannon.

Q. And was he physically in Newfoundland at that time?

A. I'm not sure.

Q. So you say also in paragraph seven, your last sentence, "The Monitor understands that the barge is currently in the same condition as it was when the Monitor was appointed."

A. Correct.

Q. And I'd say at the time you were appointed to, and you're saying as of March 3, 2023, that it's in the same condition?

A. It's my understanding the barge is in the same condition as it was on our appointment, that's correct.

Q. So who, who is it that you understand this from?
A. That would have come from CFI management at the time, a variety of people, I'm not entirely sure who it came through, that's just my understanding.
Q. Okay, so I want to find out from you specifically, did the Monitor cause any soundings to be done in the ballast tanks onboard the barge?
A. No.
Q. Never?
A. Never.
Q. Never, okay, has the barge, has the Monitor ever caused to have a record of the draught of the barge?
A. The Monitor has not had a draught recorded of the barge, no.
Q. Okay, never?
A. Never.
Q. And the only, your evidence is is that the only, the only thing that the Monitor has relied



upon is the visual inspection through photographs and of various people with respect to looking at the barge, correct?
A. And Marbase.
Q. And Marbase.
A. Marbase has advised the Monitor they're not concerned with the list.
Q. Do you know if Marbase has employed there any technical person with respect to being able to do surveys of ships?
A. I am not aware of them doing that work, no.
Q. Do you know whether or not they have anybody employed on their staff that has the technical ability to be able to do surveys of vessels?
A. That I don't know, I'd have to ask Marbase.
Q. You haven't investigated that, have you?
A. I have not investigated that.
Q. Okay, and that was not a requirement for the Monitor when they entered into a contract with Marbase for the barge?



A. So just to be clear, Deborah, the Monitor never entered into a contract with Marbase, that agreement, the agreement with Marbase was between Marbase and CFI and it existed before appointment of the Monitor.
Q. Oh, right, okay.
A. So it was just continued.
Q. You're correct, that's right, do you know whether or not CFI would have made it a prerequisite to entering into that contract with Marbase that they have somebody with the technical background to be able to do surveys on the vessels?
A. That I don't know, I don't have any information on ...
Q. And the Monitor hasn't, up until today has never asked them about anybody at Marbase having a technical background?
A. We haven't inquired of Marbase with regards to their technical capabilities or asked them for an update, no.
Q. Okay, no, that's alright.



A. Yeah, we just know they're experienced.
Q. They're experienced in what, in ...
A. Well, they have a background in port facilities.
Q. Okay, and what skill do you need for that?
A. I don't know, I just ...
Q. That's right, you don't know.
A. No, I don't know.
Q. No, you don't know, okay, so just to be clear, nothing has been done by the Monitor to date to investigate what is causing the list to the barge.
A. That's correct.
Q. Okay.
A. The list, the barge is in the same condition as it was.
Q. Okay, do you know whether or not that there is a risk to the barge by having a list to it?
A. Marbase has advised me they're not concerned about the list.

Q. Okay, is, do you know whether the ... okay, is the Monitor concerned that there might be a risk to the barge because it has a list?
A. Am I concerned, I'm concerned about all the assets, my concern is ... I'm not concerned, I don't have any concern that the barge is in immediate peril because we've been monitoring the barge on a weekly basis since 2022 and it appears the list isn't changing, and Marbase is also advising me that they're not concerned about the list either.
Q. Okay, have you seen, have you ... has the Monitor investigated whether or not that there are any fuels or hydraulics that's aboard the barge?
A. We have not investigated that, no.
Q. So you have no idea whether there is any diesel or any hydraulics that's aboard the vessel. I keep saying "vessel", sorry, the barge.
A. The barge, it's not a vessel, I just don't know, I can't answer that question.



Q. You don't know if it's been done. Do you know if there's been any investigation to determine ... you don't know how ... sorry, so you don't know whether there's any fuels onboard that vessel, that barge?
A. I'd have to ask and look into the CFI files. There's been lots of work and examination of the barge. I just don't know off the top of my head.
Q. It hasn't been investigated though by the Monitor, correct?
A. Well, I can't say that either way, I've never asked. I'd have to go back to look and see what was done.
Q. It's never come up at those meetings that you have, that you referred to?
A. No, no, no, I do know there was work done by the company in advance of the insolvency around, you know, salt water in the ballast and not being able to discharge the salt water and a variety of other things, I just don't, I just



can't recollect right now but if you made the request I'd happily respond and dig into it.
Q. Who did that work at the beginning?
A. I'd have to go back and look.
Q. What was the problem that they couldn't discharge their ballast?
A. There's an issue with the barge in that when it was acquired it was acquired as a foreign vessel. Now, this is just a ... yeah, so that when it came into Canadian waters my understanding is you can't discharge foreign water into Canadian waters so that the ballast comprises of water, foreign, we'll call it foreign ocean water, so it has to be specially discharged.
Q. Okay, and there's no, at that time would there have been a report about what fuel, if anything, was aboard the barge?
A. I just don't, I just don't recollect, I'm not sure, I'd have to go back and look.
Q. Has there been any investigation done since the listing has been noticed to the barge as to



whether there has been a discharge of pollutants from the barge?
A. I'm not aware of any discharge, no.
Q. Has there been an investigation conducted by the Monitor to determine whether there has been a discharge from the barge of any pollutants?
A. There has not, there has been no indication that that's required.
Q. Okay, so the answer to the question would be, no, there's been no investigation?
A. Again, there's been no investigation, there's been nothing to indicate it's required.
Q. What would you need to have an investigation conducted into a discharge?
MR. CAHILL: Debbie, where in the Affidavit are you pointing to ... this is a cross-examination on the Affidavit.
MS. HUTCHINGS, K.C.: Yeah, it is, it is, yeah.
MR. CAHILL: I've been letting it go for a while but if this goes to the subject matter ... I know that you have pretty broad discretion and ...

MS. HUTCHINGS, K.C.: Are you ...

MR. CAHILL: I'm not objecting but I'd just like to point him to the Affidavit where this is relevant.

MS. HUTCHINGS, K.C.: Well, I'm asking a question, are you objecting to my question?

MR. CAHILL: No, I would just like ...

MS. HUTCHINGS, K.C.: Well, let me continue please.

MR. CAHILL: ... I'd like to keep it to the Affidavit, this is a cross-examination on an Affidavit, I think you can ask him ...

MS. HUTCHINGS, K.C.: It is in the Affidavit.

MR. CAHILL: ... finish asking the question, we've been now two hours almost walking through a few paragraphs of the Affidavit.

MS. HUTCHINGS, K.C.: Listen, Will, Will, that's enough, this is my cross-examination. If you're going to object then please object and then we'll deal with it with the, with Justice Zinn. If you're not going to object I'd like to finish off my cross-examination. This is the



third time you've interrupted my cross-examination and I really don't know what for other than to delay ...

MR. CAHILL: If you could point to the paragraph in the Affidavit that you're asking the question in relation to, that would be helpful for me.

MS. HUTCHINGS, K.C.: I'm dealing with their maintenance of the vessel and that is included with the maintenance and caretaking of the vessel including the list.

MR. CAHILL: Okay, thank you.

MS. HUTCHINGS, K.C.: You knew that ... or if you didn't know it ... anyway. So I want to continue on here now to the, with the list, I have one other question to deal with the list and that is, do you know whether or not that there would be a risk of the vessel, or the barge here sinking if there is a list?

MR. CLARKE: I've been advised there's not a concern about the barge sinking.

Q. Okay, and you would have gotten that from Marbase?



A. Correct.

Q. And who else, anybody else?

A. I would expect CFI management to raise the concern but no party has raised the concern that there's a risk of the barge sinking.

Q. Okay, alright, so I understand that, from your Affidavit that ... let's see, this is the one on ... do you want to turn to paragraph nine?

A. Correct, I'm with you.

Q. Alright, yeah, this is the incident on February 24th, 2023.

A. Correct.

Q. Can you just tell me what ... there's some rope moorings that had snapped.

A. Correct.

Q. Can you just tell me how that all came about? You were in St. John's that week, correct, or were you?

A. I don't know where I was that day. I believe there was, the Federal Court hearing was February 21st, if memory serves me right.



Q. Alright, I think there would have been, let me just check here, February 21st there would have been the motion before Justice McDonald in the morning at 9:30.

A. Correct, oh yes, and then that Thursday was the Federal Court hearing.

Q. Yes, February 23rd, so were you in St. John's that week or not?

A. I was in St. John's on the, not on the 21st, I don't believe ... I don't recollect, but I definitely was on the 24th in the Federal Court hearing.

Q. Okay.

A. Or the 23rd, sorry, the 23rd.

Q. Okay, so, okay, so, and did you go back to Halifax the following day or did you stay around, or that day after when we finished the 23rd?

A. I think I flew home the next morning.

Q. Okay, alright, so can you just tell me how it came about with the barge, it had snapped its ropes?

A. Sure, yeah, there was a storm that happened and Marbase called the Monitor to advise that certain of the moorings had, had become unfastened due to recent bad weather. The Monitor attended on site immediately to assess the situation with Marbase staff and arrangements were made with Marbase to re-secure the barge as soon as possible, subject to weather and availability. That work to re-secure the barge was completed on February 26th without incident.
Q. So it took ...
A. It's all outlined in the ...
Q. So it ...
A. ... in paragraph nine.
Q. Okay, so it took a couple of days to have it all re-secured, is that correct?
A. That's correct.
Q. Okay, what time of the day was the, was it noticed that the, that the moorings had snapped and some of the moorings had



become untied because of the weather, you say?
A. I think it was around 5:00 p.m..
Q. 5:00 p.m. on the 24th?
A. Yeah, around the early evening the call went to the Monitor, the Monitor went down right away.
Q. Okay, bear with me for a second, give me a moment.
A. Just to be clear, it wasn't me that went down, it was somebody else from Grant Thornton.
Q. Okay, so it was somebody else from Grant Thornton that went down then?
A. Yeah.
Q. That's what I was trying to figure out.
A. Yeah, sorry, yeah.
Q. And that would have been, they would have arrived at 5:00 p.m. or something, or they left at 5:00 p.m.?
A. Well, the call would have came in around suppertime, my understanding is the call



came in to the Monitor around suppertime on the ...
Q. On the 24th?
A. ... on the 24th, and then the Monitor had people in St. Lawrence at the time so they would have went immediately to Marbase to investigate the situation.
Q. Okay, alright, and now, my understanding is that the way that that barge is moored out there that there are a number of lashings and ropes tied on to keep that vessel from, I keep calling it a vessel, to keep that barge from moving, that's correct?
A. Yeah, that's correct.
Q. And some of those ropes are quite thick.
A. Correct.
Q. Okay.
A. Yeah.
Q. Now, some of those ropes had snapped, do you know why they snapped, some of those?
A. No, they didn't snap, they became unsecured.



Q. Okay, in some of the ... didn't you have to get new rope because some of them had been chafed?
A. I don't know the particulars, I just know that we attended right away to the facility and that the barge was re-secured. We worked, the Monitor engaged with Marbase to re-secure the barge as soon as possible.
Q. Okay, because I'm just looking at here now, and I'll start right from the beginning there at paragraph nine, "With respect to paragraph nine of the Spellacy Affidavit, Spellacy's understanding is factually inaccurate. The Monitor states that February 24, Marbase advised CFI that the barge had become unfastened from the rope due to recent bad weather in Marystown", so that's one thing, that it became unfastened, "and that various rope moorings", or "various ropes mooring the barge had snapped."
A. That is correct, that is correct, some came unmoored and I guess some snapped.

Q. Okay.
A. That's my understanding.
Q. Now, do you know the ropes that moored the vessel snapped?
A. It would have, my understanding is there was storm, the way the wind was blowing up the harbour in a particular direction, you know, the barge became unfastened, unmoored from the pier, that's what I know, that's what I've been advised.
Q. So you really don't know why it would have happened?
A. Yeah, I haven't, we haven't investigated why ropes would have unfastened or snapped during that particular event.
Q. You didn't do that, okay, okay. When the inspections were done of the barge was there anything recorded about inspecting the moorings or inspecting the ropes?
A. The visual inspections done by CFI were visual. You know, Marbase management



would see the barge every day, the Marbase folks would see the barge every day.
Q. So did you, do you know whether or not that Marbase actually went down on a daily basis or weekly basis, whatever, to inspect the ropes to that barge that was tying it to the wharf?
A. I'm not aware of them inspecting the ropes but they see them every day, the office is right in front of the barge.
Q. Okay, and do you know whether or not that they would have reported to CFI or to the Monitor whether or not some of the ropes were chafing?
A. My experience with Marbase is they report anything they're concerned about to the Monitor when they're concerned about it.
Q. Yeah, but the question is, did they, did they report to you that they had a concern about chafing of the ropes?
A. They did not have any, raise any concerns with the mooring of the barge.



Q. Yeah, and do you know where those ropes are now that snapped?
A. I do not know, no.
Q. They could be discarded, do you ... or ...
A. I don't know where they are.
Q. Okay, can you find out from CFI if ... it was CFI who did the work, I take it, on getting that retied and getting ... because there had to be new rope obtained, I understand, isn't that correct?
A. Marbase ... so we retained Marbase to re, to re-moor the barge.
Q. Okay, alright.
A. Yeah.
Q. So would you be able to find out from Marbase, and if necessary, if they don't know, probably CFI, what happened to the ropes that were snapped?
A. I can make the inquiry, yeah, no problem.
Q. You know, as to whether or not they were thrown away or if they are still kept around?
A. Yeah, I don't know but I'll make the inquiry.



Q. Okay, alright, because I may go down there and if they have the ropes I'd like to be able to have a look at them. When you got appointed as Monitor did the Monitor cause a survey, a maritime survey or a marine survey, I should say, of the barge to be conducted?
A. We did not, no.
Q. Okay, do you, are you aware whether anybody from the Monitor, or CFI, or even Marbase have been down below in the barge?
A. That's a good question, in which timeframe?
Q. Any time since, since you took over as ...
A. So since the appointment of the Monitor, or since the insolvency proceeding I'm not aware of anybody going into the barge.
Q. Okay.
A. But before the insolvency proceeding, you know, I don't know, I could investigate.
Q. That wouldn't involve you, would it?
A. No, no.
Q. No, so I'm not interested, yeah.

A. Yeah.
Q. So are you, do you know whether since your appointment whether or not the engines on that barge have been started?
A. They would not have been started, no.
Q. Okay, and what about the generators, would they have been started?
A. That I don't, I don't know, I just don't know the answer to that question.
Q. Okay.
A. (Inaudible) investigate the specifics.
Q. Trust me, I'm almost finished.
A. That's alright, I was going to ask, I have another appointment in 30 minutes.
Q. Okay, well I will make sure you are at your appointment. Have you seen a log for the barge itself?
A. I personally have not seen a log for the barge.
Q. Okay, do you know if anybody has ... has the issue of the log for the barge been raised at any of the meetings or with you?



A. I've never, the log for the barge has never been raised with me.
Q. Okay, do you know roughly how much it costs on that, after the moorings came loose and the ropes snapped, how much it cost to reposition, I guess, or re-settle the barge?
A. To re-moor the barge?
Q. To re-moor the barge, there you go, that's a good word.
A. Yeah, re-moor. I don't but I can get, if you put that information in a request I can get that.
Q. Okay.
A. At some point Marbase will bill us for that cost.
Q. I'm sure they will, yeah, okay, if you can do that, that would be great.
A. Yeah.
Q. Do you know if any of the ropes became unfastened on the 23rd of February?
A. I wasn't there so I can only ... what's in (inaudible) ...



Q. Yeah, to what the Monitor would know, or was reported to them, to the Monitor?
A. So what's in paragraph nine is what was reported to the Monitor.
Q. Okay.
A. I don't have specifics on that, I have ... I'm sure we can find out which ropes and what, I could make that inquiry but I don't have, I'm not aware of that detailed information.
Q. Okay.
A. I would just point to paragraph nine.
Q. Okay, thank you. If I can ask you to turn to paragraph 10 (e)?
A. Yes.
Q. Okay, you started off saying, "Out of an abundance of caution", and then you go on to say that, "the Monitor directed a CFI representative to attend Marbase on March 3".
A. Correct.
Q. Why was it out of an abundance of caution?



A. Well, there was an allegation that there was something wrong with the barge in the Spellacy Affidavit so, you know, it's always good and prudent to just go back and check to be sure, so out of an abundance of caution we, the Monitor had somebody from CFI go to Marbase and physically inspect the barge and just confirm that it's still in the same condition that it was.
Q. Okay, and still had the list?
A. It was in the same condition it's been since May, yeah, no change.
Q. The list itself.
A. Yeah, the list is still there, it's still small.
Q. Okay.
A. And Marbase reconfirmed they're not concerned with the list.
Q. Yeah, I just want to go to ... this is on your Affidavit of the 22nd of February, this would be the one that you filed, the first one, not the Supplementary one, the one you would have filed in response to our motion, okay?

A. Correct.
Q. Okay.
A. Yeah.
Q. So you state there, you said, "Counsel for IMSL", that would be, I guess, Inaminka, "appeared at the hearing on February 21 and did not object to the extension of the stay."
A. Which paragraph is that, Deborah, sorry?
Q. Oh, did I say ten? Sorry, 12, I meant to say, my apology, my apology, I was looking at ten but I ... yeah.
A. Yeah, I'm with you.
Q. Okay, so, and you heard, you could hear what was going on in court at that time?
A. Correct.
Q. Okay, so isn't it true that what was said to the Judge by the solicitor is that Inaminka takes no position?
MR. SPENCER: Isn't this semantics, Debbie, I mean, you know, Phil made the statement in his Affidavit that counsel did not object to the extension of the stay.



MS. HUTCHINGS, K.C.: Yeah, but the way that it's, it's ...
MR. SPENCER: I think your question is, I think your question is argumentative. I think if you want to make that submission in court you're free to do so but he made a statement and the statement stands, I think.
MS. HUTCHINGS, K.C.: Well, can I also act *(sic)* whether or not, or ask whether or not the ... well, I think it's a fair question because if you're putting that there for a judge to see and it's not clarified as to what really took place, the judge is going to say, well she must have had, she must have said that they would, we're not going to object to the stay.
MR. CLARKE: You didn't object to the stay, that's my statement, that's the answer to the question.
Q. Okay.
A. You did not object, Inaminka did not object to the extension of the stay.



Q. Did Inaminka, did Inaminka consent to the stay?
A. I'll stick with my answer as outlined in paragraph 12, Inaminka did not object to the extension.
Q. So you're not, so what's your, what's your position when I say that the solicitor, who was myself, of course, stated to the court that Inaminka takes no position when it asks does Inaminka consent or object to the stay.
MR. SPENCER: That's really not for him to say, is it? I mean that's ...
MR. CLARKE: Yeah, that's your statement, not mine, so I can't answer to what you said in court.
MS. HUTCHINGS, K.C.: But you said, you've got it down there very clearly what happened.
MR. CLARKE: Yeah, you did not object, that's the ...
MS. HUTCHINGS, K.C.: I'm asking you, I asked you as well, did Inaminka agree with the, with the stay continuing.



MR. SPENCER: That's not for him to answer whether, what ... I mean ...
MS. HUTCHINGS, K.C.: He was there ...
MR. SPENCER: ... he made a statement that you did not object to the stay.
MS. HUTCHINGS, K.C.: Okay, I'm going to ask ... alright, I will ... are you objecting to him answering that question?
MR. SPENCER: I'm objecting to him trying to say what Inaminka intended. He made a statement that Inaminka did not object to the stay.
MS. HUTCHINGS, K.C.: I didn't say what Inaminka intended, I did not ask him what, does he know what Inaminka intended, he doesn't know that, but he knows, he was there, he could hear, he could hear enough for him to put in a sworn statement that Inaminka did not object.
MR. CLARKE: That's correct, and that is factually accurate.
Q. So you're saying that's factually correct?

A. That's correct, you did not raise an objection to ...
Q. So are you denying then that Inaminka, Inaminka's response to the Judge, do you consent or object to the stay continuing, are you objecting that Inaminka ...
A. Deborah, I don't have an answer to that question, I'm going to stick with ...
Q. I put it to you that you don't want to answer the question.
A. That's inaccurate, I don't recollect exactly what you said, your position in the court ...
Q. You don't recollect, well that ...
A. ... I don't know exactly what words you said to the judge, I can't remember them, but you did not object to the stay of proceedings, and that would be in the court transcript, whatever was said.
Q. So I specifically said, we do not object to the extension?
A. Well, that's what's in my Affidavit.
Q. Is that what you're saying?



A. I do not know what you specifically said.
Q. Thank you.
A. Your position to the ...
Q. Thank you very much.
A. ... court was that you did not object.
Q. That's all I need. Alright, we're almost done. With respect to the consultation that was provided by Inaminka to CFI respecting the barge, are the chains and anchors still available with the sale of the assets?
A. I don't know the answer to that question but if you pose it in writing I could get a response for you.
Q. Do you know what I'm saying about the chains and anchors?
A. I do not know the specifics of that question but if you put it in writing I could get an answer for you.
Q. Can I just go off for a couple of minutes, I want to talk to ... this is where we get to the end, I want to have a chat with Dick about



this before we close off ... is that okay, just about, probably about a minute?
A. I don't have any issue.
Q. Are you okay with that, and then we probably would break then for the, or finish, I should say.
A. Will, you're on mute.
MR. CAHILL: I guess just to clarify, I may have a couple of questions in re-examination, I assume that that's permitted in ... this is a cross-examination so I will keep my ... I think I have two questions so it won't take more than two minutes. I don't think she's listening to me but ...
MR. CLARKE: No, and I don't know what that means so, go for it.
MS. HUTCHINGS, K.C.: Yeah, I heard everything, nicely done. I would keep that on the record please, David? Anyway ...
MR. CAHILL: Just to clarify, I'm not sure what you mean by "nicely done", sorry, can you clarify what's ... we went off the record, and I



tried to speak to you before that but it didn't, you went on mute.
MS. HUTCHINGS, K.C.: Okay, I'm not under cross-examination, Will.
MR. CAHILL: I fully understand that, as a solicitor I understand.
MS. HUTCHINGS, K.C.: Okay, so I'm finished my cross-examination. Phil, I thank you very, very much for enduring the past two hours and a bit, and I appreciate your time and I know that you're a very, very busy guy, and I wish you a good weekend.
MR. CLARKE: Yeah, no, thanks, Deborah, any time, and if ...
MS. HUTCHINGS, K.C.: Okay.
MR. CLARKE: ... if you have any further questions just send them to the Monitor's ...
MS. HUTCHINGS, K.C.: Alright, great.

**MR. P. PHILIP CLARKE, RE-X'D BY MR. CAHILL**

MR. CAHILL: Alright, so I do have a couple of questions in, I guess, re-direct or ...

MS. HUTCHINGS, K.C.: I don't think there's re-direct under the Rules, I think there's just cross-examination.

MR. SPENCER: Well, it would be, it certainly would be common if a party wanted to ask a question of clarification, that's normally, that's normally part of it.

MS. HUTCHINGS, K.C.: Guys, come on now, we all know the Rules of the Federal Court, and I refreshed my memory of them yesterday, and I don't see anything there on an affidavit, a cross-examination, for re-direct. All that you have available to you is, is replying to something that ... in writing, that's all you've got available to you.

MR. CAHILL: I don't believe that's true, I think it's, this is a cross-examination under oath, I would expect ... I have two questions, if you want to object to the questions we can bring that before the court. They're very minor and



I don't know if anything really turns on them but I think that to say that there's no right of, for counsel to re-examine after cross-examination ...

MS. HUTCHINGS, K.C.: Can you point out the rule to me?

MR. CAHILL: Can you point out the rule where it says that it's not permitted? I haven't researched case law, I do see Federal Court cases where ...

MS. HUTCHINGS, K.C.: Yeah, it's not mentioned, so if it's not mentioned ... I didn't see it. What are the questions, Will?

MR. CAHILL: You know what, I'm okay, I think this is on the record, I would hope, and if it becomes an issue later we can discuss it, but the questions are not material enough for me to, to go to bat over them. I think that what you've asked has been answered and I guess I'll retain the right if need be in the future to re-examine him, and at the consent of the court then I'll do that.



MS. HUTCHINGS, K.C.: Sure, yeah, so we're finished? Are we finished?

MR. CAHILL: Yes.

MS. HUTCHINGS, K.C.: Okay, yes, okay, alright, thank you, gentlemen.

*(hearing adjourned)*

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***This list is intended as a guide only***
***Please refer to the transcript for request details***

## Table of Requests

| REQ # | Agreed to by: | Description | Page | ✓ |
|---|---|---|---|---|
| 1 | Mr. Spencer | Copy of moorage contract with Marbase. | 20 | |
| 2 | “ | Is there information in the data room concerning Inaminka consulting services. | 48 | |
| 3 | “ | To inquire what happened to the ropes that were replaced due to the damage done during bad weather. | 87 | |
| 4 | “ | Advise how much it cost to replace the moorings and have the barge re-moored at Marbase. | 90 | |

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I hereby certify that the foregoing pages of printed matter, numbered 1 to 103, are a true and accurate transcript of the proceedings recorded by a sound recording device and has been transcribed by me to the best of my knowledge and ability.

R. Elxy

Transcriber

**TRANSCRIBER'S NOTE**

The notation ... seen throughout this transcript DOES NOT indicate missing or omitted evidence. It is merely used to indicate pauses, changes in questions/answers/thought, etcetera, by the speaker involved.

## Appendix R

Order and Reasons - April 20, 2023

Federal Court Cour fédérale

**Date: 20230420**

**Docket: T-279-22**

**Citation: 2023 FC 574**

**Ottawa, Ontario, April 20, 2023**

**PRESENT: The Honourable Mr. Justice Zinn**

**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED,**
**a body corporate**

**Plaintiff**

**and**

**CANADA FLUORSPAR (NL) INC,**
**a body corporate**

**Defendants**
(*In personam*)

**and**

**THE OWNERS AND ALL OTHERS**
**INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
(*In Rem*)

**ORDER AND REASONS**

[1] This is an action by Inaminka Marine Services Limited [IMS] *in personam* against Canada Fluorspar (NL) Inc. [CFI] and *in rem* against the Ship "Barge H-404" [the Barge]. IMS claims amounts owing for services alleged to have been provided to these Defendants.

[2] CFI moved, pursuant to 50(1) of the *Federal Courts Act*, RSC 1985, c F-7 [Act], for an Order staying IMS's action and, under Rule 488 of the *Federal Courts Rules*, SOR/98-106 [Rules], releasing the Barge from arrest. That motion was in the context of proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA] in the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency [the Bankruptcy Court] arising out of the insolvency of CFI, in which the Bankruptcy Court has issued a stay of proceedings against CFI.

[3] Justice Southcott, by Order dated October 5, 2022, granted the requested relief: *Inaminka Marine Services Limited v Canada Fluorspar (NL) Inc.*, 2022 FC 1375. His Order [the Stay Order] reads in relevant part, as follows:

> 1. The Plaintiff's action is stayed, effective until October 17, 2022, or any later date to which the stay issued by the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency may be extended.
>
> 2. The Plaintiff shall have leave to apply to have the stay of its action lifted at an earlier time in the event of any material change in circumstances.
>
> 3. The Defendant Ship is released from arrest.

[4] Before the Court is a motion by IMS to have the stay of its action lifted and reinstating the Order arresting the Barge.

[5] The material facts are not in dispute and those prior to September 28, 2022, are recited fully in the reasons of Justice Southcott. The following is a brief summary of the facts prior to the Stay Order and those since the Stay Order that are relied on by IMS.

[6] CFI operates a fluorspar mine in St. Lawrence, Newfoundland and Labrador. CFI is the owner of the Barge and obtained it to facilitate the loading of fluorspar from the mine to cargo ships at its loading pier at the Blue Beach Terminal.

[7] In this action, IMS claims for consultation and design services that allowed the safe and effective utilization of the Barge by CFI in inclement weather. The cost of these services remain owing by CFI.

[8] IMS commenced its action against CFI on February 16, 2022. IMS obtained a Warrant for the arrest of the Barge, which was effected on February 18, 2022 [the Arrest].

[9] Pursuant to an order dated February 22, 2022 [the Interim Receivership Order], Grant Thornton Limited [GTL] was appointed interim receiver [Monitor] of all of the current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, save and except for the Excluded Property (as defined therein) of Canada Fluorspar Inc. and CFI.

[10] The Interim Receivership Order stated that no proceeding against or in respect of CFI was to be commenced or continued except with the written consent of the Monitor or leave from

the SCNL and that any and all proceedings underway against or in respect of CFI, were stayed pending further order of the SCNL.

[11] Pursuant to an initial order dated March 11, 2022, which was subsequently amended and restated on March 18, 2022 [the CCAA Order], the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency [Bankruptcy Court] appointed GTL as the Monitor for Canada Fluorspar Inc., CFI and Newspar (a General Partnership) pursuant to the CCAA.

[12] The CCAA Order stayed all proceedings against CFI or its property until July 10, 2022. The Bankruptcy Court stated that CFI and the Monitor were at liberty and authorized and empowered to apply to any court, tribunal, regulatory or administrative body for the recognition of the CCAA Order and for assistance in carrying out the CCAA Order.

[13] Pursuant to an order dated March 18, 2022, the Bankruptcy Court approved a Sale and Investment Solicitation Process [SSIP] of CFI assets.

[14] The Monitor received multiple bids on CFI's assets. The Monitor made a recommendation on the bids received. The Debtor-in-Possession [DIP] lenders agreed with the Monitor's recommendation and the successful bidder [the Initial Successful Bidder] was notified on August 18, 2022.

[15] The Stay Order of Justice Southcott stayed IMS's action until October 17, 2022 or any later date to which the stay issued by the Bankruptcy Court was extended, subject to the right to seek leave to lift the stay in the event of any material change in circumstances.

[16] The Initial Successful Bidder failed to top up the agreed upon deposit as required by the SSIP and therefore failed to meet the deadline requirement of the SSIP. As a result, the agreement was terminated.

[17] As of January 26, 2023, CFI claims that the DIP lenders have approved a new successful bidder [New Successful Bidder] and the Monitor entered into a binding letter of intent with the New Successful Bidder on February 13, 2023.

[18] Pursuant to an order dated February 21, 2023, the Bankruptcy Court extended the stay of proceedings against CFI to May 31, 2023.

[19] In addressing the motion before the Court to lift the stay, the Court must first determine whether there has been a material change in circumstances since the Stay Order issued. If there has been a material change in the circumstances, then the Court must determine if it should exercise its discretion to lift the stay.

[20] It is agreed that when determining whether there has been a material change in the circumstances, the Court is to be guided by the Supreme Court of Canada judgment in *LMP v LS*, 2011 SCC 64 [*LMP*]. There it was held that if there is a change, which if known at the time,

would likely have resulted in different terms to the order, then that is a material change in circumstances. The onus is on the party seeking a variation to establish such a change: see *LMP* at paras 31-33.

[21] IMS submits that individually or collectively, the following constitutes a material change in circumstances: (1) the sale to the Initial Successful Bidder which was before the Court when the Stay Order issued, subsequently failed, (2) distributing the assets through a Reverse Vesting Order [RVO] rather than the direct sale of the assets as initially contemplated when the Stay Order issued, and (3) the lack of maintenance to the Barge, diminishing its value since the issuance of the Stay Order.

*Failure of Sale to Initial Bidder*

[22] IMS submits that the failure of the sale of CFI assets to the Initial Successful Bidder is a material change. It submits that this failure may result in the CCAA proceeding reverting to proceedings under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA]. Under the BIA proceeding, it submits that it risks losing its priority claim and therefore, not being paid.

[23] CFI submits that given the New Successful Bidder, the recovery potential for creditors has not changed because of the default of the Initial Successful Bidder. It submits that even if the Initial Successful Bidder had completed that transaction, the unsecured creditors would not have recovered anything and other creditors with possible priority claims, such as the maritime lien claimed by IMS, would be addressed through the application for distribution process.

[24] I agree with CFI. The failure of the sale to the Initial Successful Bidder is not a material change in the circumstances. I understand the concern of IMS that the proceeding may revert to a BIA proceeding and that under the BIA there may not be sufficient funds to pay IMS. However, IMS has not provided sufficient evidence to demonstrate that the CCAA proceeding will revert to the BIA proceeding. It is at best a hypothetical. Given the New Successful Bidder, CFI's submission that this is the best offer, and there being no indication that this new sale is likely to fail, IMS is in a similar position to that when Justice Southcott rendered the Stay Order. The change in sale from the Initial Successful Bidder to the New Successful Bidder is not a material change in the circumstances.

*Reverse Vesting Order*

[25] IMS submits that selling the CFI assets through a RVO structure is a material change in the circumstances. The Respondent explains that the RVO structure of the "proposed transaction involves the vesting out of certain of the CFI liabilities and excluded assets to ResidualCo."

[26] IMF submits that "the Monitor made it clear that none of the creditors of the Companies would receive payment pursuant to the RVO" and that "IMS will have no opportunity under a RVO to present to the SCNL that it has a maritime lien and priority position against the Barge and the sale proceeds thereof."

[27] I am unable to accept this submission. First, the Monitor did not make it clear that the creditors would not receive payment pursuant to the RVO, the Monitor stated that unsecured creditors would receive nothing and that the secured creditors would suffer a substantial loss.

This does not translate to none of the creditors receiving payment pursuant to the RVO. It does not appear to the Court to be any different a situation vis-à-vis IMS than had the Initial Successful Bidder agreement been completed.

[28] Second, the Monitor considered the possibility of other creditors with possible priority claims. He stated that creditors with priority claims "will have an opportunity to advance a priority claim through the application for distribution process." This contemplates IMS's position that they have a priority claim against the Barge and the sale proceeds thereof, and allows it to make an application to the Bankruptcy Court to assert its claim in the CCAA proceeding.

[29] IMS also says that the Monitor has not fully explained how the RVO structure will not result in any material prejudice to the creditors nor how it will not impair any of the creditors' rights they had under the original asset sale. Therefore, it says, IMS will be prejudiced by this new arrangement as the Barge will be sold to a different entity. IMS submits that if the new third-party purchaser sold the Barge to another third-party buyer or removed the Barge from the jurisdiction, then IMS would have a very difficult time establishing its position to the Bankruptcy Court of being a secured creditor of CFI and holding a maritime lien.

[30] I find this latter point to be mere speculation. Speculation of what the purchaser may or may not do with the Barge is insufficient to constitute a material change warranting the lifting of the Stay Order.

[31] I am also not convinced by its first point, that because the Monitor has "not fully explained" that the RVO structure will not result in any material prejudice to the creditors nor impact their rights, IMS will therefore be materially prejudiced. Simply stating that the Monitor has not fully explained the RVO structure amounts to material prejudice is not sufficient. The onus is on IMS to demonstrate how the lack of a full explanation amounts to a material prejudice to them. It has not done so.

[32] In any event, I am not convinced that IMS will be worse off under the RVO structure than what was contemplated prior to the issuance of the Stay Order.

[33] For this Court to determine that IMS will be worse off under the RVO structure compared to other viable alternatives requires the Court to assess whether the RVO is appropriate under the present circumstances. Without a careful consideration of the RVO and viable alternatives, the Court is not in a position to make that decision. Since this consideration of the RVO and viable alternatives is to be determined by the Bankruptcy Court, I cannot conclude that selling the CFI assets by the RVO structure is a material change.

*Diminution of the Value of the Barge*

[34] IMS purports to have demonstrated that the Barge is losing value and that the Monitor is not taking care of it. IMS has not provided evidence that shows the Barge is losing value, a picture of a list attached to the affidavit in support of this motion is not sufficient.

[35] During the cross-examination of the Monitor, he stated that he was aware of the list identified in the affidavit since May 2022 and found it not to be of concern. The Monitor asserts that there has been a weekly check of the Barge since the list was first discovered in May 2022.

[36] IMS asserting that the Barge has not been "moved, used, maintained nor its engines started" since at least January 2022 and therefore, the Barge is deteriorating and losing market value is insufficient to demonstrate that the Barge is actually losing value. Mere assertions without evidence are insufficient to find a material change in circumstances.

[37] Moreover, the onus is on IMS to demonstrate that the diminishing value is a material change from the Stay Order. The only evidence that IMS has provided are pictures of a list, a list that CFI claims to have been aware of since May 2022, months prior to the Stay Order. I cannot make a determination on the diminishing value of the Barge being a material change because, based on the evidence, I am unable to determine whether the list that IMS has noted developed prior to or after the Stay Order. And even if I could determine that the list developed after the Stay Order, there is insufficient evidence to determine that the list has resulted in a loss of value that amounts to a material change.

**Conclusion**

[38] For these reasons, this motion must be dismissed. The parties agreed that the successful party would be awarded costs of $5,000.00.

[39] At the hearing, Mr. Spellacy expressed some frustration with the Court process and the delay in recovery his unpaid claim. I understand that he thinks that he would be in a better position had the Federal Court action proceeded and his maritime lien been established. The reality however, is that the owner of the Barge, the sale of which he wishes to realize his debt, is in bankruptcy. That has affected his ability to pursue his claims in this Court. Regrettably, the fact of bankruptcy affects all creditors, secured or not.

**ORDER in T-279-22**

**THIS COURT ORDERS that** the motion is dismissed, and the Plaintiff shall pay the Defendant, Canada Fluorspar (NL) Inc., costs of this motion in the all-inclusive amount of $5,000.00.

"Russel W. Zinn"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-279-22 |
| **STYLE OF CAUSE:** | INAMINKA MARINE SERVICES LIMITED, a body corporate v CANADA FLUORSPAR (NL) INC, a body corporate AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404" |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | MARCH 21, 2023 |
| **ORDER AND REASONS:** | ZINN J. |
| **DATED:** | APRIL 20, 2023 |

**APPEARANCES:**

| | |
|---|---|
| Deborah L.J. Hutchings, K.C. | FOR THE PLAINTIFF |
| William T. Cahill | FOR THE DEFENDANTS, CANADA FLUORSPAR (NL) INC, a body corporate |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| MacNab, Fagan & Murphy<br>Barristers and Solicitors<br>St. John's, Newfoundland and Labrador | FOR THE PLAINTIFF |
| Cox & Palmer<br>Barristers and Solicitors<br>St. John's, Newfoundland and Labrador | FOR THE DEFENDANTS, CANADA FLUORSPAR (NL) INC, a body corporate |

## Appendix S

Memorandum from Inaminka Marine Services Limited and Richard A. Spellacy

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October 17, 2023

**WITHOUT PREJUDICE**

By Email: Geoffrey.spencer@mcinnescooper.com

McInnes Cooper
5th Floor, Baine Johnston Centre
P.O. Box 5939
10 Fort William Place
St. John's, NL A1C 5X4

Attention: Mr. Geoffrey L. Spencer

Dear Sir:

**Re: Our Client – Inaminka Marine Services Limited ("Inaminka")**
**Memorandum of the Claims of Inaminka and of Richard A. Spellacy, as Master Mariner**

This letter is further to our clients' Memorandum, dated July 21, 2023, respecting the secured, priority claim of Inaminka Marine Services Limited ("**Inaminka**") and Richard A. Spellacy ("**Spellacy**"), Master Mariner, (the "**Memorandum**"), pursuant to Canadian Maritime Law.

The intent of this correspondence is to lay out an overview of the law which supports our clients' respective positions that they have priority claims over funds from the sale of the subject barge, being Barge H-404 (the "**Barge**"), and pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**").

The detailed facts are contained in the Memorandum, and while we do not intend to recite the same herein, we will provide a brief review of the salient facts which supports our clients' respective claims.

Facts

Inaminka is a corporation duly incorporated under the laws of Newfoundland and Labrador, and is owned and operated by its principal, Spellacy.

Canada Fluorspar (NL) Inc. ("**CFI**") obtained the Barge to use at its mine site at or near the Town of St. Lawrence, namely the Blue Beach Terminal (the "**Terminal**") to facilitate the loading of fluorspar onto ships carrying the cargo to CFI's customers. The Barge was to enable ships to dock at the Terminal to take on the cargo of fluorspar. Without the use of the Barge, the fluorspar would have to be trucked to awaiting cargo ships at a marine terminal at Spanish Room, near Marystown, NL, at a considerable expense to CFI. The use of the Barge at the Terminal would make the mining and marketing of the fluorspar at St. Lawrence a viable venture.

During inclement weather, the Terminal and the Barge were exposed to high winds and seas and, as a consequence, the Barge could not be used in its then present state. In fact, CFI had to engage tugs to move the Barge to safety before impending storms approached the area. This, too, was costly for CFI.

CFI sought the advice, consultation and services of Inaminka and Spellacy (the "**Services**"). The Services supplied by Inaminka included, but was not limited to, consultation to CFI on the manner in which the Barge could be moved to safety from approaching inclement weather without the need for tugs; designing a system or process which would allow CFI to move the Barge on and off the loading piers at the Terminal; designing a set of storm moorings to facilitate the stability and movement of the Barge when relocated from the loading piers during inclement weather; source all contractors to manufacture the various components of the mechanism which would move the Barge and to install such components, respectively; and drafting a budget and timeline for the completion of the process described herein.

It is Inaminka's position that the Services were to make it possible for CFI to use the Barge at the Terminal and, in turn, to run the mine commercially more efficient by reducing the considerable costs, as noted above. The Services also included consultation on eliminating the need of moving the Barge, by way of tugs, away from the loading pier at the Terminal when inclement weather was approaching; engaging costly tugs to move the Barge; and engaging trucks to transport the fluorspar over land to awaiting cargo ships at Spanish Room, aforesaid.

The Services provided a mechanism whereby the Barge could be removed from the loading pier and stored safely on storm moorings during stormy weather. The Services were necessary for the utilization of the Barge, thus, making the mine a more commercially efficient operation for CFI. The Services were necessary to provide safe and effective storage for the Barge during inclement weather, thereby protecting it from damage.

Description of the Services Completed by the Claimants For and on Behalf of CFI and the Barge

In October 2021, Inaminka was contacted by CFI to assist it in resolving the difficulties surrounding the condition and usage of the Barge at the Terminal. During the initial meetings, it was learned by Inaminka that CFI had imported the Barge to function as a loading facility at the Terminal.

The initial meeting between Inaminka and CFI at the Terminal revealed that CFI had actually conducted a small number of cargo movements during the late spring and summer months of 2021; but during periods of adverse weather, CFI learned that it was impossible to leave the Barge alongside the loading pier at the Terminal as the prevailing winds and swell produced adverse movement of the Barge alongside the loading pier, culminating in significant damage to the Barge's starboard side making it impossible for CFI to leave the Barge in situ after cargo operations were completed.

Inaminka was, therefore, asked by CFI to:

1. Assess the condition of the Barge, both externally and internally, to ensure that the existing structure was sufficient to continue its use as planned. To accomplish this, it was agreed by all parties that a physical inspection, both internal and external of the Barge, where she was then moored in Marystown, was necessary. As this inspection meant entry into confined spaces (being the tanks), it was decided that a local inspection company be retained to perform the inspection of the internals while Inaminka made an assessment of the externals. Inspecting the internals was a complex procedure as the protocol for confined space entry meant that the tanks to be investigated had to be ventilated, both before and during the inspection; two people were required to be at the tank's entry manhole at all times, with one person suited up with breathing apparatus at hand in case a rescue was needed, and the second person manning the winch in case a recovery was necessary. At the same time, CFI, comprising Spellacy and Inaminka's naval architect, Mr. Anthony Barclay, conducted a physical assessment of the Barge's external structure, its fixtures and fittings on the deck and a preliminary inspection of the Barge's machinery spaces.

2. Once the tasks in #1 were completed, the following documents, which were

provided in the Memorandum, were presented to CFI management:

(i) Report of the internal inspection.
(ii) Repair options.
(iii) Repair cost estimates.
(iv) Preliminary mooring plan for year-round operations.
(v) Modifications to the Barge necessary to achieve the mooring plans specified in (iv) above, including the equipment that had to be fitted to the Barge to achieve the foregoing.
(vi) Detailed designs of deck strengthening necessary to accommodate the two new tugger winches that would be required to place the Barge on and off the storm moorings.
(vii) Detailed list of the cost and location of the equipment necessary to achieve the storm moorings.
(viii) The Barge has some 3,000 tonnes of untreated ballast water on board and an assessment of the proposed treatment plan was also completed as part of this process.
(ix) On December 15, 2021, another visit was made to the Barge to ascertain the veracity of all the foregoing plans and to initiate the ballast transfer plan.
(x) At the December 15, 2021 meeting, Spellacy was appointed master of the Barge and, as such, supervised the transfer of the ballast, as was required by Transport Canada. This appointment was never rescinded and as a matter of course Captain Spellacy then continued to function as the Barge master during the period up to and including January 31, 2022, reporting directly to CFI as needed. From January 31, 2022, there was no structured management from CFI of the work or Services performed by Inaminka; however, Spellacy continued to act as master of the Barge for the month of February, 2022; thereafter, Spellacy maintained contact with the Receiver while away on another job during March, 2022, and for the month of April and most of May, 2022, he attempted to locate alternative moorings for the Barge and facilitated a potential sale of the Barge by putting the potential purchaser in touch with the Monitor; thereafter, Spellacy maintained contact with the purchaser to ensure that all the conditions required by each party were met. Subsequent to that, contact was maintained with the Monitor and occasionally with the mine Manager.

3. Once all of the above had been submitted and approved, Inaminka worked with CFI management to compile a detailed plan, schedule and cost of the process. This was a quite complex document (attached to Memorandum) comprising as it did the engagement of a high powered anchor handling vessel to lay the mooring, to locate and cost the anchors and chains, as well as two new tugger winches, in addition to various shackles, chains, buoys and pennant wires.

These activities were then supplemented with finalizing the location of the anchors and chains, the two extra winches, and review of a completed ballast plan as approved by Transport Canada.

Claims of Spellacy and Inaminka

Subsequent to the commencement of Inaminka's claim in the Federal Court and before the decision of Justice Southcott was rendered on October 5, 2022 dealing with the stay of proceedings, Spellacy filed on September 2, 2022 with the Federal Court a *Caveat Release* to assert his personal claim against the Barge (and proceeds from the sale thereof) for unpaid master's wages arising from work he performed as master of the Barge. The particulars of his work as master included the supervision and operation of the transfer of the ballast water and his sign off respecting the completion of the same as required by Transport Canada; and, through his particular knowledge of the Barge, itself, which he obtained through Inaminka's Services for CFI, as noted above, the consultation which he provided to the Monitor respecting potential purchaser(s) of the Barge and facilitating the Monitor's duty in assessing a stand-alone sale of the Barge. Spellacy, who is entitled to be paid for such work, was never paid.

Spellacy's work is related to the Barge and is pursuant to section 22(2)(o) of the *Federal Courts Act* ("**FCA**"), which states "any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his or her employment". This not only gives Spellacy a claim under Canadian maritime law, but gives him a maritime lien as against the Barge and the proceeds from its sale. (See *Canadian Imperial Bank of Commerce v. "Chene No. 1" (Le)* (2003), 229F.T.R.181)

Spellacy's claim for the work he performed is a martime lien and will be discussed further below.

Inaminka claims that the Services performed for CFI resulted in a maritime lien as security for its unpaid invoices. In understanding Inaminka's argument, the following points from the facts are noteworthy:

1. The Barge is a ship/vessel under Canadian maritime law and, unless a foreign ship, is required to be registered with Transport Canada. Pursuant to section 2 of the *Canada Shipping Act* (the "**CSA**"), ship/vessel "means a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to method or lack of propulsion, and includes such a vessel that is under construction."

2. The Barge, at all material times to this matter, was owned by CFI and is a foreign vessel, being "a vessel that is not a Canadian vessel or pleasure craft" (See section 2 of the CSA). At all material times to this matter, the Barge was registered in Panama.

3. At the time when Inaminka (and Spellacy) were retained to provide the Services, the owner of the Barge was CFI. At the time when Inaminka commenced its action against CFI and effected the arrest of the Barge, CFI was the owner of the Barge. At the time when Spellacy file his *Caveat Release,* the owner of the Barge was CFI.

4. Inaminka issued its Statement of Claim and effected the Warrant of Arrest before CFI was placed into bankruptcy under the Bankruptcy and Insolvency Act (the "**BIA**") and before the proceeding under the CCAA was commenced.

Inaminka claims that it has a maritime claim and an *in rem* action against CFI and the Barge by virtue of section 22(2)(m) of the FCA, being a claim for supplying necessaries to the Barge: "...any claim in respect of goods, materials or **services** wherever supplied to a ship for the operation or maintenance of the ship...".

Alternatively, Inaminka claims that it has a maritime claim and an *in rem* action against CFI and the Barge by virtue of section 22(2)(n) of the FCA, being a claim relating to the construction, repair or **equipping** of a ship: "...any claim arising out of a contract relating to the construction, repair or equipping of a ship..."

In respect of making out a claim for necessaries, it must be shown that at the time the action is commenced, the ship (Barge) is beneficially owned by the same person who was the beneficial owner at the time the cause of action arose and that the necessaries were supplied at the request of the owner or someone on the owner's behalf. Section 22(2)(m) also embraces the supply of goods, materials and services that may be **ancillary or complementary to the operation of the ship**. (See *Feoso Oil Ltd. v. "Sarla" (The)*, [1995] 3 F.C. 68 (C.A.); *Mount Royal/Walsh Inc. v. "Jensen Star" (The)*, [1990] 1 F.C. 199 (C.A.); *Kuhr v. "Friedrich Busse" (The)*, [1982] 2 F.C. 709 (T.D.)) Therefore, the Services which Inaminka provided to the Barge and CFI were necessary for the Barge to operate at the Terminal to facilitate the loading of fluorspar on cargo ships at the Terminal, and necessary to place the Barge on and off the storm moorings in the event of inclement weather. Without the Services of Inaminka, CFI could not operate the Barge at the Terminal as it was intended. CFI's costs in operating the mine would continue to escalate without the Services. It is known through the evidence of the Monitor in Inaminka's action before the Federal Court that the Services produced by Inaminka, which includes documents, information respecting the operation of the system and the sourcing of components and manufacturers of the components (the "**Property**"), were used by the Monitor to facilitate, bolster and support the sale of CFI, in general, and the Barge, in particular, and that such "property" created by Inaminka (for which it has not been paid) has been passed on or transferred to the purchaser for its use in its operation of the Barge.

In the alternative, Inaminka claims that its maritime claim arises as a result of section 22(2)(n), being a contract for the **repair and equipping of a ship,** the result of which creates an *in rem* claim against the Barge. It is obvious that the damage sustained by the Barge to its starboard side would have to be repaired. Prerequisite to any repairs, the damages had to be assessed and recommendations made respecting the carrying out of the repairs. Inaminka carried out that part of the Services. But, Inaminka also assessed the Barge and the area in which it was to operate, being at the Terminal, and gave CFI its recommendation as to what was needed to be done to the Barge and the Terminal area to ensure that the Barge would operate in the manner in which CFI intended. The placement of the storm mooring in the water just outside the Terminal, itself, does not derogate from the ultimate purpose of the storm moorings which were for the safe mooring (and operation) of the Barge during inclement weather. Equipment was needed to be sourced, for example the special winches, and installed on the Barge, itself. All of this was needed for the full and safe operation of the Barge, as CFI wanted and intended. (See *Wire Rope Industries of Can. (1966) Ltd. v B.C. Marine Shipbldrs. Ltd.* [1981] 1 S.C.R. 363; *Offshore Interiors Inc. Worldspan Marine Inc.* (2013), 444 F.T.R. 283)

Therefore, regardless of whether the Services come under the umbrella of "necessaries" or the umbrella of "repairs and/or equipping", Inaminka unequivocally has a maritime claim against CFI for its claim and an *in rem* claim against the Barge. Therefore, Inaminka has a maritime lien, which it asserted from the commencement of its action in the Federal Court.

Maritime Liens

There are various liens recognized in maritime law. The categories are traditional maritime liens, possessory liens and statutory liens. All can be, and should be, enforced by way of an action *in rem* which means that proceedings should generally be commenced in the Federal Court.

A traditional maritime lien, which is being claimed by Spellacy and Inaminka, respectively, is a lien unique to maritime law. It is a privileged claim, upon maritime property, such as a ship, that accrues from the moment the claim arises. It travels with the ship unconditionally, even into the hands of bona fide purchasers for value whether with or without notice. This is the maritime lien's defining characteristic. Of particular importance to this matter is that traditional maritime liens have a priority ranking above mortgages.

A maritime lien is enforced, as with other claims, by means of an action *in rem*. Traditional maritime lien claims for seaman's/master's wages, salvage, collision damage, Master's disbursements and bottomry. Also, a maritime lien, under Canadian law, can be enforced for a claim for necessaries and for a claim in contract for the repair or equipping a vessel.

The common law possessory lien, recognized under Canadian maritime law, requires continued uninterrupted possession of the *res* or thing, typically the ship, or it is lost. Possessory liens usually arise in the context of ship repairs and claims for freight.

Statutory liens are liens created by a validly enacted statute. They have the priority given to them by the statute that created them. There are many such liens, including the following:

- claims by the Master and crew for wages which rank in priority to all but marshall's costs and salvage claims (See CSA, 2001, s. 86(1) to (5));
- claims by the Master for disbursements which rank in priority to all but wage claims, marshall's costs and salvage claims (CSA, 2001, s. 86(2.1));
- claims by a carrier for any amounts due which must be perfected by notice and gives a right of sale (CSA, 2001, s. 248-9)); and
- claims in respect of goods, materials or services supplied to the foreign vessel and claims arising out of a contract for the repair or equipping of a foreign vessel by a person carrying on business in Canada which are given the status and priority of a "maritime lien". (MLA, s. 139).

It is important to note that liens that arise outside of Canada and have a status equivalent to a "maritime lien" under the foreign law applicable to the claim <u>are recognized by Canadian courts as traditional maritime liens and have the priority of a traditional maritime lien.</u> In other words, the law that determines the nature of the lien is the foreign law but the law applied in the ranking of the lien is Canadian law. But, as will be discussed below, the law in Canada developed further in 2009 in respect of recognizing necessaries as having maritime lien status.

The priority of claims against a ship are ranked generally as follows:

1. Marshall' Costs and expenses, being the costs and expenses of the sale of the ship;
2. Possessory liens that attach prior to a traditional maritime lien;
3. Maritime liens (traditional maritime liens and MLA, s. 139 claims)
4. Possessory liens that attach subsequent to a maritime lien;
5. Registered mortgages; and
6. Unregistered mortgages.

<u>Insolvency Law and Maritime Liens in Canada</u>

Insolvency law in Canada is set out primarily in two federal statutes, the BIA and the CCAA. Jurisdiction in insolvency matters is given to the superior courts of the provinces.

Liquidations are generally administered pursuant to the bankruptcy provisions of the BIA. Upon bankruptcy, there is an automatic stay of proceedings against the bankrupt. All of the assets of the bankrupt vest in a trustee in bankruptcy who is responsible for running

a claims process and for realizing upon the bankrupt's assets for distribution to creditors. However, it is a general principle of the BIA that the stay does not affect the rights of secured creditors, who can realize against secured assets including by taking foreclosure proceedings, seizing assets, or seeking the appointment of a receiver or receiver-manager either by way of court-appointment or through private appointment under a security agreement.

Restructurings are dealt with both by the BIA, under its proposal provisions, and by the CCAA, the latter which is strictly a restructuring statute available to companies owing their creditors in excess of $5.0 million. Both statutes provide for a stay of proceedings, the filing of a plan or proposal, and meetings of affected creditors for voting on the debtor's plan or proposal, followed by court sanction. The stay in restructuring proceedings is very broad and applies to the claims of secured creditors in addition to the claims of unsecured creditors.

In 2009, significant amendments to the BIA and the CCAA came into force, including the adoption in both statutes of a modified version of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency, which enhanced the cross-border protocols that Canadian courts previously followed. Both statutes permit a debtor company with its "centre of main interests" in a foreign country to have its foreign bankruptcy proceeding recognized as a "foreign main proceeding" by a Canadian court.

The effect of an order made pursuant to the BIA recognizing the foreign proceeding as a foreign main proceeding is an automatic stay of all proceedings against the debtor in Canada, subject to the exceptions that would apply in Canada had the foreign proceeding taken place in Canada; in other words, the stay will not affect secured creditors in respect of foreign liquidation proceedings, but it will affect secured creditors in respect of foreign restructuring proceedings. Under the CCAA, if an order recognizing the foreign proceeding is made, the court is obliged, subject to any terms and conditions it considers appropriate, to grant a stay of all proceedings against the debtor in Canada. Under both statutes, the Court is obliged to cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Admiralty jurisdiction in Canada is exercised by the Federal Court concurrently with the provincial superior courts. Canada has not adopted any international conventions on ship arrest. It has its own system for the arrest of property. In practice, the majority of maritime law cases are commenced in the Federal Court, rather than in the provincial superior courts, because the Federal Court's process runs throughout Canada, and it provides litigants with the action *in rem*, being the principal method of enforcing maritime claims in Canada, as in other common law countries whose maritime law is primarily derived from the admiralty law of England.

The arrest of the ship in the action *in rem* places the ship in notional judicial custody pending the posting of bail or adjudication of the claim. Unless circumstances justify otherwise, physical custody of and responsibility for the ship remains in the hands of whomever held it at the time of the arrest. The arresting party must have either a maritime lien or a statutory right in rem for a claim in a category specified in the FCA.

Assuming that bail is not posted to have the vessel released from arrest, an order for appraisal and sale of the ship normally follows after judgment, or if the arrested vessel is determined to be a deteriorating asset, may occur even before judgment.

The order for sale provides for notice to be given to creditors that *in rem* claims must be filed by affidavit by a certain date or be forever barred. Further procedural orders typically follow, leading to a hearing to determine the entitlement of the various claimants to share in the proceeds of sale including the priorities of the claims relative to one another, the usual order of which is well established under Canadian maritime law.

The maritime lien constitutes a distinctive feature of maritime law. It has been described by the Supreme Court of Canada as follows:

> Broadly speaking, a maritime lien arises without registration or other formality when debts of a specific nature are incurred by or on behalf of a ship. The lien creates a charge which "goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has certain ranking with other maritime liens, all of which take precedence over mortgages" (citation omitted) (our emphasis added).
>
> The reason for this privileged status for maritime lien holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships ... Merchant seaman will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage. The Master may be embarrassed for lack of fund, but the ship itself if assumed to be worth something and is readily available to provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence. (See *Holt Cargo Systems Inc. v. Abc Containerline N.V. (Trustee of),* [2001] 3 S.C.R. 907)

Canadian law departs from the English law in its treatment of foreign maritime liens. A maritime lien validly created under foreign law will be recognized and given the same priority under Canadian maritime law unless opposed to some rule of domestic policy or procedure which prevents the recognition of the right.

However, Canadian law was amended in 2009 to give some Canadian necessary suppliers status equivalent to a maritime lien when asserting claims against foreign vessels. (As we know, the Barge is registered in Panama and, as such, is a "foreign vessel".) This amendment was made through section 139 of the MLA:

> ***Definition of foreign vessel***
>
> **139 (1)** In this section, ***foreign vessel*** has the same meaning as in section 2 of the *Canada Shipping Act, 2001*.
>
> ***Maritime lien***
>
> **(2)** A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise
>
> > **(a)** in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or
> >
> > **(b)** out of a contract relating to the repair or equipping of the foreign vessel.
>
> ***Services requested by owner***
>
> **(2.1)** Subject to section 251 of the *Canada Shipping Act, 2001*, for the purposes of paragraph (2)(a), with respect to stevedoring or lighterage, the services must have been provided at the request of the owner of the foreign vessel or a person acting on the owner's behalf.
>
> ***Exception***
>
> **(3)** A maritime lien against a foreign vessel may be enforced by an action *in rem* against a foreign vessel unless
>
> > **(a)** the vessel is a warship, coast guard ship or police vessel; or
> >
> > **(b)** at the time the claim arises or the action is commenced, the vessel is being used exclusively for non-commercial governmental purposes.
>
> ***Federal Courts Act***
>
> **(4)** Subsection 43(3) of the *Federal Courts Act* does not apply to a claim secured by a maritime lien under this section.
>
> 2009, c. 21, s. 12

The Barge is a foreign vessel at all times material to this matter.

Maritime lien and ship mortgage holders are considered secured creditors under the BIA. As discussed above, secured creditors are not subject to the stay under the bankruptcy provisions of the BIA, and, therefore, are entitled to realize on their security as in the same manner as if there was no bankruptcy, including commencing of an *in rem* action in Federal Court.

In contrast, claimants with statutory rights *in rem* do not have the status of secured creditors, subject to the Court's equitable jurisdiction to elevate such a claim to be the equivalent of a maritime lien where necessary to prevent an obvious injustice, such as an unpaid ship repair claimant whose efforts increased the sale value of the vessel for the benefit of the creditors which would otherwise be in priority to the repairer. (See *Re Vanguard Shipping (Great Lakes) Ltd. and Vanship Ltd.*, Ont. S.C.J. Court File No. CV-12-9655; *Textainer Equipment Management B.V. v. Baltic Shipping Co.* (1994), 84 F.T.R. 108; *Cameco Corp. v. MCP Altona* (2013), 425 F.T.R. 80; *Hamilton Harbour Commissioners v. The Ship Wenchita,* 1927 Can LII 769 (CA Exc))

Therefore, under the circumstances, each of Spellacy and Inaminka has a maritime lien against the Barge, a foreign vessel, and the proceeds from its sale. In any event of the foregoing, the court may exercise the equity jurisdiction it has and rank the respective claims as a maritime lien. As a result, the claimants shall be paid first before all other secured creditors from the proceeds of the sale of the Barge.

We refer specifically to the following cases which are relevant to the issues as described above.

In *Nanaimo Harbour Link Corporation v. Abakhan & Associates (Trustees) Inc.* 2007 BCSC 109, the issue before the B.C. Supreme Court was whether the stay of proceedings under the BIA applied to Federal Court of Canada *in rem* proceedings commenced by maritime lien claimants against a catamaran fast-ferry. The claimants were crew members and ship repairers. The crew members asserted that their claim was a maritime lien ranking ahead of the ship's mortgage, and was also a secured claim and was, therefore, not stayed by the bankruptcy proceeding. The ship repairers asserted statutory rights *in rem* which they sought to elevate to a status *pari passu* with a maritime lien under equitable principles of Canadian maritime law. The mortgagee argued that Canadian maritime law had no application in determining priorities in bankruptcy proceedings.

In deciding the issue before it, the Court addressed the application of the BIA to maritime liens and confirmed that a maritime lien is a secured claim within the meaning of the BIA. The Court found that the seamen were secured creditors within the meaning of the BIA and entitled to an order that the stay of proceedings was not applicable. The Court concluded that the ranking of the priorities and the proof of the maritime claims would be

a matter for the Federal Court to determine pursuant to the principles of Canadian maritime law.

The debtors in the case of *Re Vanguard Shipping (Great Lakes) Ltd. and Vanship Ltd., supra.*, were in the business of operating two Great Lakes freighters and filed for and obtained protection under the CCAA. The sale of substantially all of the debtor companies' assets, including the vessels, was approved by Court order following a court-sanctioned sale and investor solicitation process. The purchaser of the assets agreed to assume responsibility for payment of any *in rem* claims determined to rank in priority to the existing ship's mortgages.

The Ontario Superior Court approved a claims process and procedure within the insolvency proceeding for the determination and resolution of claims against the vessels and the priorities of the claims inter se.

Finally, in the case of *Ballantrae Holdings Inc. v. The Ship "Phoenix Sun"* 2016 FC 570, the "Phoenix Sun" was purchased while under arrest by a person who intended to repair her, find a cargo and sail her to Turkey where she would be sold for scrap at a profit. The ship was purchased for $1 million which was borrowed from the plaintiff, Ballantrea, and secured by a mortgage on the ship. The mortgage was never registered in a ship registry but it was registered as a charge under the Ontario Personal Property Security Act ("**PPSA**"). The purchaser hired a crew and persuaded other chandlers and repairers to provide goods and services to the vessel. The purchaser also obtained some additional funds from a Mr. Hamilton. Eventually, the funds ran out and the ship was again arrested in the proceeding commenced by Ballantrae. The ship was subsequently sold for $680,000. Pursuant to the normal procedure established by the Federal Court, claimants to the proceeds of sale filed their claims with the court. The court was called upon to adjudge and rank the claims. The claimants and claims included:

- The Marshall for the fees and expenses of bringing the ship to sale;
- Ballantrae for its costs of bringing the vessel to sale;
- The Master and crew of the vessel for the amounts due to them under their employment contracts;
- The City of Sorel for berthage and the costs of supplying electricity, which it claimed had a priority under either the *Canada Marine Act*, the *Marine Liability Act* or in equity;
- Various necessaries supplier who claimed lien rights under s. 139 of the *Marine Liability Act*;
- Mr. Hamilton, who also claimed lien rights under s. 139 of the *Marine Liability Act* or in equity;
- Ballantrae for the amount due under the mortgage; and
- Skylane, who also claimed to have a valid mortgage registered in Panama.

The court held that generally, the highest priority claims are the Marshall's fees and expenses and the costs of the creditor that brought the ship to sale. Thereafter come maritime liens and liens created by statute, which enjoy the same status. Next in ranking are mortgages followed by *in rem* creditors. On occasion, when the interests of justice require, equity will permit the court to alter this traditional ranking, as well as elevate a claim to that of a martiem lien.

The City of Sorel claimed for berthage ($75,000) and for the supply of electricity ($22,000) and argued it is entitled to priority under s. 122 of the CMA or s. 139 of the MLA or, alternatively, on an equitable basis. Section 122 of the CMA gives priority to a Port Authority or to "a person who has entered into agreement under s. 80(5)". The court held that the City of Sorel is not a Port Authority and is not "a person who has entered into agreement under s. 80(5)" since s. 80(5) relates to parts of the Saint Lawrence Seaway and Sorel is not within the Seaway. Sorel, therefore, had no priority under s. 122 of the *Canada Marine Act*. Neither did the City's claim fall under s. 139 of the MLA. The claim of the City, as noted by the court, is not for "goods, materials or services" supplied to a vessel. This follows from the distinction in s. 22 of the FCA between necessaries and docking charges and from the purpose of s. 139 of the MLA which was to give Canadian necessaries supplier a priority to that enjoyed by foreign suppliers. In the traditonal ranking, the claims of the City of Sorel would have no priority; however, the court recognized that it does have an equitable jurisdiction to vary the traditional ranking if the interests of justice so require and held that it was appropriate to alter the traditional ranking in respect of the claim for supply of electricity to the ship since this did benefit all of the creditors. The claim for the costs of electricity ranked immediately after the claims of the Master and crew and the claims of necessaries suppliers with lien claims under s. 139 of the MLA ranked after the claim of the City of Sorel for the supply of electricity.

Trusting that all of the foregoing is found to be in order.

Yours very truly,

Deborah L. J. Hutchings Law
Per: Deborah L.J. Hutchings, K.C

## Appendix T

Inaminka Marine Services Limited – Proof of Claim

**DEBORAH L.J. HUTCHINGS LAW**
**Deborah L.J. Hutchings, K.C.**
**Barrister, Solicitor and Notary**
61 Parsonage Drive
St. John's, NL A1A 0J6

(709) 726-3082 (Home) – (709) 682-3278 (Mobile)

November 23, 2023

By Email: CanadaFluorspar@ca.gt.com

Grant Thornton Limited – The Court Appointed Monitor of
92834 Newfoundland and Labrador Inc.
Nova Centre, North Tower
1675 Grafton Street, Suite 1000
Halifax, Nova Scotia B3J 0E9

Dear Sir:

**Re: Our Client – Inaminka Marine Services Limited ("Inaminka")**
**The Debtor – 92834 Newfoundland and Labrador Inc.**
**Presentation Of Claim for Inaminka in the Claims Identification Process Pursuant to CCAA Proceedings**

In connection with the above noted matter, on behalf of Inaminka we enclose herewith and in compliance with the Claims Identification Order of Justice A. MacDonald dated October 25, 2023, the following:

1. Proof of Claim of Inaminka, signed by its director and President, Richard A. Spellacy;
2. Supporting materials, being the Memorandum Respecting the Secured Priority Claim of Inaminka, with copies of documents, case law, and legislation included therewith; and
3. Signatory page of the Memorandum signed by the undersigned.

Trusting that all of the foregoing is found to be in order.

Should you have any questions on the attached, please do not hesitate to contact the undersigned.

Yours very truly,

Deborah L.J. Hutchings Law
Per: Deborah L.J. Hutchings, K.C

**2023 01G 0841**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court-appointed Monitor of 92834 Newfoundland and Labrador Inc. ("**92834**" or the "**Company**");

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

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## PROOF OF CLAIM

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Please read carefully the enclosed Instruction Letter for completing this Proof of Claim. All capitalized terms not defined herein have the meanings ascribed to them in the Claims Identification Order dated October 25, 2023.

**I. PARTICULARS OF CLAIMANT:**

1. Full Legal Name of Claimant:

   Inaminka Marine Services Limited (the "Claimant")

2. Full Mailing Address of the Claimant:

   130 LeMarchant Road, Suite #301

   St. John's, NL

   A1C 2H2

3. Telephone Number: (709) 739-4714

4. E-Mail Address: dspellacy@nf.aibn.com

5. Facsimile Number: (709) 739-0317

6. Attention (Contact Person): Richard A Spellacy

7. Have you acquired this Claim by assignment?

   Yes; ☐ No: ☒ (if yes, attach documents evidencing assignment)

   If Yes, Full Legal Name of Original Claimant(s): N/A

## II. PROOF OF CLAIM:

1. I, Richard A. Spellacy, sole director and shareholder of Inaminka Marine Services Limited

(name of Claimant or Representative of the Claimant), of St. John's,

Newfoundland and Labrador do hereby certify:
(city and province)

(a) that I [check (✓) one]

☐ am the Claimant; OR

☒ am sole shareholder, director and President (state position or title) of Inaminka Marine Services Limited
(name of Claimant)

(b) that I have knowledge of all the circumstances connected with the Claim referred to below; and,

(c) that complete documentation in support of the Claim referred to below is attached;

| Debtor | Pre-Filing Claim Amount | Whether Claim is Secured, Priority Unsecured, or Unsecured | Value of Security Held, if any: |
|---|---|---|---|
| Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., CFI Newspar Holdings Inc. and Newspar | $146,870.02, including HST | By virtue of the amount being a maritime lien, it is secured and takes priority over over mortgage lends and their security | |

| Debtor | Restructuring Claim Amount | Whether Claim is Secured, Priority Unsecured, or Unsecured | Value of Security Held, if any: |
|---|---|---|---|
| Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., CFI Newspar Holdings Inc. and Newspar | | | |

## III. PARTICULARS OF CLAIM

The particulars of the undersigned's total Claim (including Pre-Filing Claims and Restructuring Claims) are attached.

*(Provide full particulars of the Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) or legal breach(es) giving rise to the Claim, name of any guarantor(s) which has guaranteed the Claim, particulars and copies of any security and amount of Claim allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed.)*

## IV. FILING OF CLAIM

**For Pre-Filing Claims, this Proof of Claim MUST be received by the Monitor before 5:00 p.m. (Newfoundland Time) on November 25, 2023 (the "Pre-Filing Claims Bar Date").**

**For Restructuring Claims, this Proof of Claim MUST be received by the Monitor before the later of (i) the Pre-Filing Claims Bar Date and (ii) 5:00 p.m. (Newfoundland Time) on the date that is thirty (30) days after the date on which the Monitor sends a Claims Package to you with respect to a Restructuring Claim (the "Restructuring Claims Bar Date").**

In either case, completed forms must be delivered by prepaid ordinary mail, registered mail, courier, personal delivery or email addressed:

Grant Thornton Limited - The Court Appointed
Monitor of 92834 Newfoundland and Labrador Inc.,
1675 Grafton St Suite 1000
Halifax, NS, B3J 0E9
Canada
Telephone: 902-421-1734
Email: CanadaFluorspar@ca.gt.com

**Failure to file your Proof of Claim as directed by the Pre-Filing Claims Bar Date or Restructuring Claims Bar Date, as applicable, will result in your Claim being extinguished and forever barred and in you being prevented from making or enforcing a Claim against 92834.**

DATED at St. John's, NL this 22nd day of November, 2023.

Signature of Claimant

**2022 01G 0709**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** the
*Bankruptcy and Insolvency Act*,
R.S.C. 1992, c-27 ("**BIA**") in respect
of Canada Fluorspar (NL) Inc.

**AND IN THE MATTER OF** the
*Companies' Creditors Arrangement*
*Act*, R.S.C. 1985, c-36 ("**CCAA**") in
Respect of Canada Fluorspar (NL) Inc.

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**MEMORANDUM RESPECTING THE**
**SECURED PRIORITY CLAIM**
**OF**
**INAMINKA MARINE SERVICES LIMITED**

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## Introduction

1. The creditor Inaminka Marine Services Limited ("**Inaminka**") claims a secured claim *in personam* against Canada Flurospar (NL) Inc. ("**CFI**"), and an *in rem* claim against the Owners and All others interested in the ship "Barge H-404" (the "**Barge**"). The Barge was registered in Panama on December 12, 2012 and identifies CFI as the owner thereof. Attached hereto as **Exhibit "A"** is a true copy of the proof of Registration of the Barge (the "**Registration**").

2. It is Inaminka's position that by virtue of the type of services it provided to the Barge pursuant to CFI's request and instructions, and pursuant to the provisions of section 22 of the *Federal Courts Act* 2002, c.8, 5.14 (the "**FCA**"), and Canadian maritime law, Inaminka has a maritime lien against the Barge and, in turn, has a priority claim against the proceeds from the sale (the "**Proceeds**") of the Barge and/or of the corporate shares of CFI (the "**Shares**").

**Statement of Facts**

3. The *in personam* and *in rem* claims of Inaminka are set out in Inaminka's Federal Court action commenced on February 16, 2022 and identified as Court File No. T-279-22 (the "**Action**"). Inaminka's claims arose and were prior to the commencement of the insolvency proceeding under the BIA and the restructuring proceeding under the CCAA. For completion of the record, attached hereto as **Exhibit "B"** are true copies of the Statement of Claim, Affidavit to Lead Warrant of Richard A. Spellacy, Master Mariner ("**Spellacy**"), and documents from the High Sheriff of Newfoundland and Labrador (the "**Sheriff**") verifying that the Statement of Claim was effected upon the named Defendants of the Action and that a Warrant of Arrest was effected upon the Barge. To the date hereof, no Defence has been filed in the Action.

4. By way of background, Inaminka is a body corporate, incorporated under the laws of the province of Newfoundland and Labrador ("**NL**") and is in good standing as of the date hereof. Inaminka has one employee, being Spellacy, and no others.

5. Spellacy is the sole shareholder, officer, and director of Inaminka and he is aware of the matters and claims set out herein.

6. Inaminka, through Spellacy, provides consultation and brokerage services to the marine industry in various areas, such as, marine transportation; operation of vessels, including rigs, barges and tug boats, in general; advice on operations and safe movement of rigs and barges; advice on the use of tugs in the movement of rigs and barges; consultation and oversight in the construction, conversion and/or modification, and repair of ships (including barges). Inaminka and Spellacy are well known and respected in the marine industry and their services are sought after worldwide.

7. At all material times hereto, CFI operated a fluorspar mine near the Town of St. Lawrence, NL. For some of the time, it exported and marketed fluorspar from its terminal near the mine, which terminal is known as the Blue Beach Terminal (the "**Terminal**"). Photographs attached hereto at **Exhibit "C"** depict, among other things, the location and layout of the Terminal and the Barge when interfaced with each other.

8. CFI obtained the Barge to use at the Terminal to facilitate the loading of fluorspar onto ships carrying the cargo to CFI's customers. CFI intended that the Barge would enable ships to dock at the Terminal to take on cargo of fluorspar. Without the use of the Barge, the fluorspar would have to be trucked to awaiting cargo ships at a marine terminal at Spanish Room, near Marystown, NL, at a considerable expense to CFI. The use of the Barge at the Terminal would make the mining and marketing of the fluorspar at St. Lawrence a viable venture.

9. Further, during inclement weather, the Terminal and the Barge were exposed to high winds and seas and, as a consequence, the Barge could not be used in its then present state at the Terminl. In fact, CFI had to engage tugs to move the Barge to safety before impending storms approached the area. This, too, was costly for CFI.

10. In June, 2017, the Barge was surveyed by Marine Services International Ltd. ("**Marine Services**") respecting its condition and valuation while the Barge was located in Vlissingen, Netherlands. The resulting Condition & Valuation Survey is attached hereto, with portions thereof redacted, as **Exhibit "D"** (the "**Survey**").

11. During the Fall of 2021, CFI sought the advice, consultation and services of Inaminka (the **"Services"**). Through Spellacy's communications with CFI, it was understood by Inaminka that the Barge was purchased by CFI for the expressed purpose of providing an interface at the Terminal, as shown in the photographs attached hereto as **Exhibit "C".** Without the Barge, it was difficult and unsafe to load cargo ships at its loading pier (the "**Loading Pier"**) at the Terminal, particularly during inclement weather. One of the photograph at **Exhibit "C",** and given to Spellacy by Jason Flood of CFI, shows a vessel docked at the Barge while the Barge was moored to the Loading Pier. This photo attempts to illustrate one of the issues with using the Barge at the Terminal and that was to have a safe and functional interface between the Barge and the Loading Pier, which could not be achieved without modification of some sort to the Barge.

12. As noted above, trucking fluorspar from the mine to Spanish Room was a great expense for CFI which CFI wanted to reduce or eliminate through the utilization of the Barge at the Terminal. The Barge would enable cargo ships to go to the Terminal, rather than to Spanish Room, to take on the fluorspar cargo. As shown in the photographs attached as

**Exhibit "C"**, part of the work intended for Inaminka was, therefore, to create a plan to achieve a safe and functional interface of the Loading Pier with the Barge.

13. The second issue which affected CFI's use of the Barge, was the safe mooring of the Barge during inclement weather. The Terminal was located on the south coast of the Island of Newfoundland and was open to the North Atlantic with no shelter from inclement weather. Leaving the Barge docked at the Terminal during inclement weather, with high winds and seas, exposed the Barge to the risks of instability and damage. In fact, the Barge had already sustained damage from being exposed to the strong winds and high seas that occur at Blue Beach. Thereafter, as a result of recent inclement weather, at the time Inaminka was consulted by CPI, the Barge had already been moved to a safe haven in Marystown. Thereafter, the Barge continued to reside at Marystown at all material times hereto. A report attached hereto as **Exhibit "E"** shows such damage to the starboard side of the Barge which occurred during stormy weather at Blue Beach. To move the Barge from the Terminal to a location to protect it from storm damage, can only be achieved with the use of tugs, which tugs were hired from a third-party supplier. Not only was the use of tugs a time-consuming process, it also increased CFI's expenses.

14. In or about October 2021, Spellacy, as representative and employee of Inaminka, was contacted by Leo Power, a director of CFI at that time. Mr. Power advised Inaminka that CFI was seeking assistance to resolve the difficulties it encountered dealing with (a) the damage to and (b) the usage of the Barge. An initial meeting between Inaminka and CFI was held at the Terminal to discuss the Barge and these issues (the "**Initial Meeting**"). In attendance at the Initial Meeting were Spellacy, Ron Milmine who was CFI's purchasing agent, and Patrick Gannon who was the mine manager.

15. Following the Initial Meeting, Inaminka was invited by Patrick Gannon and others to participate in a conference call that took place on the afternoon of October 12, 2021 among the Vancouver Based Management team of CFI; Jason Flood of CFI in St. Lawrence; and Patrick Gannon of CFI in Montana. Subsequent to this conference call, Bill Dobbs, on behalf of the senior management of CFI, confirmed with Inaminka that it was retained by CFI to present a solution to enable CFI to utilize the Barge at the Terminal to facilitate the loading of cargo ships there. Mr. Flood emphasized to Inaminka that CFI also wanted to eliminate the use of tugs to move the Barge to and from the Loading Pier, while protecting

the Barge from inclement weather, and eliminate the use of trucks to transport the fluorspar from Blue Beach to Spanish Room, aforesaid, to load awaiting cargo ships.

16. CFI made it known to Inaminka that the Barge had sustained damage in previous storms, as aforesaid, to its starboard side aft and that there was about 3000 tons of untreated water on board the Barge which likely came from foreign waters. With this information, Inaminka determined, and CFI concurred, that before any work on the Barge and/or Loading Pier was started, as part of the work for Inaminka to perform for CFI, there would be a three (3) step process that should take place and in this order: (1) the Barge should and would undergo a complete inspection to assess the structural integrity of the Barge since it had sustained some damage. The Barge's internal members were to be carefully examined, in particular. A subsequent assessment would be made to ensure that the Barge was fit, or could be made fit with necessary repairs to make the Barge's integrity stable to handle the work necessary for its utilization at the Loading Pier; (2) assess the Barge's ballast water system, assess how the ballast water should be treated, and ensure that a Ballast Water Maintenance Plan be put in place; and (3) assess the Barge and the Blue Beach area and prepare a plan, including the necessary equipment and where to source such equipment, to interface the Barge with the Loading Pier, and prepare a plan whereby the Barge could come off its mooring at the Loading Pier and move (without tugs) upon its storm moorings away from the Loading Pier. It was intended that steps 1 and 2 be completed simultaneously. The plan to be created was to make the Barge fit for the purpose CFI intended when it purchased the Barge.

17. Accordingly, and as noted above, on or about October 12, 2021, Inaminka was retained by CFI for the following, and other, services respecting the Barge and the Loading Pier, but not limited to the following Services: to provide consultation to CFI on the manner in which the Barge could be protected from inclement weather and how the Barge could be moved safely away from the Loading Pier to safety from the approaching inclement weather without the need of tugs; to design a system and/or process which would enable CFI to move the Barge on and off the Loading Pier, as needed; to design a set of storm moorings, equipped with storm anchors, where the Barge would be moored safely during inclement weather; to enable CFI to safely move the Barge on and off the storm moorings, as needed, and return the Barge safely to the Loading Pier after the inclement weather

had passed; to assess the moorings and continuing safe operation of the Barge in its present state; to complete sketches/drawings for each component of this system, including for the Loading Pier, storm moorings, storm anchors, and the necessary modifications to the Barge to accommodate the Loading Pier and storm moorings; to budget the cost for completing the foregoing and timeline and budget for the construction of this system; to source all contractors, sub-contractors to manufacture, fabricate, and install the various components for the Loading Piers, storm moorings, storm anchors, and the modification to the Barge, itself, to facilitate its movement between the Loading Pier and storm moorings and to secure the Barge safely to the Loading Pier and the storm moorings, as needed; to contract surveyors, engineers and other professional to facilitate inspections and surveys; to conduct an inspection of the Barge to determine whether any work was required to it before starting the work noted above, and to provide a full assessment of such work. These activities were then supplemented with finalizing the location of the anchors and chains, adding two extra winches and reviewing a complete ballast plan as approved by Transport Canada.

18. As part of any and all activity undertaken by Inaminka pursuant to the Services, a log was kept of Inaminka's/Spellacy's activities, and this Daily Log was submitted each day to CFI by Inaminka (the "**Daily Logs**"). Attached hereto at **Exhibit "F"** are the true copies of the Daily Logs for the period over which the Claim of Inaminka covers.

19. Inaminka, through Spellacy, devised a preliminary plan for the safe mooring of the Barge and other procedures toward preparing the in-depth plan and sourcing of equipment. The Preliminary Plans dated November 4, 2021 were drafted and then approved by CPI (the "**Preliminary Plans**"). Attached hereto as **Exhibit "G"** are true copies of the material created for the Preliminary Plans.

20. To accomplish the utilization of the Barge at the Loading Pier, as mentioned above, Inaminka determined that CFI needed a set of storm moorings that would allow the Barge to move on and off the Loading Pier without the use of tugs. This would allow the Barge to be safely moored on a set of storm moorings away from the Loading Pier during periods of inclement weather. The drawings prepared by Inaminka, attached hereto as **Exhibit "H"**, illustrated to CFI this plan as developed by Inaminka. Also, attached hereto as

**Exhibit "I"** is a photograph from Google Earth upon which Inaminka drafted the proposed location of the storm moorings.

21. As noted above, it was intended that an inspection or investigation of the Barge be carried out to ensure that the Preliminary Plans could be implemented in respect of the damage to the Barge, and to assess the ballast water onboard that needed to be addressed. Accordingly, once the preliminary results from the investigations were known, a follow up meeting with CFI was to be held as recommended in the Preliminary Plan. This meeting was held on November 12, 2021 in St. Lawrence with the following people present: Spellacy, Jason Flood, John Norman, Leo Power, and Pat Gannon, the latter being present as needed. Other relevant CFI personnel, such as those from Safety, also participated in the meeting on an as required basis. Attached hereto as **Exhibit "J"** is a copy of the meeting agenda for November 12, 2021.

22. Subsequent to this meeting, Inaminka proceeded to the implementation stage. The primary part of that stage was to carry out an in-depth inspection of the Barge and also obtain measurements of the internal strength members to determine if they were affected by the damage to the starboard side aft. This part of the project was initiated on November 21, 2021 with a trip to Marystown by Spellacy, on behalf of Inaminka, who participated in the physical inspection of the Barge. This inspection was carried out in conjunction with Adaptive Marine Solutions Inc. ("**AMS**"). AMS is an engineering consultant firm that operates out of Ottawa, Ontario, but has a local office situate in St. John's.

23. On December 15, 2021, Inaminka (Spellacy) and naval architect, Anthony Barclay, who Inaminka sub-contracted, travelled to Marystown to participate in an in-depth inspection of the internals of the Barge with AMS. The Barge was duly inspected, with Inaminka (Spellacy) and Anthony Barclay present. On December 16, 2021 a follow up inspection of the internals and, also an inspection of the ballast system of the Barge were conducted. Given his qualifications as well as being a master mariner, Spellacy attended with AMS to inspect the Ballast System and was able to explain and operate the Ballast System for the AMS inspectors.

24. To facilitate the ongoing inspection of the Ballast System's internals, ballast water had to be transferred internally and as the ballast water was and still under the control of Transport Canada, the operation had to be monitored by a licensed person, such as

Spellacy. It was Jason Flood of CFI who, at that time, asked Spellacy, and then appointed Spellacy, to act in the capacity of master of the Barge for the purpose of signing off on the transfer of ballast in the Barge's Ballast Water Record Book. This appointment has never been rescinded by CFI or anyone else. In fact, Spellacy still has the physical possession of the Ballast Water Record Book, as master of the Barge. The Ballast Water Record Book shows that Spellacy signed off on the transfer of ballast water as master of the Barge. Attached hereto as **Exhibit "K"** are copies of the Ballast Water Record Book wherein Spellacy made his entries. Spellacy notes that no one has ever asked him for the return or handover of the Ballast Water Record Book. He is not deliberately keeping the said Ballast Water Record Book or refusing to hand it over to CFI or the Monitor. Very simply, no one has asked him for it.

25. Attached hereto as **Exhibit "L"** are drawings prepared by AMS of the internal members inspected during the inspections of the Barge (the **"Drawings"**). Attached hereto as **Exhibit "M"** is the Damage Report prepared also by AMS of the damage observed to the Barge (the **"Damage Report").** The Drawings, together with the Damage Report, showed and described the damages sustained to the internal members. Inaminka prepared a proposed repair plan containing options and recommendations, and the cost of each method of repair regimes. Attached hereto as **Exhibit "N"** is a true copy of the options and the estimated costs thereof. CFI consulted with Inaminka throughout on the findings, recommendations, and cost of repairs as presented by AMS.

26. In terms of the Ballast System, itself, it was found to be totally inoperable, with one pump down and, what Inaminka suspected, was corrosion damage to the main suction lines. Due to the condition of the Ballast System, the ballast transfer had to be conducted manually, thus, requiring its oversight and operation to be carried out by a master mariner, as noted above.

27. Attached hereto as **Exhibit "F",** as aforesaid, are Daily Logs or time notes of Inaminka's employee, Spellacy, in respect of the Services Inaminka performed for which it was contracted by CFI. The Services performed are set out on the invoices which were tendered upon CFI for payment. Attached hereto as **Exhibit "O"** are true copies of Inaminka's invoices.

**Inaminka's Maritime Lien**

28. The plan or system as designed by Inaminka, pursuant to its execution of the Services and under the instructions of CFI, would have made it possible for CFI to use the Barge at the Terminal, eliminating the need to hire tugs to move the Barge off the Loading Pier and away from the Terminal in order to protect the Barge from the inclement weather and resulting damage. Further, the system designed by Inaminka would have, in turn, avoided the transport of the fluorspar from the Terminal to Spanish Room by truck to load the fluorspar on awaiting cargo ships. Therefore, the Services would have made it possible for CFI to use the Barge at the Terminal to load cargo ships there, thereby making the overall operation of the fluorspar mine by CFI more commercially efficient, effective, and profitable. It is very clear that the Services were applied directly to the Barge in order to make it operable for the purpose for which CFI intended.

29. The Services were necessary to allow the safe and effective utilization of the Barge, in this case, by CFI to operate the fluorspar mine and its business of marketing, selling and transporting its product around the world to its buyers.

30. In fact, the Services of Inaminka and the work thereof produced by Inaminka, including but not limited to the Drawings and the mechanism whereby the Barge could be removed from the Loading Pier and stored safely on the storm moorings during stormy weather, aforesaid, were provided with the Barge to the successful bidder of CFI. In accordance with the court documents filed by the Monitor in the Action and the evidence of the Monitor, the Barge, and the work completed by Inaminka, aforesaid, was a necessary asset to complete the sale of CFI.

31. The Services were completed and presented in final form to CFI by Inaminka on or about January 20, 2022 with the final budget, drawings, operating proposals, and timelines completed by Inaminka on January 30, 2022. Attached hereto as **Exhibit "P"** is the final budget, drawings, operating proposal and time line presented to CFI by Inaminka.

32. Upon retaining Inaminka for the Services, CFI required Inaminka to complete a vendor registration form (the "**VR Form**"), which was completed on or about October 28, 2021. In the VR Form, Inaminka stated that its terms for the Services were 30 days of issuing its

invoices (net 30 days) and the contract amount for the Services was $143,000.00 plus tax. CFI issued to Inaminka two purchase orders to start the Services. Attached hereto as **Exhibit "Q"** is a true copy of the VR Form. Attached hereto as **Exhibit "R"** is a true copy of the purchase orders issued to Inaminka from CFI.

33. Inaminka issued invoices to CFI dated November 30, 2021, December 12, 2021, December 31, 2021, January 15, 2022 and February 1, 2022, respectively. The aggregate amount of the invoices is $146,870.02, including HST. CFI failed to pay the amount owing to Inaminka for the Services completed and Inaminka, therefore, commenced its action in the Federal Court and caused the Barge to be arrested. Attached hereto as **Exhibit "S"** are true copies of invoices issued by Inaminka to CFI for the Services.

34. Inaminka claims that the Services performed for CFI resulted in a maritime lien as security for its unpaid invoices. In understanding Inaminka's argument, the following points from the facts are noteworthy:

1. The Barge is a ship/vessel under Canadian maritime law and, unless a foreign ship, is required to be registered with Transport Canada. Pursuant to section 2 of the *Canada Shipping Act* (the "**CSA**"), ship/vessel "means a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to method or lack of propulsion, and includes such a vessel that is under construction."

2. The Barge, at all material times to this matter, was owned by CFI and is a foreign vessel, being "a vessel that is not a Canadian vessel or pleasure craft". At all material times to this matter, the Barge was registered in Panama.

3 At the time when Inaminka (and Spellacy) were retained to provide the Services, the owner of the Barge was CFI. At the time when Inaminka commenced its action against CFI and effected the arrest of the Barge, CFI was the owner of the Barge. At the time when Spellacy file his *Caveat Release,* the owner of the Barge was CFI.

4. Inaminka issued its Statement of Claim and effected the Warrant of Arrest before CFI was placed into bankruptcy under the Bankruptcy and Insolvency Act (the

"**BIA**") and before the proceeding under the CCAA was commenced.

**Reference**: Section 2, CSA [**TAB 1**]

35. Inaminka also claims that it has a maritime claim and an *in rem* action against CFI and the Barge by virtue of section 22(2)(m) of the FCA, being a claim for supplying necessaries to the Barge: "…any claim in respect of goods, materials or **services** wherever supplied to a ship <u>for the operation or maintenance of the ship</u>…". (Our emphasis added)

**Reference**: Section 22(2)(m), FCA [**TAB 2**]

36. Alternatively, Inaminka claims that it has a maritime claim and an *in rem* action against CFI and the Barge by virtue of section 22(2)(n) of the FCA, being a claim relating to the construction, repair or **equipping** of a ship: "…any claim arising out of a contract relating to the construction, repair or equipping of a ship…" (Our emphasis added)

**Reference**: Section 22(2)(n), FCA [**TAB 2**]

37. In respect of making out a claim for necessaries, it must be shown that at the time the action is commenced, the ship (Barge) is beneficially owned by the same person who was the beneficial owner at the time the cause of action arose and that the necessaries were supplied at the request of the owner or someone on the owner's behalf. Section 22(2)(m) also embraces the supply of goods, materials and <u>services</u> that may be **ancillary or complementary to the operation of the ship**. Therefore, the Services which Inaminka provided to the Barge and CFI were necessary for the Barge to operate at the Terminal to facilitate the loading of fluorspar on cargo ships at the Terminal, and necessary to place the Barge on and off the storm moorings in the event of inclement weather. Without the Services of Inaminka, CFI could not operate the Barge at the Terminal as it was intended. It is known through the evidence of the Monitor in Inaminka's action before the Federal Court that the Services produced by Inaminka, which includes documents, information respecting the operation of the system and the sourcing of components and manufacturers of the components (the "**Property**"), were used by the Monitor to facilitate, bolster and support the sale of CFI, in general, and the Barge, in particular; and that such "property" created by Inaminka (for which it has not been paid) has been passed on or transferred to the purchaser for its use in its operation of the Barge. (Our emphasis added)

**Reference**: *Feoso Oil Ltd. v. "Sarla" (The)*, [1995] 3 F.C. 68 (C.A.) [**TAB 3**]

*Mount Royal/Walsh Inc. v. "Jensen Star" (The)*, [1990] 1 F.C. 199 (C.A.) [**TAB 4**]

*Kuhr v. "Friedrich Busse" (The)*, [1982] 2 F.C. 709 (T.D.) [**TAB 5**]

38. In the alternative, Inaminka claims that its maritime claim arises as a result of section 22(2)(n), being a contract for the **repair and equipping of a ship,** the result of which creates an *in rem* claim against the Barge. It is obvious that the damage sustained by the Barge to its starboard side would have to be repaired. Prerequisite to any repairs, the damages had to be assessed and recommendations made respecting the carrying out of the repairs. Inaminka carried out that part of the Services. But, Inaminka also assessed the Barge and the area in which it was to operate, being at the Terminal, and gave CFI its recommendation as to what was needed to be done to the Barge and the Terminal area to ensure that the Barge would operate in the manner in which CFI intended. The placement of the storm mooring in the water just outside the Terminal, itself, does not derogate from the ultimate purpose of the storm moorings which were for the safe mooring (and operation) of the Barge during inclement weather. Equipment was needed to be sourced, for example the special winches, and installed on the Barge, itself. All of this was needed for the full and safe operation of the Barge, as CFI wanted and intended.

**Reference**: *Wire Rope Industries of Can. (1966) Ltd. v B.C. Marine Shipbldrs. Ltd*. [1981] 1 S.C.R. 363 [**TAB 6**]

*Offshore Interiors Inc. v. Worldspan Marine Inc.* (2013), 444 F.T.R. 283 [**TAB 7**]

39. Therefore, regardless of whether the Services come under the umbrella of "necessaries" or the umbrella of "repairs and/or equipping", Inaminka unequivocally has a maritime claim against CFI for its claim and an *in rem* claim against the Barge. Therefore, Inaminka has a maritime lien, which it asserted from the commencement of its action in the Federal Court.

**<u>Maritime Liens</u>**

40. There are various liens recognized in maritime law. The categories are traditional maritime liens, possessory liens and statutory liens. All can be, and should be, enforced by way of an action *in rem,* which means that proceedings should generally be commenced in the Federal Court.

41. A traditional maritime lien, which is being claimed by Inaminka, is a lien unique to maritime law. It is a privileged claim, upon maritime property, such as a ship (in this case a barge), that accrues from the moment the claim arises. It travels with the ship unconditionally, even into the hands of bona fide purchasers for value whether with or without notice. This is the maritime lien's defining characteristic. Of particular importance to this matter is that traditional maritime liens have a priority ranking above mortgages.

42. A maritime lien is enforced, as with other claims, by means of an action *in rem*. Traditional maritime lien claims for seaman's/master's wages, salvage, collision damage, Master's disbursements and bottomry. Also, a maritime lien, under Canadian law, can <u>be enforced for a claim for necessaries and for a claim in contract for the repair or equipping a vessel</u>. (Our emphasis added)

43. The common law possessory lien, recognized under Canadian maritime law, requires continued uninterrupted possession of the *res* or thing, typically the ship, or it is lost. Possessory liens usually arise in the context of ship repairs and claims for freight.

44. Statutory liens are liens created by a validly enacted statute. They have the priority given to them by the statute that created them. There are many such liens, including, but not exclusive of, the following:

- claims by the Master and crew for wages which rank in priority to all but marshall's costs and salvage claims;
- claims by the Master for disbursements which rank in priority to all but wage claims, marshall's costs and salvage claims;
- claims by a carrier for any amounts due which must be perfected by notice and gives a right of sale; and
- claims in respect of goods, materials or services supplied to the foreign vessel and claims arising out of a contract for the repair or equipping of a foreign vessel by a person carrying on business in Canada which are given the status and priority of a "maritime lien".

**References**: Sections 86(1) to (5), 86(2.1), 248, and 249, CSA [**TAB 1**]
Section 139, Marine Liability Act ("**MLA**") [**TAB 8**]

45. It is important to note that liens that arise outside of Canada and have a status equivalent to a "maritime lien" under the foreign law applicable to the claim are recognized by Canadian courts as traditional maritime liens and have the priority of a traditional maritime lien. In other words, the law that determines the nature of the lien is the foreign law but the law applied in the ranking of the lien is Canadian law. As will be discussed below, this law in Canada developed further in 2009 in respect of recognizing necessaries as having maritime lien status in Canada. (Our emphasis added)

46. The priority of claims against a ship are ranked generally as follows:

1. Marshall' Costs and expenses, being the costs and expenses of the sale of the ship;
2. Possessory liens that attach prior to a traditional maritime lien;
3. Maritime liens (traditional maritime liens and MLA, s. 139 claims)
4. Possessory liens that attach subsequent to a maritime lien;
5. Registered mortgages; and
6. Unregistered mortgages.

**Insolvency Law and Maritime Liens in Canada**

47. Insolvency law in Canada is set out primarily in two federal statutes, the BIA and the CCAA, and jurisdiction is given to the superior courts of the provinces.

48. Liquidations are generally administered pursuant to the bankruptcy provisions of the BIA. Upon bankruptcy, there is an automatic stay of proceedings against the bankrupt. All of the assets of the bankrupt vest in a trustee in bankruptcy who is responsible for running a claims process and for realizing upon the bankrupt's assets for distribution to creditors. However, it is a general principle of the BIA that the stay does not affect the rights of secured creditors, who can realize against secured assets including by taking foreclosure proceedings, seizing assets, or seeking the appointment of a receiver or receiver-manager either by way of court-appointment or through private appointment under a security agreement. (Our emphasis added)

49. Restructurings are dealt with both by the BIA, under its proposal provisions, and by the CCAA, the latter which is strictly a restructuring statute available to companies owing their creditors in excess of $5.0 million. Both statutes provide for a stay of proceedings,

the filing of a plan or proposal, and meetings of affected creditors for voting on the debtor's plan or proposal, followed by court sanction. The stay in restructuring proceedings is very broad and applies to the claims of secured creditors in addition to the claims of unsecured creditors.

50. In 2009, significant amendments to the BIA and the CCAA came into force, including the adoption in both statutes of a modified version of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency, which enhanced the cross-border protocols that Canadian courts previously followed. Both statutes permit a debtor company with its "centre of main interests" in a foreign country to have its foreign bankruptcy proceeding recognized as a "foreign main proceeding" by a Canadian court.

51. The effect of an order made pursuant to the BIA recognizing the foreign proceeding as a foreign main proceeding is an automatic stay of all proceedings against the debtor in Canada, subject to the exceptions that would apply in Canada had the foreign proceeding taken place in Canada; in other words, the stay will not affect secured creditors in respect of foreign liquidation proceedings, but it will affect secured creditors in respect of foreign restructuring proceedings. Under the CCAA, if an order recognizing the foreign proceeding is made, the court is obliged, subject to any terms and conditions it considers appropriate, to grant a stay of all proceedings against the debtor in Canada. Under both statutes, the Court is obliged to cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

52. While there was no foreign proceeding respecting this matter, the amendments to the BIA and CCAA has a significant impact upon admiralty matters in that martime liens arising in Canada against foreign ships (as defined in the Canadian legislation) maintained a secured and priority claim over other secured creditors including those holding mortgages.

53. Admiralty jurisdiction in Canada is exercised by the Federal Court concurrently with the provincial superior courts. Canada has not adopted any international conventions on ship arrest. It has its own system for the arrest of property. In practice, the majority of maritime law cases are commenced in the Federal Court, rather than in the provincial superior courts, because the Federal Court's process runs throughout Canada, and it provides litigants with the action *in rem*, being the principal method of enforcing maritime

claims in Canada, as in other common law countries whose maritime law is primarily derived from the admiralty law of England.

54. The arrest of the ship in the action *in rem* places the ship in notional judicial custody pending the posting of bail or adjudication of the claim. Unless circumstances justify otherwise, physical custody of and responsibility for the ship remains in the hands of whomever held it at the time of the arrest. The arresting party must have either a maritime lien or a statutory right *in rem* for a claim in a category specified in the FCA. (Our emphasis added)

55. Assuming that bail is not posted to have the vessel released from arrest, an order for appraisal and sale of the ship normally follows after judgment, or if the arrested vessel is determined to be a deteriorating asset, may occur even before judgment.

56. The order for sale provides for notice to be given to creditors that *in rem* claims must be filed by affidavit by a certain date or be forever barred. Further procedural orders typically follow, leading to a hearing to determine the entitlement of the various claimants to share in the proceeds of sale including the priorities of the claims relative to one another, the usual order of which is well established under Canadian maritime law.

57. The maritime lien constitutes a distinctive feature of maritime law. It has been described by the Supreme Court of Canada as follows:

> Broadly speaking, a maritime lien arises without registration or other formality when debts of a specific nature are incurred by or on behalf of a ship. The lien creates a charge which "goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has certain ranking with other maritime liens, all of which take precedence over mortgages" (citation omitted) (our emphasis added).

The reason for this privileged status for maritime lien holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships … Merchant seaman will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage. The Master may be embarrassed for lack of fund, but the ship itself if assumed to be worth something and is readily available

to provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence.

**Reference**: See *Holt Cargo Systems Inc. v. Abc Containerline N.V. (Trustee of),* [2001] 3 S.C.R. 907 [**TAB 9**]

58. Canadian law departs from the English law in its treatment of foreign maritime liens. A maritime lien validly created under foreign law will be recognized and given the same priority under Canadian maritime law unless opposed to some rule of domestic policy or procedure which prevents the recognition of the right.

59. As, Canadian law was amended in 2009 to give some Canadian necessary suppliers status equivalent to a maritime lien when asserting claims against foreign vessels. (As we know, the Barge is registered in Panama and, as such, is a "foreign vessel".) This amendment was made through section 139 of the MLA (Our emphasis added):

**Definition of *foreign vessel***

**139 (1)** In this section, ***foreign vessel*** has the same meaning as in section 2 of the *Canada Shipping Act, 2001*.

**Maritime lien**

**(2)** A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise

**(a)** in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or

**(b)** out of a contract relating to the repair or equipping of the foreign vessel.(Our emphasis added)

**Services requested by owner**

**(2.1)** Subject to section 251 of the *Canada Shipping Act, 2001*, for the purposes of paragraph (2)(a), with respect to stevedoring or lighterage, the

services must have been provided at the request of the owner of the foreign vessel or a person acting on the owner's behalf.

**Exception**

**(3)** A maritime lien against a foreign vessel may be enforced by an action *in rem* against a foreign vessel unless

**(a)** the vessel is a warship, coast guard ship or police vessel; or

**(b)** at the time the claim arises or the action is commenced, the vessel is being used exclusively for non-commercial governmental purposes.

**(4)** Subsection 43(3) of the *Federal Courts Act* does not apply to a claim secured by a maritime lien under this section.

**Reference**: Section 139, MLA [**TAB 8**]

60. The Barge is a foreign vessel at all times material to this matter.

61. While section 43 of the *Federal Courts Act* may not always allow a claim that is conferred under section 22(2)(e), (f), (g), (h), (i), (j), (k), (m), (n), (p), or (r), it unequivocally allows such a claim as set out therein, which are the exact circumstances involved in Inaminka's claim*:*

**43 (3)** Despite subsection (2), the jurisdiction conferred on the Federal Court by section 22 shall not be exercised in rem with respect to a claim mentioned in paragraph 22(2)(e), (f), (g), (h), (i), (j), (k), (m), (n), (p), or (r) unless at the time of the commencement of the action, the ship, aircraft or other property that is subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.

**Reference**: Subsection 43(3) of the FCA [**TAB 2**]

62. CFI was the owner of the Barge when Inaminka's claim arose and when Inaminka commenced its action in the Federal Court.

63. Maritime lien and ship mortgage holders are considered secured creditors under the BIA. As discussed above, secured creditors are not subject to the stay under the bankruptcy provisions of the BIA, and, therefore, are entitled to realize on their security as in the same manner as if there was no bankruptcy, including commencing of an *in rem* action in Federal Court.

64. In contrast, claimants with statutory rights *in rem* do not have the status of secured creditors, subject to the Court's equitable jurisdiction to elevate such a claim to be the equivalent of a maritime lien where necessary to prevent an obvious injustice, such as an unpaid ship repair claimant whose efforts increased the sale value of the vessel for the benefit of the creditors which would otherwise be in priority to the repairer. (Our emphasis added)

**Reference**: *Re Vanguard Shipping (Great Lakes) Ltd. and Vanship Ltd*., Ont. S.C.J. Court File No. CV-12-9655 [**TAB 10**]

*Textainer Equipment Management B.V. v. Baltic Shipping Co.* (1994), 84 F.T.R. 108 [**TAB 11**]

*Cameco Corp. v. MCP Altona* (2013), 425 F.T.R. 80 [**TAB 12**]

*Hamilton Harbour Commissioners v. The Ship Wenchita,* 1927 Can LII 769 (CA Exc) [**TAB 13**]

65. Therefore, under the circumstances, Inaminka has a maritime lien against the Barge, a foreign vessel, and the proceeds from its sale. In any event of the foregoing, the court may exercise the equity jurisdiction it has and rank the respective claims as a maritime lien based upon the fact that its efforts from it Services increased the value of the Barge, and in turn, either the value of CFI's shares or the interest in the purchase of the assets of CFI for the benefit of the creditors. As a result, Inaminka shall be paid first before all other secured creditors from the proceeds of the sale of the Barge.

66. Reference is made specifically to the following cases which are relevant to the issues as described above.

67. In *Nanaimo Harbour Link Corporation v. Abakhan & Associates (Trustees) Inc*. 2007 BCSC 109, the issue before the B.C. Supreme Court was whether the stay of proceedings under the BIA applied to Federal Court of Canada *in rem* proceedings

commenced by maritime lien claimants against a catamaran fast-ferry. The claimants were crew members and ship repairers. The crew members asserted that their claim was a maritime lien ranking ahead of the ship's mortgage, and was also a secured claim and was, therefore, not stayed by the bankruptcy proceeding. The ship repairers asserted statutory rights *in rem* which they sought to elevate to a status *pari passu* with a maritime lien under equitable principles of Canadian maritime law. The mortgagee argued that Canadian maritime law had no application in determining priorities in bankruptcy proceedings.

68. In deciding the issue before it, the Court addressed the application of the BIA to maritime liens and confirmed that a maritime lien is a secured claim within the meaning of the BIA. The Court found that the seamen were secured creditors within the meaning of the BIA and entitled to an order that the stay of proceedings was not applicable. The Court concluded that the ranking of the priorities and the proof of the maritime claims would be a matter for the Federal Court to determine pursuant to the principles of Canadian maritime law.

**Reference**: In *Nanaimo Harbour Link Corporation v. Abakhan & Associates (Trustees) Inc*. 2007 BCSC 109 [**TAB 14**]

69. The debtors in the case of *Re Vanguard Shipping (Great Lakes) Ltd. and Vanship Ltd*., *supra.*, were in the business of operating two Great Lakes freighters and filed for and obtained protection under the CCAA. The sale of substantially all of the debtor companies' assets, including the vessels, was approved by Court order following a court-sanctioned sale and investor solicitation process. The purchaser of the assets agreed to assume responsibility for payment of any *in rem* claims determined to rank in priority to the existing ship's mortgages. The Ontario Superior Court approved a claims process and procedure within the insolvency proceeding for the determination and resolution of claims against the vessels and the priorities of the claims *inter se*.

**Reference**: *Re Vanguard Shipping (Great Lakes) Ltd. and Vanship Ltd*., *supra.* [**TAB 10**]

70. Finally, in the case of *Ballantrae Holdings Inc. v. The Ship "Phoenix Sun"* 2016 FC 570, the "Phoenix Sun" was purchased while under arrest by a person who intended to repair her, find a cargo and sail her to Turkey where she would be sold for scrap at a profit. The ship was purchased for $1 million which was borrowed from the plaintiff, Ballantrea,

and secured by a mortgage on the ship. The mortgage was never registered in a ship registry but it was registered as a charge under the Ontario Personal Property Security Act ("**PPSA**"). The purchaser hired a crew and persuaded other chandlers and repairers to provide goods and services to the vessel. The purchaser also obtained some additional funds from a Mr. Hamilton. Eventually, the funds ran out and the ship was again arrested in the proceeding commenced by Ballantrae. The ship was subsequently sold for $680,000. Pursuant to the normal procedure established by the Federal Court, claimants to the proceeds of sale filed their claims with the court. The court was called upon to adjudge and rank the claims. The claimants and claims included:

- The Marshall for the fees and expenses of bringing the ship to sale;
- Ballantrae for its costs of bringing the vessel to sale;
- The Master and crew of the vessel for the amounts due to them under their employment contracts;
- The City of Sorel for berthage and the costs of supplying electricity, which it claimed had a priority under either the *Canada Marine Act*, the *Marine Liability Act* or in equity;
- Various necessaries supplier who claimed lien rights under s. 139 of the *Marine Liability Act*;
- Mr. Hamilton, who also claimed lien rights under s. 139 of the *Marine Liability Act* or in equity;
- Ballantrae for the amount due under the mortgage; and
- Skylane, who also claimed to have a valid mortgage registered in Panama.

**Reference**: *Ballantrae Holdings Inc. v. The Ship "Phoenix Sun"* 2016 FC 570 [**TAB 15**]

71. The court held that generally, the highest priority claims are the Marshall's fees and expenses and the costs of the creditor that brought the ship to sale. <u>Thereafter come maritime liens and liens created by statute</u>, which enjoy the same status. Next in ranking are mortgages followed by *in rem* creditors. <u>On occasion, when the interests of justice require, equity will permit the court to alter this traditional ranking, as well as elevate a claim to that of a maritime lien.</u> (Our emphasis added)

72. The City of Sorel claimed for berthage ($75,000) and for the supply of electricity ($22,000) and argued it is entitled to priority under s. 122 of the CMA or s. 139 of the MLA or, alternatively, on an equitable basis. Section 122 of the CMA gives priority to a Port Authority or to "a person who has entered into agreement under s. 80(5)". The court held that the City of Sorel is not a Port Authority and is not "a person who has entered into agreement under s. 80(5)" since s. 80(5) relates to parts of the Saint Lawrence Seaway and Sorel is not within the Seaway. Sorel, therefore, had no priority under s. 122 of the *Canada Marine Act*. Neither did the City's claim fall under s. 139 of the MLA. The claim of the City, as noted by the court, is not for "goods, materials or services" supplied to a vessel. This follows from the distinction in s. 22 of the FCA between necessaries and docking charges and from the purpose of s. 139 of the MLA <u>which was to give Canadian necessaries supplier a priority to that enjoyed by foreign suppliers</u>. In the traditional ranking, the claims of the City of Sorel would have no priority; however, <u>the court recognized that it does have an equitable jurisdiction to vary the traditional ranking if the interests of justice so require</u> and held that it was appropriate to alter the traditional ranking in respect of the claim for supply of electricity to the ship <u>since this did benefit all of the creditors</u>. The claim for the costs of electricity ranked immediately after the claims of the Master and crew and the claims of necessaries suppliers with lien claims under s. 139 of the MLA ranked after the claim of the City of Sorel for the supply of electricity. (Our emphasis added)

**<u>Conclusion and Remedy Sought</u>**

73. In conclusion, Inaminka is entitled to a priority maritime lien against the Barge, or the proceeds thereof, for its unpaid invoices for the Services. Since the Barge has been sold with the assets or shares of CFI, Inaminka is entitled to a priority claim against that portion of the sale equivalent to it claim being $146,870.02, including HST, plus interest thereon and reasonable costs in having to pursue it claim under the BIA and CCAA.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**DATED** this 22st day of November, 2023

_____
Deborah L. J. Hutchings, K.C.
**Deborah L.J. Hutchings Law**
Solicitor for
Inaminka Marine Services Limited
61 Parsonage Drive
St. John's, NL  A1A 0J6
Telephone:  709-682-3728
Email: deborahljhutchings@gmail.com

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**DATED** this 23rd day of November, 2023

Deborah L. J. Hutchings, K.C.
**Deborah L.J. Hutchings Law**
Solicitor for
Inaminka Marine Services Limited
61 Parsonage Drive
St. John's, NL A1A 0J6
Telephone: 709-682-3728
Email: deborahljhutchings@gmail.com

# Exhibit “A”

Registration of Barge

REPÚBLICA DE PANAMÁ | REPUBLIC OF PANAMA
AUTORIDAD MARÍTIMA DE PANAMÁ | PANAMA MARITIME AUTHORITY

PANAMA MARITIME AUTHORITY

DIRECTORATE GENERAL OF MERCHANT MARINE / DIRECCION GENERAL DE MARINA MERCANTE
INTERNATIONAL SERVICE / SERVICIO INTERNACIONAL

| IMO NUMBER<br>Número OMI | REGISTRATION No<br>Número Oficial | CALL SIGN<br>Distintivo de Llamada |
|---|---|---|
| ********** | 19557-91-I | S/R |

Issued under Law No. 57 dated August 6th, 2008 / Expedido bajo Ley No. 57 de 6 de agosto de 2008

## NAVIGATION STATUTORY REGISTRY / PATENTE REGLAMENTARIA DE NAVEGACION

### Vessel's Information / Información de la Nave

| Name of Vessel / Nombre del Buque | Type Vessel / tipo de Buque |
|---|---|
| CFI PONTOON 1 | BARCAZA |

Registered Owner / Propietario
CANADA FLUORSPAR NL INC

| Resident Agent / Agente Residente | Radio Accounting Authority / Autoridad de Cuentas de Radio |
|---|---|
| ALEMAN, CORDERO, GALINDO & LEE | SIN RADIO |

| Previous Name / Nombre Anterior | Previous Flag / Nacionalidad a la que Renuncia |
|---|---|
| 40 | INGLATERRA |

| Built in / Construido en | Builders / Constructores | Hull Material / Material del casco | Keel Laid / Puesta de Quilla | Construction Date / Año de Construcción |
|---|---|---|---|---|
| SUNDERLAND, INGLATERRA | AUSTIN & PICKERSGILL, LTD. | ACERO | 1986 | 1987 |

| Lenght / Eslora | Breadth / Manga | Depth / Puntal | GRT / TB | NRT / TN | Dead Weight / Peso Muerto |
|---|---|---|---|---|---|
| 117.12 MTS | 36.60 MTS | 7.60 MTS | 9,638.00 | 2,891.00 | ********* |

PROPULSION SYSTEM / SISTEMA DE PROPULSION

| Type of Engines / Tipo de Máquina | Vessel Speed / Velocidad del Buque | Manufacture & Cylinders / Fabricantes y Cilindros | Engines Power / Potencia de la Máquina |
|---|---|---|---|
| S/Propulsión Propia<br>S/Propulsión Propia | ---------- | ----------<br>---------- | ---------- |

| Issuance Date / Fecha de Expedición | Expiration Date / Fecha de Expiración |
|---|---|
| DECEMBER 12th, 2017<br>DOCE (12) de DICIEMBRE de 2017 | DECEMBER 11th, 2022<br>ONCE (11) de DICIEMBRE de 2022 |

| Place of Issuance / Lugar de Emisión | Fees / Derechos |
|---|---|
| PANAMA | R.O 1142529/ 18-8-17 |

Renmarks / Observaciones

LIC. FERNANDO SOLORZANO
OFFICER SIGNATURE / FIRMA DEL FUNCIONARIO

PANAMA

**This is Exhibit** A **referred to in the Affidavit of** Richard A. Spellacy
**Sworn or affirmed before me this** 24th
**day of** ~~November~~ October, **20** 2022.

M. RCM-ENMT

REPÚBLICA DE PANAMÁ | REPUBLIC OF PANAMA
AUTORIDAD MARÍTIMA DE PANAMÁ | PANAMA MARITIME AUTHORITY

PANAMA MARITIME AUTHORITY

DIRECTORATE GENERAL OF MERCHANT MARINE / DIRECCION GENERAL DE MARINA MERCANTE
INTERNATIONAL SERVICE / SERVICIO INTERNACIONAL

| IMO NUMBER<br>Número OMI | REGISTRATION No.<br>Número Oficial | CALL SIGN<br>Distintivo de Llamada |
|---|---|---|
| ********** | 19557-91-I | S/R |

Issued under Law No. 57 dated August 6th, 2008 / Expedido bajo Ley No. 57 de 6 de agosto de 2008

## NAVIGATION STATUTORY REGISTRY / PATENTE REGLAMENTARIA DE NAVEGACION

### Vessel's Information / Información de la Nave

| Name of Vessel / Nombre del Buque | Type Vessel / tipo de Buque |
|---|---|
| CFI PONTOON 1 | BARCAZA |

Registered Owner / Propietario
CANADA FLUORSPAR NL INC.

| Resident Agent / Agente Residente | Radio Accounting Authority / Autoridad de Cuentas de Radio |
|---|---|
| ALEMAN, CORDERO, GALINDO & LEE | SIN RADIO |

| Previous Name / Nombre Anterior | Previous Flag / Nacionalidad a la que Renuncia |
|---|---|
| 40 | INGLATERRA |

| Built in / Construido en | Builders / Constructores | Hull Material / Material del casco | Keel Laid / Puesta de Quilla | Construction Date / Año de Construcción |
|---|---|---|---|---|
| SUNDERLAND, INGLATERRA | AUSTIN & PICKERSGILL, LTD. | ACERO | 1986 | 1987 |

| Lenght / Eslora | Breadth / Manga | Depth / Puntal | GRT / TB | NRT / TN | Dead Weight / Peso Muerto |
|---|---|---|---|---|---|
| 117.12 MTS | 36.60 MTS | 7.60 MTS | 9,638.00 | 2,891.00 | ******** |

PROPULSION SYSTEM / SISTEMA DE PROPULSION

| Type of Engines / Tipo de Máquina | Vessel Speed / Velocidad del Buque | Manufacture & Cylinders / Fabricantes y Cilindros | Engines Power / Potencia de la Máquina |
|---|---|---|---|
| S/Propulsión Propia<br>S/Propulsión Propia | ---------- | ----------<br>---------- | ---------- |

| Issuance Date / Fecha de Expedición | Expiration Date / Fecha de Expiración |
|---|---|
| DECEMBER 12th, 2017<br>DOCE (12) de DICIEMBRE de 2017 | DECEMBER 11th, 2022<br>ONCE (11) de DICIEMBRE de 2022 |

| Place of Issuance / Lugar de Emisión | Fees / Derechos |
|---|---|
| PANAMA | R.O.1142529/ 18-8-17 |

Renmarks / Observaciones

LIC. FERNANDO SOLORZANO
OFFICER SIGNATURE / FIRMA DEL FUNCIONARIO

PANAMA

000275735

RCM-FNMT

**Court File No. T-**

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.**, a body corporate

**Defendant**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

## AFFIDAVIT TO LEAD WARRANT

## (RULE 481)

I, Richard A. Spellacy, of the City of St. John's, in the Province of Newfoundland and Labrador, being duly sworn, do depose and say that:

1. I am the sole shareholder and director, and the President of the Plaintiff, Inaminka Marine Services Limited, and, as such, I am aware of the matters relating to the arrest of the ship "BARGE H-404" (the "Barge"), except where stated to be based upon information and belief.

2. The Plaintiff provides consultation and other services in the marine industry in the Province of Newfoundland and Labrador (the "Province") and elsewhere.

3. The claim of the Plaintiff is for the recovery of money owed by the Defendants for the Plaintiff's consultation and design services, as will be further described below, relating to the protection of the Barge from damage caused by inclement weather. The claim is presently due and owing to the Plaintiff by the Defendants. Accordingly, this will invoke

the *in rem* jurisdiction of the Federal Court pursuant to section 22(2) (m) and (n), and section 23 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

4. At all times material to this matter, Canada Fluorspar (NL) Inc. ("CFI") docked the Barge at its loading piers situate at its Blue Beach terminal (the "Terminal") at or near St. Lawrence, Burin Peninsula, in the Province. The Barge typically cannot be moved without the assistance of tugs. On the occasions of approaching inclement weather, CFI would be required to engage tugs to move the Barge from the Terminal to a safer and more protected location to avoid damage to the Barge from the inclement weather. It is my understanding from those I dealt with at CFI that engagement of tugs to move the Barge for this purpose was a great expense for CFI. Also, there were occasions when tugs were not immediately available, and the Barge would often sustain damage if left at the Terminal to ride out the inclement weather.

5. Therefore, in or about late summer or early fall of 2021 the Plaintiff was approached by CFI to provide a solution, through its consultation and design services, for the protection of the Barge from damage caused by inclement weather and without relying upon the tug service (the "Services").

6. On behalf of the Plaintiff, I completed a vendor registration with CFI on or about October 28, 2021 (the "Vendor Registration") wherein it was stated that the Plaintiff's terms for payment for its Services was 30 days of issuing its invoices (net 30 days). It was agreed to between the Plaintiff and CFI that the Plaintiff would provide the Services to CFI. Attached hereto as Exhibit "A" is a true copy of the Vendor Registration.

7. Through me, the Plaintiff provided the specific Services: consultation to CFI on the manner in which the Barge could be moved to safety from approaching inclement weather without the use of tugs; designed a system or process which would allow CFI to move the Barge on and off the loading piers; designed a set of storm moorings to facilitate the movement of the Barge on and off the loading piers; sourced all contractors for manufacturing the various components in the process of moving the Barge and for the installation of such components, respectively.

8. On or about November 5, 2021 the Plaintiff received from CFI one purchase requisition dated for November 5, 2021 in the amount of $90,000. Then on December 14, 2021, by which time the Plaintiff had delivered approximately 70% of the Services to the Defendants and most of the initial requisite amount for the Services had been used up, CFI provided the Plaintiff with two purchase orders of the same date. The Plaintiff states that the aggregate amount of the two purchase orders dated December 14, 2021 was approximately $143,000 plus tax. Contrary to the Plaintiff's terms, as noted above, the purchase orders stated that terms were 60 days net. Attached hereto as Exhibit "B" are true copies of the purchase orders.

9. The Services were completed and presented in its final form to CFI on or about January 20, 2022. The final budget was completed by the Plaintiff on January 30, 2022 and presented to CFI on the afternoon of January 31, 2022. Attached hereto as Exhibit "C" are true copies of the invoices issued by the Plaintiff to CFI for the Services rendered, which invoices total the sum of $146,870.02. I note that the invoices dated January 15, 2021 and February 1, 2021 should be January 15, 2022 and February 1, 2022, respectively.

10. The amount of $146,870.02, at the time of execution of this my Affidavit, remains owing by the Defendants to the Plaintiff, with interest accruing thereon as of today's date. In addition, expenses for legal fees have been incurred by the Plaintiff to proceed with this action plus additional expenses Which are expected for the issuance and service of the Statement of Claim and the Warrant for the arrest of the Barge. The Plaintiff's claim remains unsatisfied.

11. The nature of the property to be arrested is a ship, being a barge named H-404 and identified as CFI Pontoon 1. I am advised and do verily believe that the beneficial owner of the Barge is the Defendant Canada Fluorspar (NL) Inc. and that the Barge is currently tied up at the Marbase (the former Marystown Shipyard) in Marystown in the Province.

12. The Plaintiff's claim and action are to secure payment of the outstanding debt related to the Services it has provided to the Defendants for the benefit of protecting and preserving the Barge from damage resulting from inclement weather, which Services are described above in this my Affidavit.

13. All facts deposed above in this my Affidavit I believe to be true.

**SWORN** before me at the City of St. John's, in the Province of Newfoundland and Labrador, this 15th day February, 2022, before me:

Commissioner for Oaths / Barrister /Notary Public

**RICHARD A. SPELLACY**

# VENDOR REGISTRATION APPLICATION

## Canada Fluorspar (NL) Inc.

St Lawrence Newfoundland

**Notes to vendors :** Vendor registration is essential for procurement and payment purposes.
Please answer all questions fully so that your application may proceed without delay
INFORMATION PROVIDED REMAINS CONFIDENTIAL IN PERPETUITY

| Date of Application | Prepared by | Title |
|---|---|---|
| 28-Oct-21 | Richard Spellacy | President |

Full company name *: Inaminka Marine Services Ltd.

Currency *: Canadian Dollars

Business Address *: Suite 202, 130 Lemarchant Road

| City * | Province/State * | Country * |
|---|---|---|
| St. Johns | Newfoundland and Labrador | Canada |

| Postal/Zip Code | Company registration number * | Payment Terms * |
|---|---|---|
| A1C 2H2 | 38557 | Net 30 days |

**Contacts**

| | Phone Number | Email Address |
|---|---|---|
| Operations Contact Name: Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |
| PO Contact Name: Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |
| A/R Contact Name: Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |

VOLUNTARY: Is your business owned by a member of an underrepresented group (mark X in all that apply)

| | | | |
|---|---|---|---|
| | Women | | Disability |
| | Aboriginal | | Visible Minority |

**Banking information**

Name to appear on cheques or wire transfers *: Inaminka Marine Services Ltd

| Name of bank | Address of bank |
|---|---|
| CIBC | 215 Water Street, St. Johns, NL, A1C6C9 |

| Institution # (3 digits) * | IBAN/Account Number * | Swift * |
|---|---|---|
| 390 | 00063-010-4811410 | CIBCCATT |

| Transit # (5 digits) * | Country |
|---|---|
| 63 | CANADA |

**Mailing Address for Cheque (If applicable)**

Full company name *: Inaminka Marine Srvices Ltd.

Business Address *: Suite 202, 130 Lemarchant Road

| City * | Province/State * | Country * |
|---|---|---|
| St. Johns | NL | CANADA |

Postal/Zip Code: A1C 2H2

**Internal use Only (CFI)**

Entered in Sage date: _____ /_____ /_____ Entered By: _____

This is exhibit A referred to in the affidavit of Richard A. Spellacy sworn or affirmed before me this 15th day of February, 2022

_____

Canada Fluorspar (NL) Inc.

# Purchase Requisition

| Date | Page |
|---|---|
| 2021-11-05 | 1 |
| Purchase Requisition Number | |
| RQN0012966 | |

| Reference | Description | Required Date | | Requested By |
|---|---|---|---|---|
| Blue Beach | Review BB barge mooring away f | | CAP2021-001 | Serena Hickey |

| Ship To | Bill To | Ship Via | FOB Point |
|---|---|---|---|
| | | | |

| Item | Description | Vendor | Expected Arrival | GL Account | Quantity | UOM | Unit Cost | Extended Cost |
|---|---|---|---|---|---|---|---|---|
| CAPDC | Review BB barge mooring away from cribs | | | 18343-505-033 | 60.00 | EA | 1,500.00 CAD | 90,000.00 |

This is exhibit "B" referred to in the affidavit of Richard A. Spellacy sworn or affirmed before me this 15th day of February, 2022.

Comment:
Vendor Richard Spellacy

Total Cost: 90,000.00

Approver Name: Approver Position / Title:

# Purchase Order

| Date | Page |
|---|---|
| Dec 14, 2021 | 1 |
| **Purchase Order Number** | |
| PO00021012 | |

Canada Fluorspar (NL) Inc.
P.O. Box 337
St. Lawrence, NL A0E 2V0

01/19/2022
7:27:52AM

REQUISITION # **RQN0012966**

**Vendor Address:**

Inaminka Marine Services Ltd.
Suite 202
130 Lemarchant Rd
St. John's, NL A1C 2H2
Canada

| Reference | Contact | Vendor Number | PO Date | Terms | Ship Via | Expected Arrival |
|---|---|---|---|---|---|---|
| Blue Beach | | INAMAR | Dec 14, 2021 | NET60 | | |

| Qty. Ordered | Vendor Item Number | Description | CFI Item Number | Unit Cost | UOM | Extended Price |
|---|---|---|---|---|---|---|
| 0.0000 | CAPDC | Review BB barge mooring away from cribs $220.00 PER HOUR<br>**Instructions:** Requisitioner: SHICKEY RQN0012966 | CAPDC | 1.000000 | EA | 0.00 |
| 0.0000 | CAPDC | MILELAGE .60 PER KM<br>**Instructions:** Requisitioner: SHICKEY RQN0012966 | CAPDC | 1.000000 | MT | 0.00 |
| 50,000.0000 | RQN13616 | Review BB Barge Mooring Away from Crib (220.00 per hr) | CAPDC | 1.000000 | EA | 50,000.00 |
| 3,000.0000 | CAPDC | MILELAGE | CAPDC | 1.000000 | EA | 3,000.00 |

**Comments:**
Richard Spellacy to SUBMIT DAILY RECORD OF WORK DONE WITH INVOICE

**Tax Summary:**
HSTGST 7,950.00

| | |
|---|---|
| **Less:** included tax | **0.00** |
| **Subtotal** | **53,000.00** |
| **Total tax** | **7,950.00** |
| **Total purchase order** | **60,950.00** |

CFI
CANADA FLUORSPAR INC.

# Purchase Order

| Date | Page |
|---|---|
| Dec 14, 2021 | 1 |

Purchase Order Number
PO00021012

12/14/2021
8:14:19AM

REQUISITION # RQN0012966

**Vendor Address:**

Inaminka Marine Services Ltd.
Suite 202
130 Lemarchant Rd
St. John's, NL A1C 2H2
Canada

Contact : Richard Spellacy
Phone: 7096851725
Email: richardspellacy@hotmail.com

**Ship To/Billing address**

**Canada Fluorspar (NL) Inc**
**141 Director Drive**
**P.O. Box 337**
**St. Lawrence, NL**
**A0E 2V0**
**Phone: (709) 873-3331**
**Fax: (709) 873-3335**

| Reference | Contact | Vendor Number | PO Date | Terms | Ship Via | Expected Arrival |
|---|---|---|---|---|---|---|
| Blue Beach | | INAMAR | 12/14/2021 | NET60 | | |

| Vendor Item Number | Description | CFI Item Number | Qty. Ordered | Expected Arrival | Unit Cost | UOM | Extended Price |
|---|---|---|---|---|---|---|---|
| GL ACCT: | Review BB barge mooring away from cribs $220.00 PER HOUR 18343-505-033 | CAPDC | 87,000.00 | | 1.000000 | EA | 87,000.00 |
| GL ACCT: | MILELAGE .60 PER KM 18343-505-033 | CAPDC | 3,000.00 | | 1.000000 | MT | 3,000.00 |

**Comments:**
Richard Spellacy to SUBMIT DAILY RECORD OF WORK DONE WITH INVOICE

**Tax Summary:**
HSTGST 13,500.00

| | |
|---|---|
| **Subtotal** | **90,000.00** |
| **Total tax** | **13,500.00** |
| **Total purchase order** | **103,500.00** |

**Approver Name:** **Approver Position / Title:**

Bill Dobbs
Jason Flood
Patrick Gannon
Ron Milmine
Serena Hickey
Terry Fleming

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #301
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

November 30th 2021

**Canada Fluorspar (NL) Inc.**
**PO Box 337**
**St. Lawrence, NL**
**A0E2V0**

This is exhibit "C" referred to in the affidavit of Richard Spellacy sworn or affirmed before me this 1st day of February, 2022.

RQN #N0012966
Inaminka 20209

Attention: Jason Flood

Re Consulting on loading Barge

| | |
|---|---|
| 27.5 days @ C$1,500.00 per day | $41,250.00 |
| HST @15% | $6,187.50 |
| Expences as attached | $894.00 |
| **Total** | **$48,331.50** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
**130 LeMarchant Road, Suite #301**
**St. Johns, Newfoundland, A1C 2H2**
**(709) 739-4714**
**Fax: (709) 739-0317**
**email;dspellacy@nf.aibn.com**
**HST#88690 8235 RT0001**

December 12th 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 20210

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 64.5 hours @$220.00/hour | $14,190.00 |
| A. Barclay 24 hours @$200.00/hour | $4,800.00 |
| HST @15% | $2,848.50 |
| Expences as attached | $539.17 |
| **Total** | **$22,377.67** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

December 31st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202111

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 140.0 hours @$220.00/hour | $30,800.00 |
| A. Barclay 30 hours @$200.00/hour | $6,000.00 |
| HST @15% | $5,520.00 |
| Expences as attached | $606.85 |
| **Total** | **$42,926.85** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
**130 LeMarchant Road, Suite #202**
**St. Johns, Newfoundland, A1C 2H2**
**(709) 739-4714**
**Fax: (709) 739-0317**
**email;dspellacy@nf.aibn.com**
**HST#88690 8235 RT0001**

January 15th. 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202201

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 65.0 hours @$220.00/hour | $14,300.00 |
| HST @15% | $2,145.00 |
| **Total** | **$16,445.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

February 1st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202202

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 66.0 hours @$220.00/hour | $14,520.00 |
| Expences as attached | $91.00 |
| HST @15% | $2,178.00 |
| **Total** | **$16,789.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

Court File No. T - 279-22

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.**, a body corporate

**Defendants**
*(In Personam)*

**AND:** **THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

**WARRANT**
**(RULE 481)**

TO The High Sheriff of the Province of Newfoundland and Labrador or as the case may be:

YOU ARE DIRECTED to arrest the ship **"Barge H-404"** and to keep the same under arrest until further order of this Court.

DATED this 16th day of February, 2022.

ORIGINAL SIGNED BY
MICHAEL KOWALCHUK
ORIGINAL SIGNÉ PAR

Issued By: _____
(Registry Officer)

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the 16 day of February A.D. 20 22

Dated this 16 day of February 20 22

M. Kowalchuk
Registry Officer
Agent du greffe

4865-5723-0607, v. 1

E-MAILED Oct 17/2022

OFFICE OF THE HIGH SHERIFF Newfoundland & Labrador

# JUDGMENT REGISTRATION FORM

(THIS AREA FOR OFFICE USE ONLY)

COURT NO: _____ *Date Received:* _____ *Registration Fee:* _____

ORDER DATE: _____ *Registration #:* _____ *Receipt/Req.#:* _____

*Processed By:* _____ *Small Claims Reg. Fee:* $15.00

**REGISTRATION TYPE**

☐ Notice of Judgment ☐ Recovery Order ☐ Attachment Order ☐ Wage Claim ☐ Appraisal & Sale

☐ Small Claims Judgment ☐ Possession Order ☐ Support Order ☑ Ship Arrest ☐ Other Order

**CREDITOR:** ☐ Individual ☑ Enterprise

Enterprise/Last Name: Inaminka Marine Services Middle Name: _____

First Name: _____ Telephone: _____

Address: Suite 202 130 LeMarchant Rd. St. John's NL A1C 2H2 Facsimile: _____

**Creditor Enterprise Contact:**

Law Firm: Benson Buffett PLC Telephone: 570-7256

Representative: Debnah Hutchings Q.C. Facsimile: 579-2647

**DEBTOR:** ☐ Individual ☑ Enterprise

Enterprise/Last Name: Canada Fluorspar (NL) Inc. Middle Name: _____

First Name: _____ Enterprise Contact: _____

Address: 1 Clarke's Pond Road St Lawrence NL A1E 2V0 Telephone: _____

Facsimile: _____

**Identifying Information for Individuals**

Alternate Names: _____ D.O.B: _____ Day _____ Month _____ Year

Driver's Licence: _____

SIN: _____ MCP: _____

**Identifying Information for Serial Numbered Goods**

Type/Description: _____ Serial Number: _____

**Debtor Enterprise Contact:**

Law Firm: _____ Telephone: _____

Representative: _____ Facsimile: _____

Original Order: $146,870.02 Costs: $512.50 Pre-Judgment Interest: _____

Current Order Balance: _____

Post-Judgment Interest: ☐ None ☐ Judgment Interest Act ☐ Interest Rate/Schedule (attach details)

**Attach Certified Copy of Court Order**

**CREDIT CARD AUTHORIZATION**

**Card Holder:** _____

**Card Number:** _____

**Bank:** _____

**Expiry date:** _____ **Amount:** _____

**Signature:** _____ **Phone:** _____

_____

**Creditor/Agent Signature**

*Revised June 26, 2013*

**Court File No. T -**

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.,** a body corporate.

**Defendants**
*(In Personam)*

**AND:** **THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

## STATEMENT OF CLAIM

**TO THE DEFENDANTS:**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a Solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Court Rules, 1998*, serve it on the Plaintiff's solicitor or, where the Plaintiff does not have a solicitor, serve it on the Plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served in Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty (40) days. If you are served outside Canada and the United States of America, the period for serving and filing your defence is sixty (60) days.

Copies of the Federal Court Rules, 1998, information concerning the local offices of this Court and other necessary information may be obtained on request by the Administrator of this Court at Ottawa (613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

**DATED** at St. John's, Newfoundland and Labrador, this day of February, 2022.

Issued by: _____
**(Registry Officer)**

**TO:** Canada Fluorspar (NL) Inc.
P.O. Box 337
1 Clarke's Pond Road
St. Lawrence, NL A1E 2V0

**AND TO:** The Ship "Barge H-404", the Owners and All Others Interested in the Ship "Barge H-404" Their Solicitors or Agents

1. The Plaintiff, Inaminka Marine Services Limited, claims against the Defendants for consultation and design services provided by the Plaintiff to the Defendants at their request (the "Services"). By contract the Services were performed by the Plaintiff for the Defendants and the cost of same is due and owing from the Defendant, Canada Fluorspar (NL) Inc. ("CFI").

2. The Plaintiff is a body corporate duly incorporated under the laws of the Province of Newfoundland and Labrador (the "Province"), whose registered office is Suite 202, 130 LeMarchant Road, St. John's, NL A1C 2H2.

3. CFI is a body corporate duly incorporated under the laws of the Province, whose registered office is P.O.Box 337, 1 Clarke's Pond Road, St. Lawrence, NL A0E 2V0. At all times material hereto, CFI was the beneficial owner of the Barge H – 404 (the "Barge") which is typically moored at CFI's loading piers at its Blue Beach terminal, at or near the Town of St. Lawrence, in the Province (the "Terminal").

4. The Services supplied by the Plaintiff included, but were not limited to, consultation to CFI on the manner in which the Barge could be moved to safety from approaching inclement weather without the use of tugs; designed a system or process which would allow CFI to move the Barge on and off the loading piers; designed a set of storm moorings to facilitate the movement of the Barge on and off the loading piers; sourced all contractors to manufacture the various components in the process of moving the Barge and to install such components, respectively; and drafted a budget and timeline for the completion of the process.

5. The Plaintiff states that the amount of $146,870.02 is the outstanding debt due and owing to it from CFI and the Defendants for the supply by the Plaintiff of the Services, aforesaid. Despite repeated requests to CFI and the Defendants for payment, the outstanding amount has not been paid.

6. The Plaintiff pleads breach of contract and the provisions of the *Federal Court Act*, R.S.C. 1985, c.F-7.

7. The Plaintiff claims against CFI and the Defendants the sum of $146,870.02 which is due and owing to the Plaintiff, plus interest thereon and costs.

8. The Plaintiff requests that the hearing in this matter take place in St. John's, Newfoundland and Labrador.

**DATED** at St. John's, Newfoundland and Labrador, this 16th day of February, 2022.

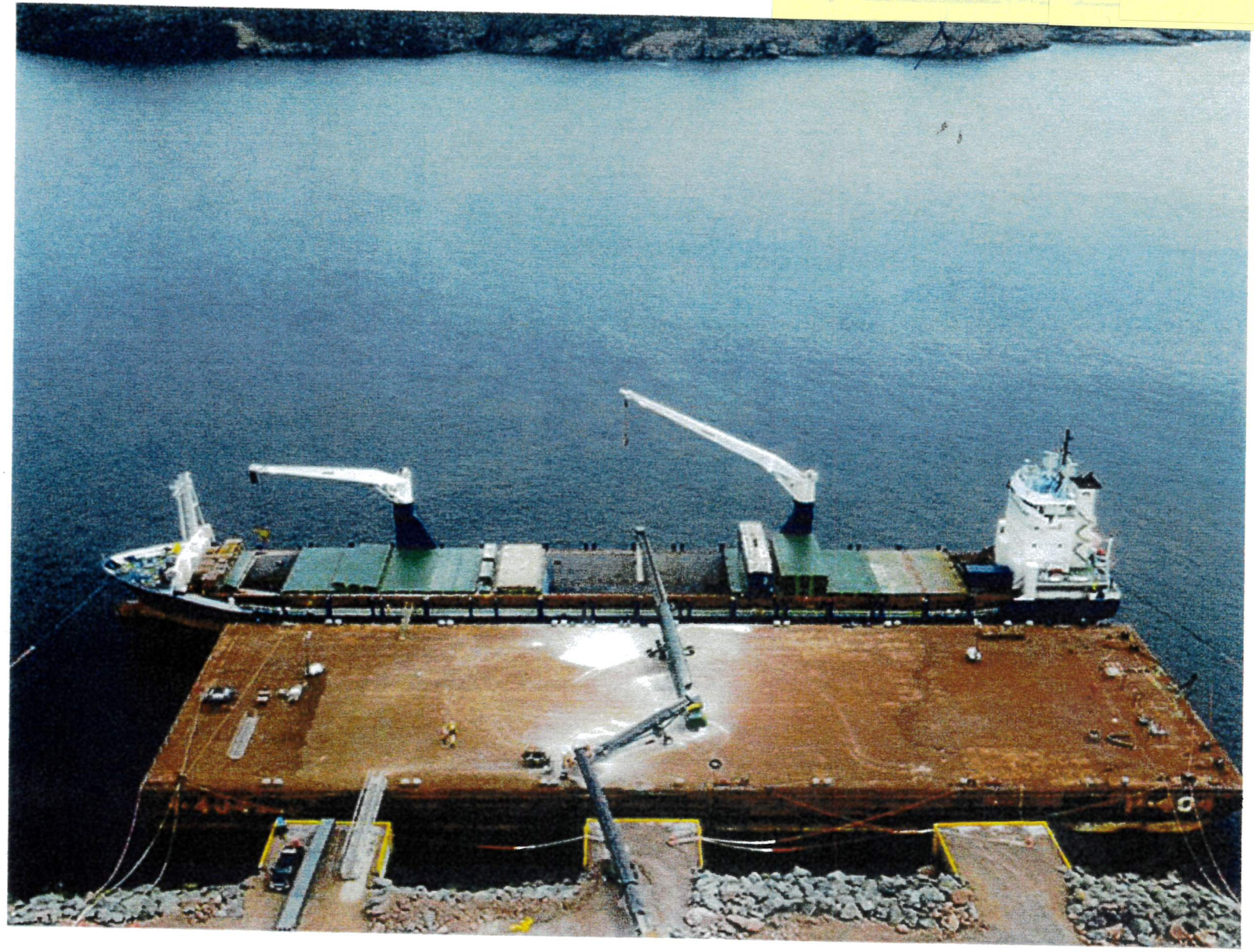
**BENSON BUFFETT PLC INC.**

Per: _____
**DEBORAH L.J. HUTCHINGS, QC**
Solicitors for the Plaintiffs
*Whose Address for Service is:*
Suite 900, Atlantic Place
St. John's, NL A1C 5N8

**TO:** Canada Fluorspar (NL) Inc.
P.O. Box 337
1 Clarke's Pond Road
St. Lawrence, NL A1E 2V0

**AND TO:** The Ship "Barge H-404", the Owners and All Others Interested in the Ship "Barge H-404" Their Solicitors or Agents

This is Exhibit 2 referred to in the Affidavit of Robert A. Sworn or affirmed before me this day of October 20

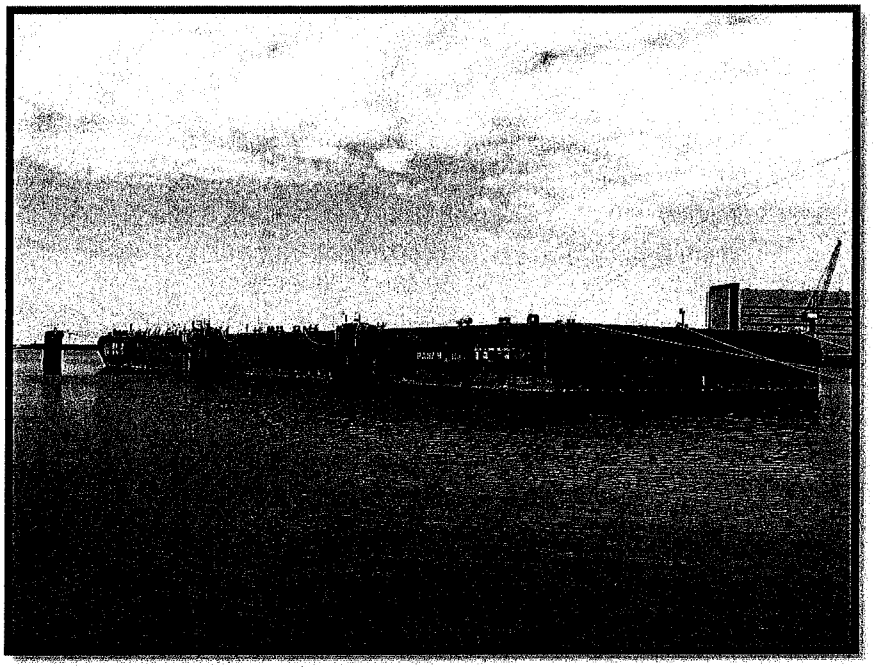


Nanny b's
Blue Beach Cove
Great St Lawrence Harbour
Cape Chapeau Rou

MSI Marine Services InternationalLtd.

# H-404 Barge

# Condition & Valuation Survey



Issued
June 2017

**ompleted By:**

**Marine Services International (2008) Ltd.**
P.O. Box 29132
St. John's, NL
Canada, A1A 5B5
Phone:709 782 2700

**Completed For:**

**Miller Shipping Limited**
P.O Box 8175
21 Pippy Place - Suite 205
St. John's, NL, A1B 3M9
Phone: 709 41

**Project Number** 2910

**Revision** 0

## General

At the request of Mr. Pat Miller of Miller Shipping Limited, the undersigned surveyed the barge 'H-404' while located in Vlissingen, Netherlands on June 13 - 14, 2017. At the time of the survey, the barge was moored alongside piers near the harbour entrance and accessible only by vessel tenders. It was reported the barge has been moored in this area and not in use for approximately 1 – 2 years. The completed survey was a visual inspection with an internal survey of all ballast tanks and void compartments and machinery spaces. The purpose of the survey was to determine the general condition and assess the value of the barge

## Barge Details

| | | |
|---|---|---|
| Name | **H-404** | |
| Type | Deck cargo barge | |
| Owner | Heerema Marine Contractors | |
| Official Number | 709296 | |
| Builder | Austin and Pickersgill Ltd., Southwick Shipyard, Sunderland | |
| Year Built | 1987 | |
| Classification | American Bureau of Shipping (ABS) Class A1 Deck Barge | |
| Particulars | Length Overall | 122.0m (400' - 0") |
| | Breadth | 36.60m (120' – 0") |
| | Depth | 7.60m (25' – 0" |
| | Draft (ABS Loadline) | 5.767m (18' – 11") |
| | Gross Tonnage | 9,638 |
| | Net Tonnage | 2,891 |
| Lightship Displacement | 3,913 Tonnes | |
| Loaded Displacement | 25, 663 Tonnes @ 5.763m draft | |
| Cargo Capacity | 21, 750 Tonnes | |
| Deck Loadings | Maximum Surface Loading | 15 Tonnes/m$^2$ |
| | Bulkheads and Transverses | 250 Tonnes |

The H-404 is a flat top deck cargo barge arranged with a raked bow (stern is flat and is not fitted with skegs) fitted with an anchor pocket and anchor winch located within the forward machinery space containing three auxiliary engines driving two ballast pumps, anchor winch and 35kVA, 84 A alternator. The barge is arranged with two longitudinal watertight bulkheads, a center non-watertight bulkhead, seven full breadth transverse bulkheads and a forward transverse watertight bulkhead located between the port and starboard void compartments. This structural arrangement sub divides the barge into 21 watertight ballast tanks, three forward void compartments (port, center and starboard) and a forward machinery space compartment located aft of the center void.

## Classification

The barge was designed and constructed in accordance with the American Bureau of Shipping Class A1 Deck Barge. It is unknown (but assumed) the barge was surveyed under Class since construction and more recently (2008) has been classed with Lloyds Register. The certificate of Class has been suspended since September 2016.

## Towing Arrangement

The main towing bridal legs are connected to smit type cable clenches (port and starboard) through 45 tonne cast steel fairleads. Cable clenches and bridal legs were certified and stamped by LR in 2009 and 2015 respectively. The bridal legs are connected to a 130 tonne S.W.L Delta Plate via 130 tonne Crosby Shackles. Additional details of the main towing bridal are as follows:

- 2 x 27.5m x 73mm U3 Stud Link Chain
- 1 x Delta Plate 130 tonne S.W.L
- 1 x 6.0m x 73mm U3 Stud Link Chain
- 3 x 130 tonne Crosby Shackles

The tow bridles and shackles were visually inspected (where accessible) and found free of defects.

The barge is fitted with an emergency (or secondary) tow bridal connected to a smit type cable clench through a 45 tonne cast steel fairlead. Details of the emergency tow bridal are as follows:

- 1 x 6.0m x 73mm U3 Stud Link Chain
- 1 x 75 tonne Crosby Shackle
- 1 x 127m x 76mm GSWR 6/36 steel core wire secured to deck edge with steel clips
- 1 x 110m x 48mm polypropylene rope with buoy attached

The emergency towing arrangement was visually inspected and found to be in good order.

## Barge Attachments

The barge is arranged with 12 mooring bollards rated for 35 tonnes and 8 fairleads rated for 45 tonnes located around the perimeter of the barge. Navigation lights are battery powered and are fitted on light post located port, starboard and stern. A forward bridal recovery a-frame structure is fitted and appeared to be the location for the forward mast and anchor light (not fitted at time of survey). Distortion of the a-frame legs was noted. 28 ballast tank vents (14 port and starboard) are located around the perimeter of the barge. The vents are aluminium constructed with screens and fitted with a ball type vent and bolted to a deck mounted flange. All barge attachments appeared to be in average to above average visual condition.

## Machinery Equipment

The barge is fitted with a forward machinery room located aft of the forward center void compartment. The following equipment was noted within the machinery room:

- Auxiliary Engine No. 1: Duetz diesel engine (123kW @ 1840 rpm)
- Auxiliary Engine No. 2: Deutz diesel engine (123kW @ 1840 rpm)
- Genset: Deutz engine (37kW @ 1500 rpm) / Stamford alternator (35kVA, 50Hz, 84 A)
- Transmission No. 1: Marine and Industrial Transmission (CF/SP 214/1000/1/03)
- Transmission No. 2: TwinDisc (SP211 H8-1)
- Anchor Winch (Robertson's Fleetwood England 2865) – anchor was removed at time of survey
- Ballast Pump No. 1 (1000m$^3$/hr)
- Ballast Pump No. 2 (1000m$^3$/hr)
- Electrical Control Panels (Gen. monitoring panel, start/stop/alarm panels)

Auxiliary engine No. 1 is fitted with a TwinDisc Transmission and is a dedicated engine for ballast pump No. 1. Auxiliary engine No. 2 powers the anchor winch via the Marine and Industrial Transmission and provides power to Ballast Pump No. 2 via a power take off on the forward end of the engine. All machinery appeared to be in average to above average visual condition. At the time of the survey, the genset and Auxiliary Engine No. 1 and Ballast Pump No. 1 were in operation and appeared to be in good working order (several tanks were pumped out at the time of the survey).

## Barge Structure

The barge is of all welded steel construction. The deck, sides and bottom are longitudinally framed. The longitudinals are supported by transverse deep frames and bulkheads. The barge is fitted with seven watertight transverse bulkheads and three longitudinal bulkheads; outboard longitudinal bulkheads are watertight while the centerline longitudinal bulkhead is non-watertight and subdivides the center ballast tanks into two compartments. This arrangement subdivides the barge into 25 compartments (21 water ballast tanks, 3 forward void spaces and a machinery space. The transverse bulkheads are vertically stiffened while the longitudinal bulkheads are longitudinally stiffened.

The following list of barge scantlings were obtained from design drawings by Austin and Pickersgill Ltd.

| | |
|---|---|
| Bottom Plating | 17.50mm |
| Bilge Plating | 17.50mm |
| Side Plating | 14.0mm |
| Deck Plating | 17.50mm |
| Bottom Longitudinals | 340 x 13 BP |
| Hull Side Longitudinals | 240 x 9.5 BP / 200 x 8.5 BP / 160 x 8 BP |
| Deck Longitudinals | 340 x 13 BP |
| Transverse Bulkhead Plating | 12.0mm / 14.0mm |
| Long. Bulkhead Plating | 14.0mm / 16.0mm |
| Long. Bulkhead (C.L) | 10.0mm |
| Vertical Bulkhead Stiffeners | 370 x 14 BP |
| Long. Bulkhead Stiffeners | 200 x 8.5 |
| Bottom Deep Frames | T1000 x 11 + 200 x 1 FF |
| Side Deep Frames | T1000 x 11 + 150 x 12 FF |
| Deck Deep Frames | T1500 x 14 + 275 x 20 FF |

## Condition of Barge Structure

A visual survey was completed on the deck, hull and internal structure within all barge compartments. In general, the H-404 appeared to be in average visual condition. The general alignment of the barge is good and was found without any major permanent hog or sag. The hull sides were surveyed using a boat to steam around the perimeter of the barge. The following items were noted:

- Barge is fitted with three sections of steel fendering along the upper hull sides on the port, starboard and aft and is fitted with additional steel over the fendering at the barge corners. Minor dents noted over length of fendering; higher degree of dents about the starboard side forward. Corner plate and fendering is heavily dented in this area.
- Hull dent noted on the starboard side near the bow rake. No other hull damage noted.
- Marine growth noted on hull sides at the 2.4m draft.
- Deterioration of steel coatings and paint system. Recommend coatings to be re-applied.

Overall the barge hull sides appear to be in average visual condition. No major damages noted.

The main deck was visually inspected with the following noted:

- Minor surface corrosion noted and deterioration of deck coating and paint system. Recommend coatings to be re-applied.
- Damage noted on hatch cover for tank 4P. To be repaired prior to being placed in service
- Main deck damage (hole) noted near hatch cover for tank 4P. To be repaired prior to being placed in service.
- Main deck fracture noted in way of tank #2C. To be repaired prior to being placed in service.
- Sea fastenings for previous deck cargoes were noted to be welded to deck. Remove all fixed and loose sea fastenings and misc. steel prior to being placed in service.

Overall, main deck was found to be in an average visual condition. No major damages or deformations between deck longitudinals were noted. Appears that several sections of main deck plating have been replaced.

The internal structure was inspected with the findings detailed in the next section, in general, all main structure webs and bulkheads are in average condition, except as noted. Bottom plating was inspected from the inside of the surveyed spaces (where accessible) and found free of damage, except as noted. No doubler plates were noted on the barge plating, shell and bulkheads. Any previously completed renewals on the barge appear to be completed as per good shipbuilding practice.

## Ultrasonic Steel Thickness Measurements (UTM's)

We were provided with a 'Ultrasonic Thickness Measurement Report' completed March 2016 by Ned Marine Services B.V. A UTM survey was completed on the following barge areas:

- Main Deck (100%)
- Bulkhead at Frame 13 (50%) – port and starboard
- Bulkhead at Frame 19 (50%) – port side only
- Bulkhead at Frame 31 (50%) – starboard side only
- Bulkhead at Frame 37 (50%) – port side only
- Web Frame at 18 located in Ballast Tank 5P. UTM's completed on bottom web frame, partial side web frame, web frame tripping brackets and lower web frame corner brackets.
- Web Frame at 21 located in Ballast Tank 4P. UTM's completed on bottom web frame, partial side web frame, web frame tripping brackets and lower web frame corner brackets
- Web Frame at 45 located in Port Side Void Space. UTM's completed on bottom web frame, partial side web frame, web frame tripping brackets and lower web frame corner brackets.

The main deck is constructed with 17.50mm deck plate. Upon review of the supplied UTM report, approximately 5-6% of the total shots taken (~1850) is less than 12.0mm which represents 30% diminution of the original steel plate thickness and is typically the point where Classification Societies require a plan to be submitted for steel renewals. It is realised the barge is heavily constructed for maximum deck loadings of 15 Tonnnes/ $m^2$ and total cargo capacity of 21,750 Tonnes and that the barge is not intended to be operated as an ocean going heavy deck cargo barge. No UTM's were noted to be less than 11.0mm. Recommend to blast and apply protective coatings to the main deck plate to prevent further diminution.

Upon review of the UTM's taken on the bulkheads and web frames as noted above, there are areas of low steel thickness (high diminution). However, the majority of the shots taken are above the acceptable limit of steel renewals.

It is recommended to establish a ballast tank cleaning, steel monitoring/renewal and tank coating plan.

## Internal Condition

Prior to our survey, all barge compartments were ventilated and tested before entry. Surveying from the stern to the bow, the following was noted.

*#7 Port*

Compartment was found to be in a **generally average** visual condition; no major damage noted.

- Minimal corrosion noted over majority of structural members.
- Coating deterioration is evident on all structural members
- Slight deformation of deck edge bracket located on port hull side near transom.
- Approximately 20" of water noted in compartment

#7 Center

Compartment found to be in **a generally fair – average** visual condition.

- Holes noted on lower plate along length of Centerline bulkhead.
- Moderate amount of corrosion noted on all structural members.
- Some tank coatings are still intact, however the majority of coatings have deteriorated
- Approximately 20" of water noted in compartment

*#7 Starboard*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Slight bottom hull indentation located between Frames 1 and 2. Noticeable only by ladder deformation. Temporary repair was reported by Lloyds Register to have been completed.
- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident on all structural members.
- Approximately 20" of water noted in compartment

*#6 Port*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Approximately 20" of water noted in compartment

*#6 Center*

Compartment found to be in a **generally fair - average** visual condition

- Centerline bulkhead heavily corroded and holed throughout the length along lower portion of plating
- Corrosion damage to web frame #3 and 4 located on centerline bulkhead.
- Heavy corrosion noted on longitudinal bulkhead structure. Several longitudinal are holed.
- Moderate to extensive corrosion noted on structural members
- Coating deterioration is evident on all structural members except for bottom longitudinals which appear to be still mainly intact.
- Some steel renewals include aft bulkhead, longitudinal bulkhead stiffeners and centerline bulkhead
- Approximately 20" of water noted in compartment

*#6 Starboard*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Approximately 12" of water noted in compartment

*#5 Port*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members

- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Approximately 12" of water noted in compartment

*#5 Center*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Approximately 40" of water noted in compartment

*#5 Starboard*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Hull side longitudinal corrosion damage
- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Corrosion damage to bottom structure catwalk
- Approximately 12" of water noted in compartment

*#4 Port*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Small hole noted in deck near hatch cover
- Corrosion damage noted on hatch cover
- Web frame holed near shell plate between longitudinals
- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Approximately 20" of water noted in compartment

*#4 Center*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate corrosion on bulkhead and longitudinals near hatch opening
- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Approximately 18" of water noted in compartment
- Web frame steel renewals are noted.

*#4 Starboard*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Approximately 18" of water noted in compartment

*#3 Port*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident, however coatings are partially intact on bulkheads and bottom longitudinals.
- Approximately 18" of water noted in compartment
- Side shell upper bracket deteriorated
- Corrosion damage to hull side longitudinal
- (x2) bottom gussets slightly tripped
- Slight side shell indent

*#3 Center*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Approximately 18" of water noted in compartment

*#3 Starboard*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Approximately 18" of water noted in compartment
- Steel renewals noted on side web frames

*#2 Port*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Approximately 18" of water noted in compartment

*#2 Center*

Compartment found to be in a **generally average** visual condition; no major damage noted, however compartment survey was limited due to high level of water in tank.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Approximately 48" of water noted in compartment

*#2 Starboard*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Approximately 18" of water noted in compartment

*#1 Port*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members

- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Approximately 18" of water noted in compartment
- Portion of tank bottom catwalk is missing
- Deformation noted on hull side longitudinal (isolated)
- Steel thinning noted around hatch header

*#1 Center*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Centerline bulkhead corrosion damage noted near the aft tank bulkhead
- Approximately 18" of water noted in compartment

*#1 Starboard*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident on all structural members except for bottom longitudinals which appeared to be still mainly intact.
- Approximately 18" of water noted in compartment

*Void – Starboard Forward*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident, however intact on some surfaces
- Ladder is not attached to bottom structure
- Minimal water noted

*Void – Center*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident, however intact on some surfaces
- Minimal water noted

*Void – Port Forward*

Compartment found to be in a **generally average** visual condition; no major damage noted.

- Moderate amount of corrosion noted on structural members
- Coating deterioration is evident, however intact on some surfaces
- Minimal water noted

*Pump Room / Machinery Compartment*

Compartment found to be in a generally average visual condition; no damage noted.

## Comments

The H-404 is a 400' heavy deck cargo barge that was constructed in 1987 and has been in Class with Lloyds Register (Class Certificate has expired in 2016). It was reported the barge has not been in use for approximately 1 – 2 years. It was evident during our survey that steel renewals have been completed on the main deck, bulkheads and primary structure. Coating failures were noted in all ballast tanks with a moderate amount of corrosion noted. Holes were noted in the centerline nonwatertight bulkhead of Ballast Tank's 7C and 6C. Immediate repairs are not required, however should be addressed to prevent further steel degradation. UTM's on the main deck, bulkheads and web frames do indicate areas of moderate diminution. Immediate repairs are not required; however, a monitoring plan should be put in place and areas addressed as required.

In general, the barge structure was found to be in average visual condition

## Recommendations

1. Main deck to be repaired in way of tanks 2C and 4P.
2. Marine growth to be removed on hull sides and bottom, sand blasted and anti-fouling coating to be applied
3. Main deck to be sandblasted and painted
4. Hull sides to be spot sandblasted and painted
5. Steel renewal strategy to be developed for renewal of centerline bulkhead in way of noted damage
6. Steel thickness measurement surveys to be completed on the barge structure on a regular basis to monitor the steel condition and renew areas of diminution that exceeds acceptable limits
7. Strategy to be developed to complete cleaning of water ballast tanks for removal of excess corrosion and re-application of tank coatings.

## Valuation and Life Expectancy

Replacement Cost
Value

Life Expectancy Remaining

Patrick Byrne,
Project Naval Architect / Marine Engineer
**Marine Services International Ltd.**

## DISCLAIMER

This report is not intended to express or imply any form of approval of the vessel, and its furnishings. This report sets forth the condition of the vessel at the time of the survey to the best of the surveyor's ability and without the removal of bulkheads, paneling or ceiling, parts of propulsion machinery or auxiliaries, tanks or fittings, for internal examination. It represents the honest, unbiased opinion of the surveyor based on conditions found and is not a warranty of the condition of the vessel or its hull, machinery and equipment.

This report of survey may not be altered by anyone other than the individual surveyor whose name appears hereon. If this survey does not discuss a specific item, equipment or machinery, it is not covered by this survey. This report is not intended to serve as a complete inventory or listing of all items found aboard the vessel. It has been prepared for the exclusive use of the survey purchaser named hereon and may not be relied upon by any other person without the written consent of the surveyor. No details of this report will be released by the surveyor without the survey purchaser's express authorization.

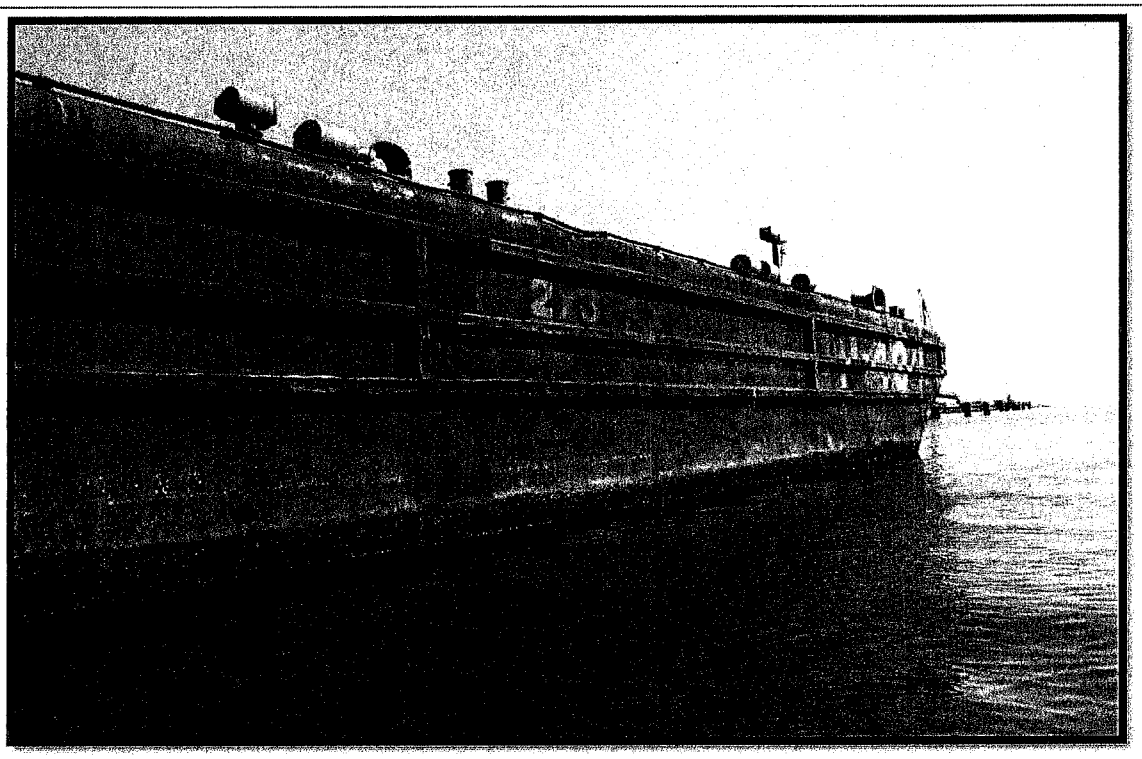
This report constitutes only a statement of the surveyor's opinion, based on the inspection of the vessel and the condition found at the time of the inspection. This survey makes no representation and does not purport to describe any condition that may have changed since the date of the inspection. The recommendations herein are limited to those that, in the opinion of the surveyor, are reasonably necessary and appropriate, based upon the conditions as they existed at the time of the inspection.

The use of the word "appear" "appears" or "appeared" where used in the text of this document, is intended to mean that a close or complete inspection was not possible, a close or complete inspection would have been possible only with destructive testing or that a close or complete inspection was not deemed appropriate at the time of the survey.

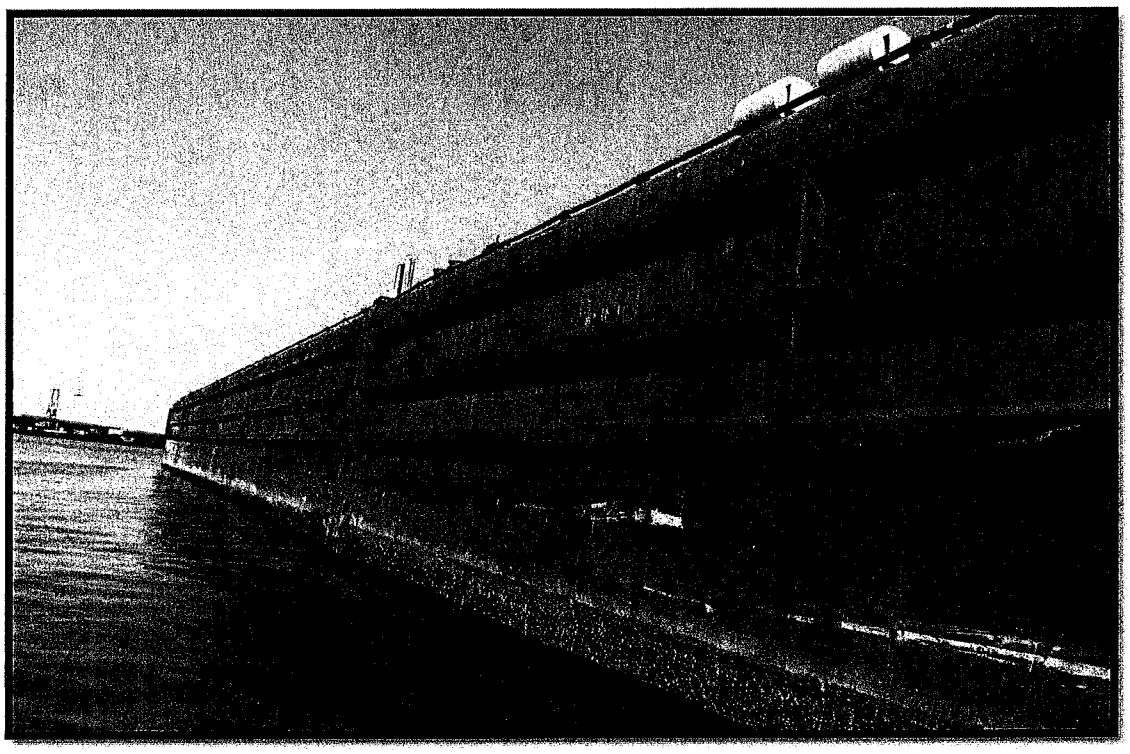
This report is issued subject to the condition that Marine Services International Ltd. and/or the individual surveyor will not be held liable or responsible, under any circumstances, for any error, omission or misstatement contained herein. In no way shall this document serve as a warranty of the vessel, its hull or machinery.

The use of this report for any purpose whatsoever shall constitute acceptance of the foregoing condition. This report of survey is invalid until the fee and other related charges have been paid in full. The survey purchaser agrees that the delivery of this report satisfies and completes any and all obligations on the part of Marine Services International Ltd. and on the part of the individual surveyor.

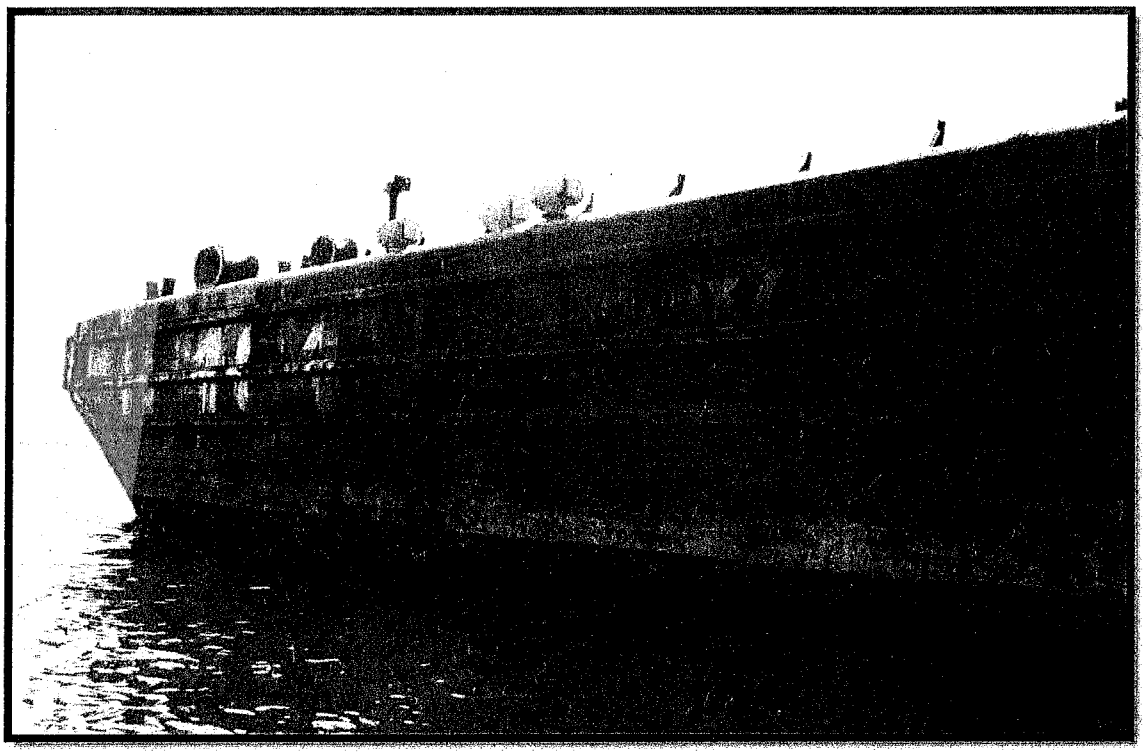
**PICTURES**
**BARGE EXTERIOR AND MACHINERY SPACE**



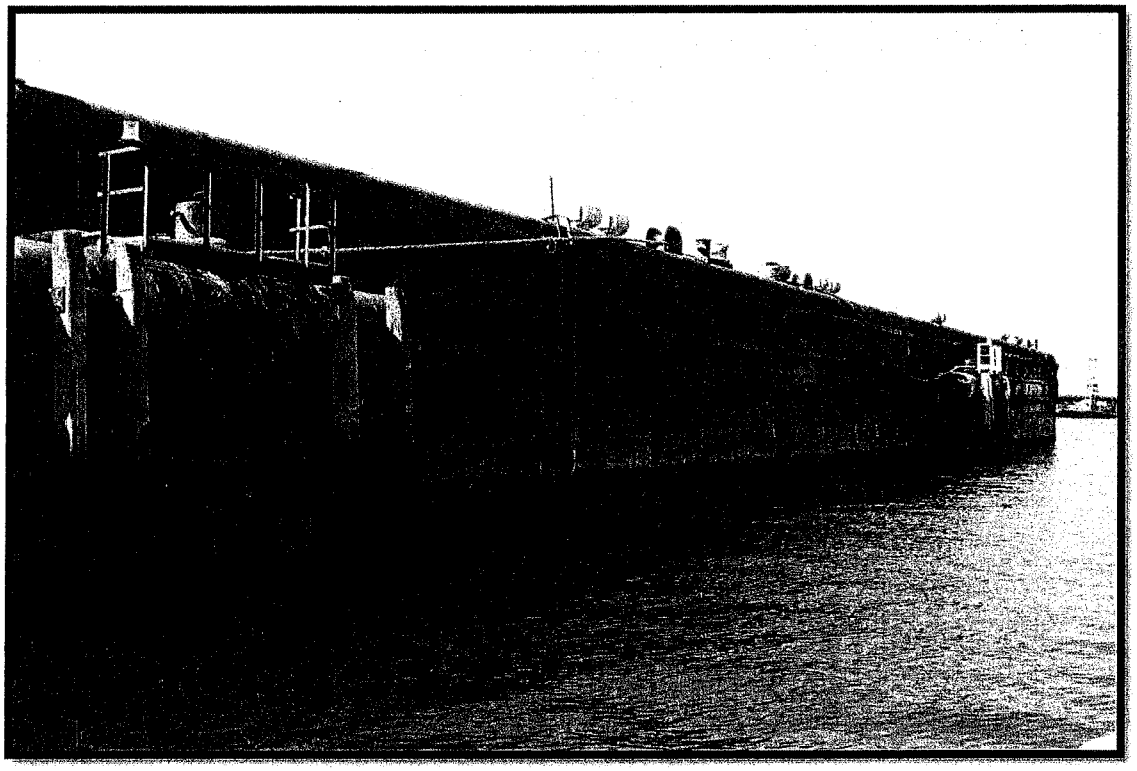
**STARBOARD HULL SIDE LOOKING FORWARD**



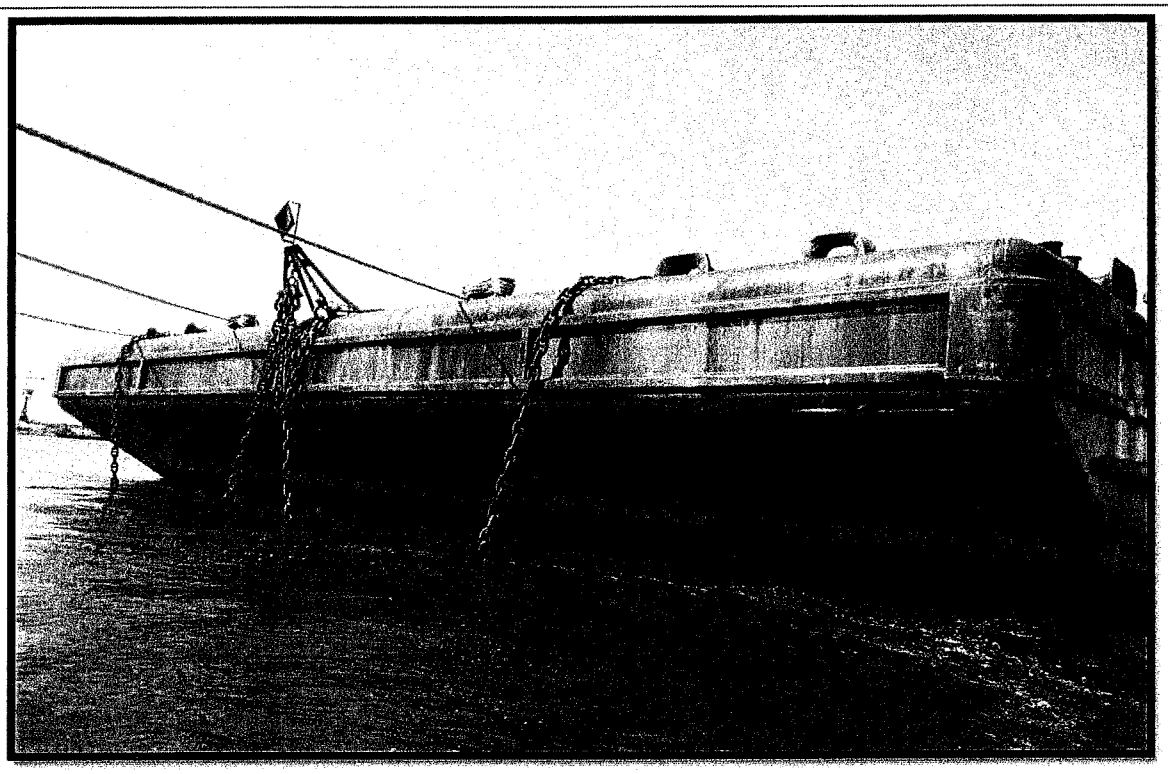
**STARBOARD HULL SIDE LOOKING AFT**



**PORT HULL SIDE LOOKING FORWARD**

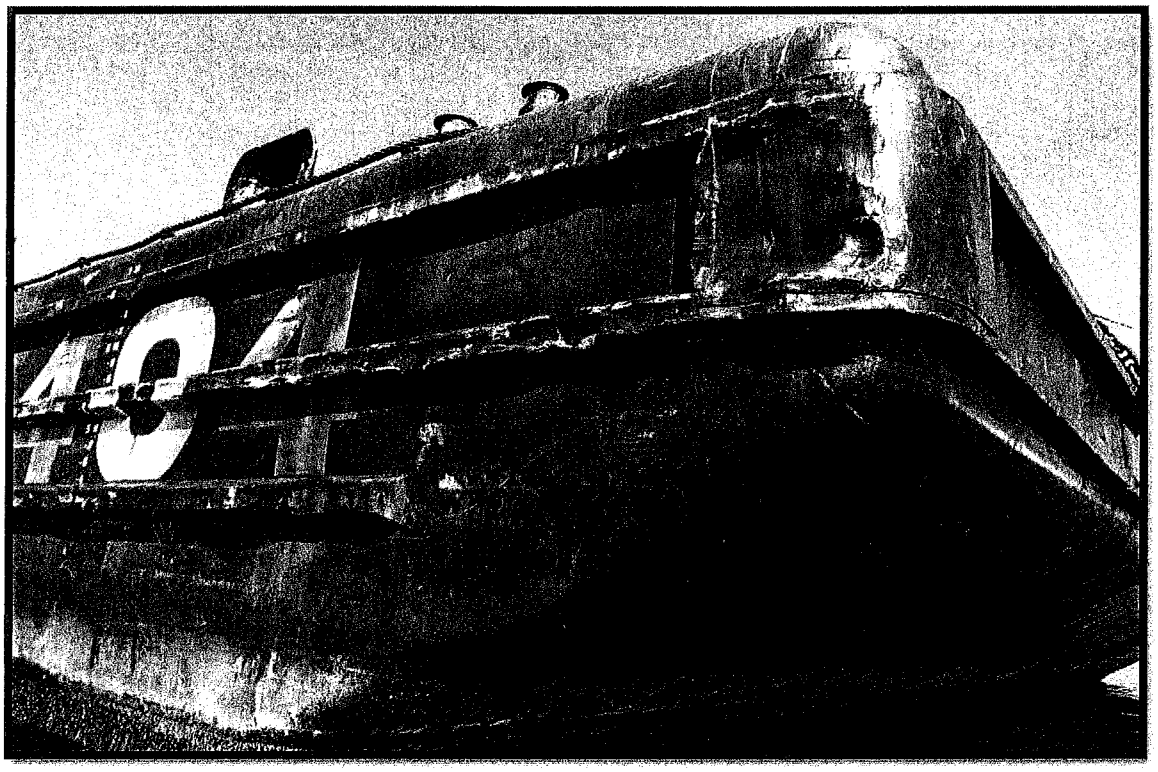


**PORT HULL SIDE LOOKING AFT**

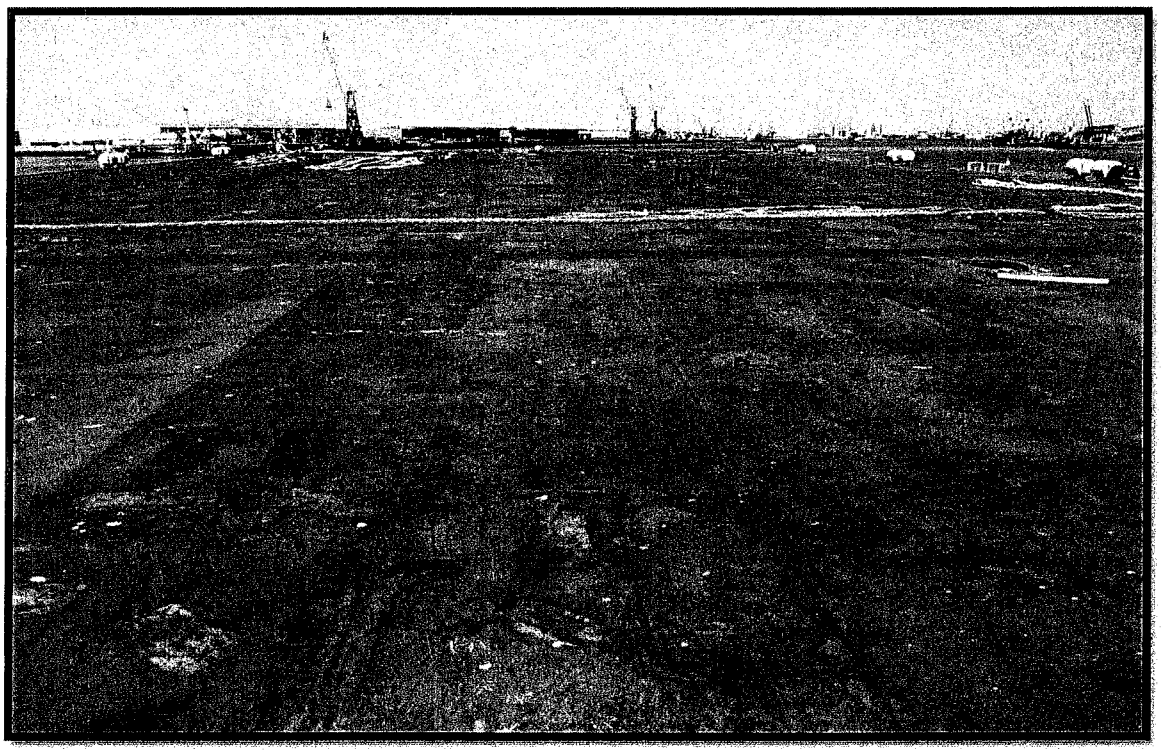


**BOW VIEW**

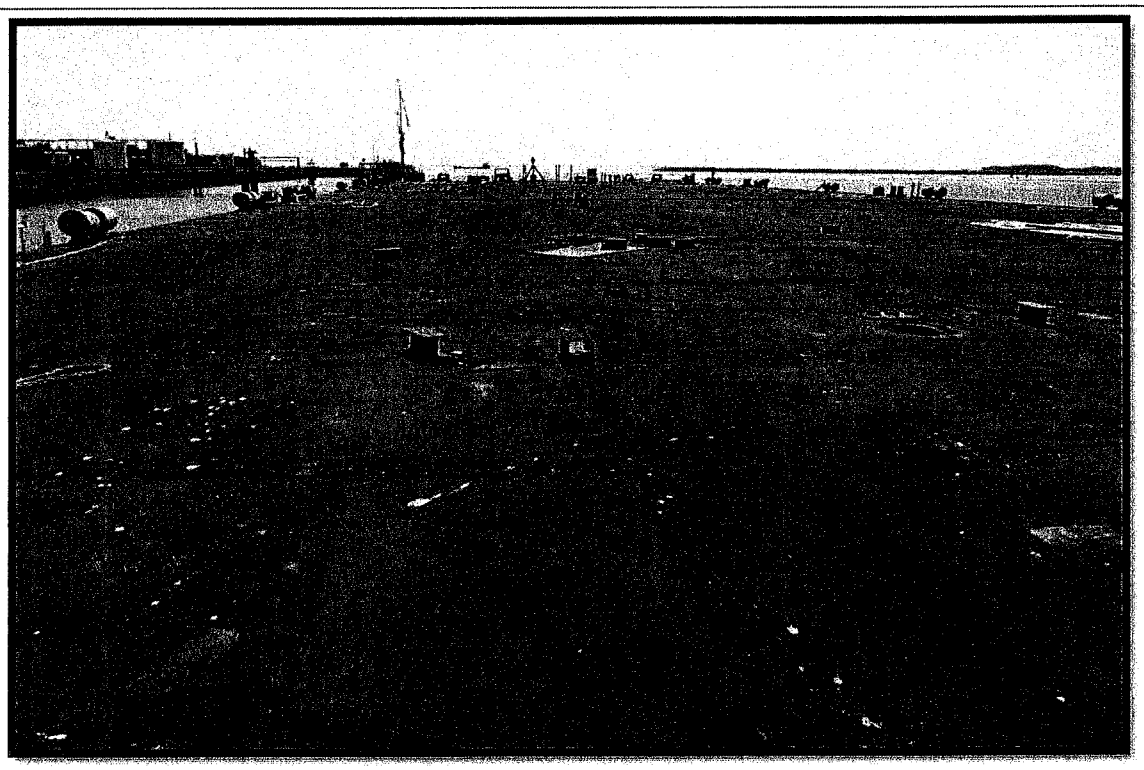
**STERN VIEW**



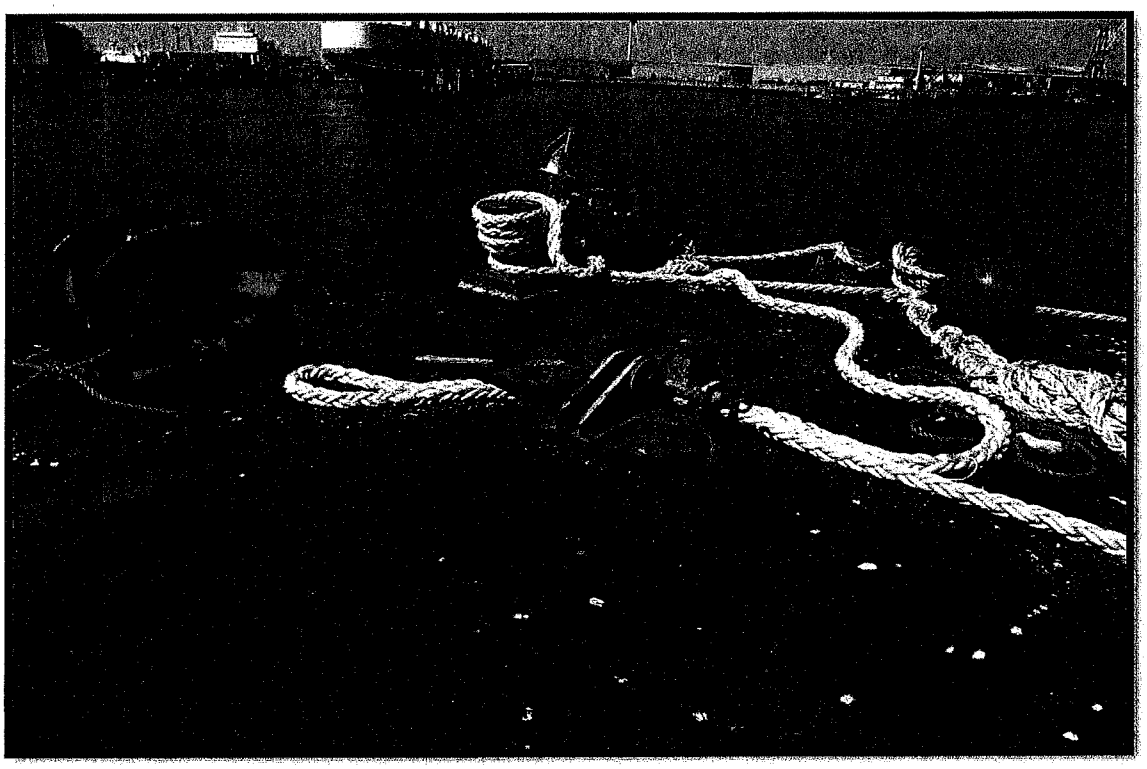

**STARBOARD BOW DAMAGE**



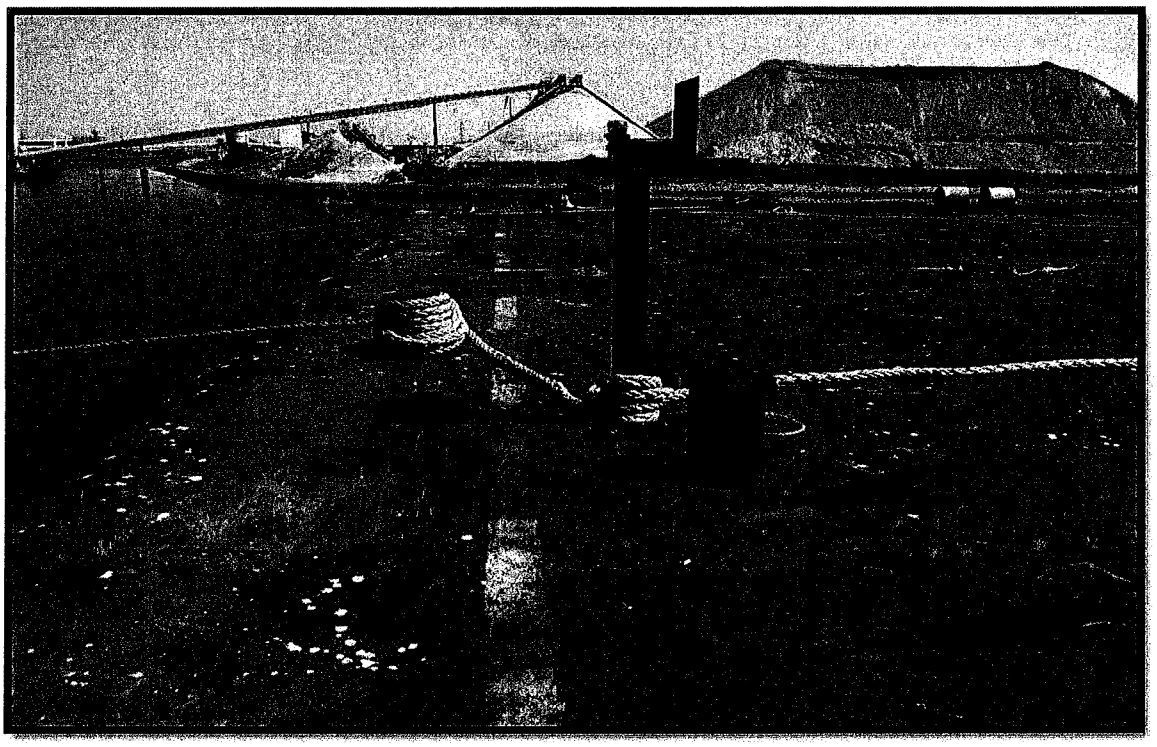
**MAIN DECK LOOKING AFT**



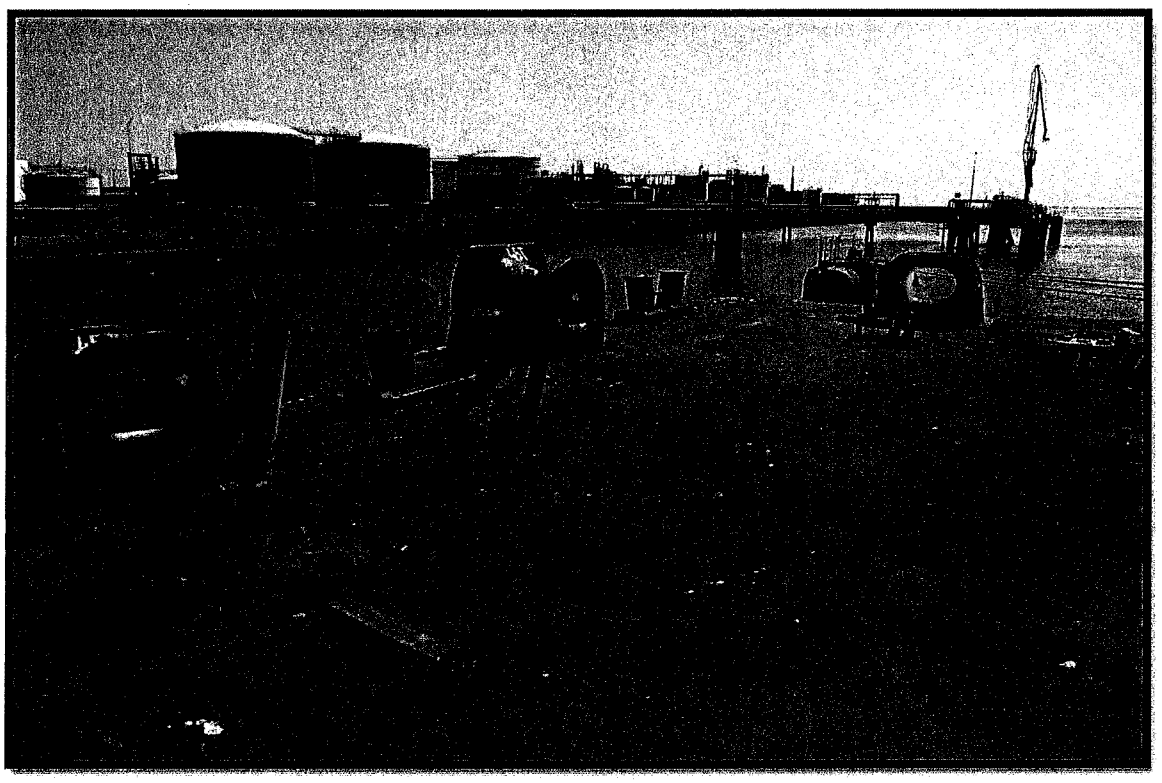
**MAIN DECK LOOKING FORWARD**



**STARBOARD MAIN DECK AFT CORNER**

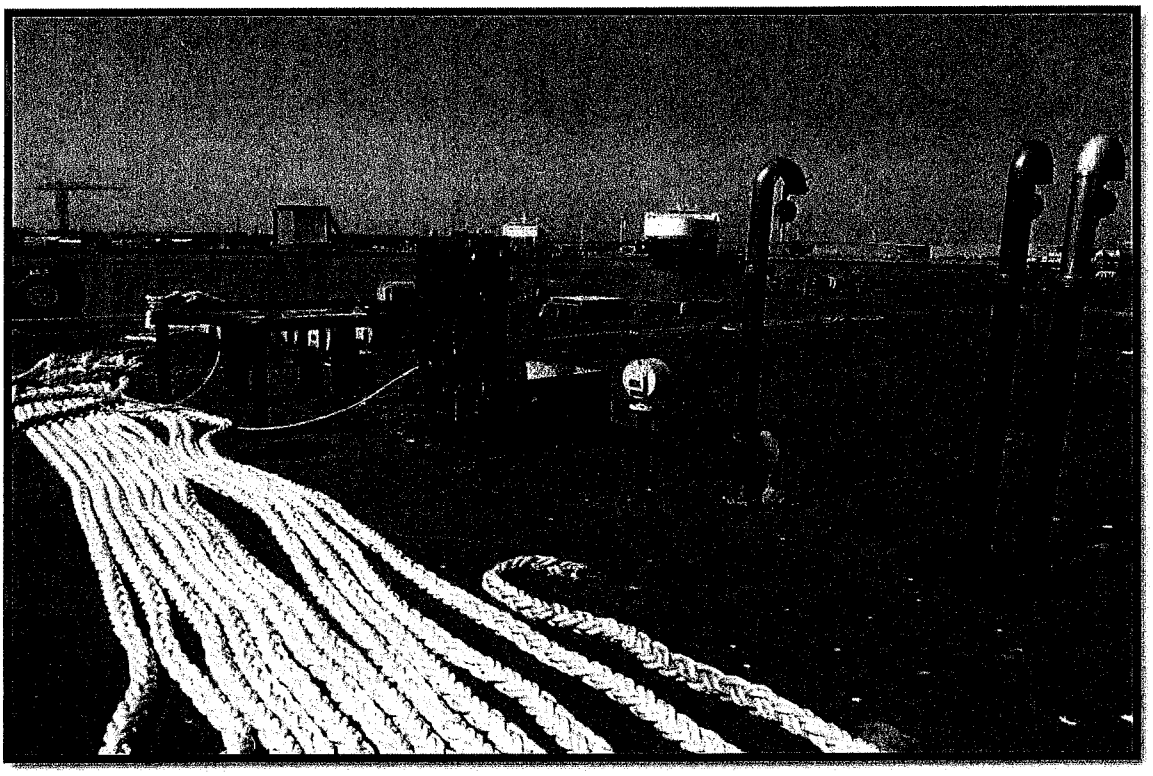


**AFT MAIN DECK LOOKING PORT**



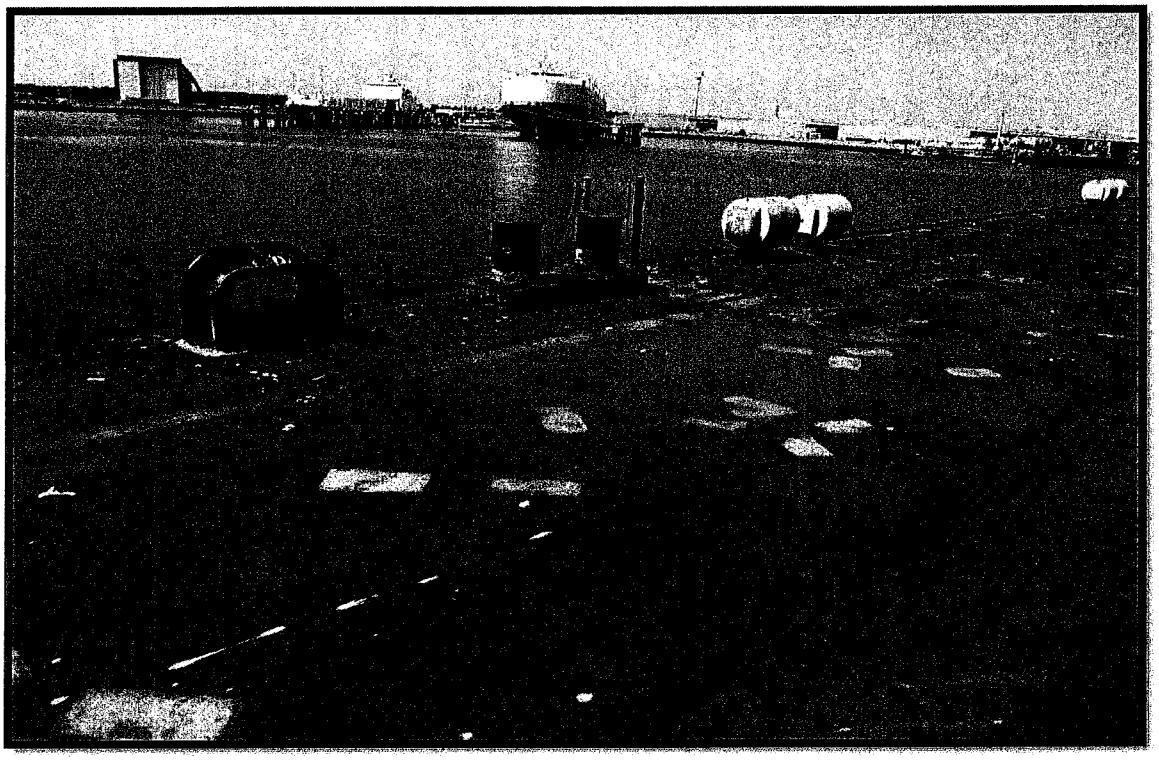
**PORT MAIN DECK LOOKING FORWARD**

**TOW CONNECTION**

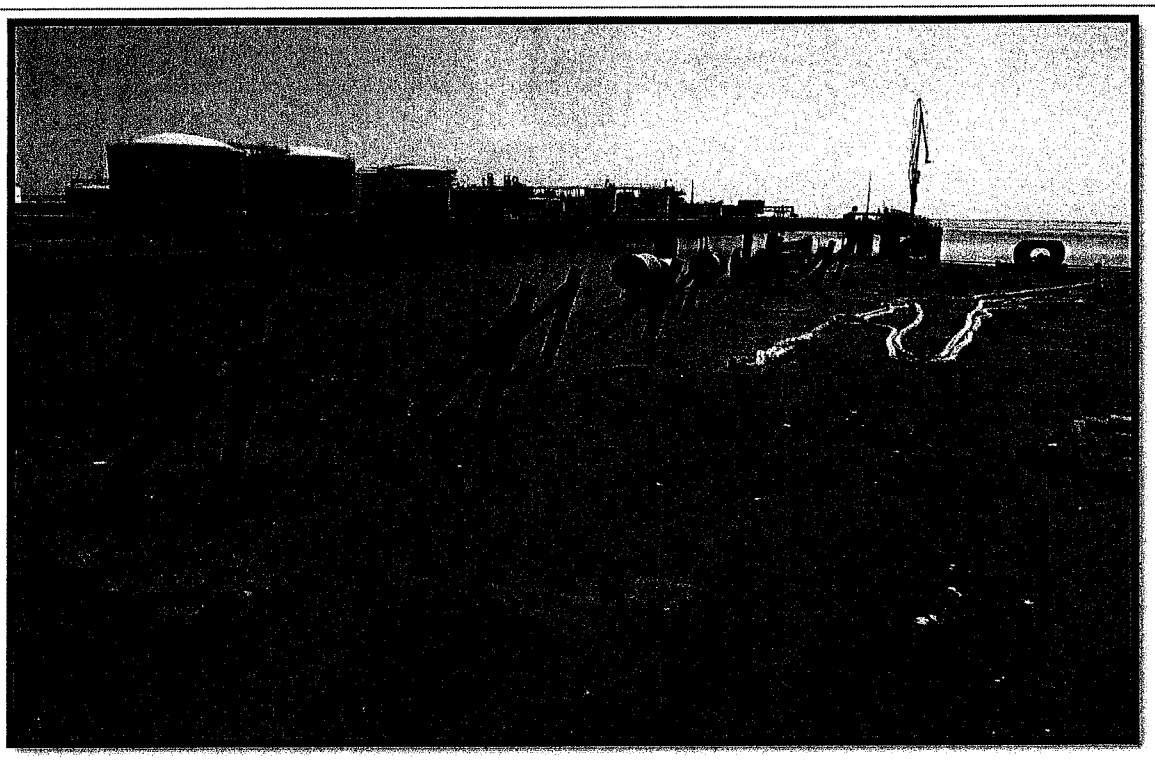


**MACHINERY SPACE ACCESS, ENGINE EXHAUST**

**EMERGENCY TOW WIRE**



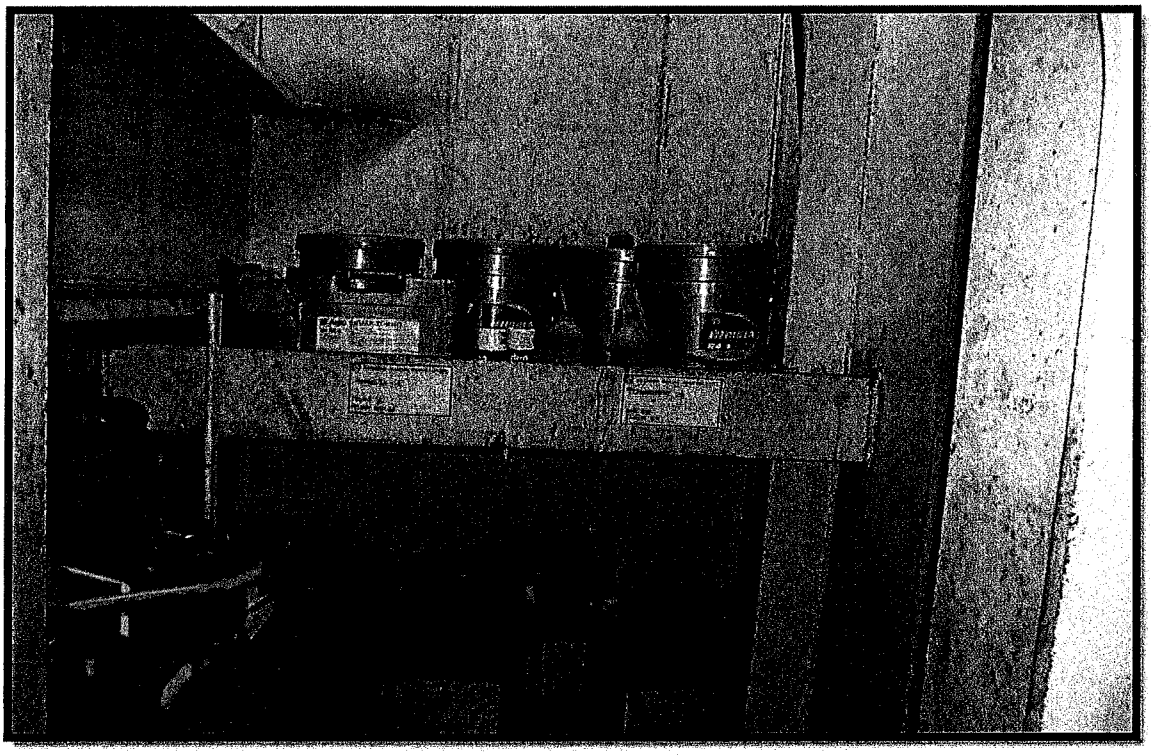
**TYPICAL BOLLARD AND FAIRLEAD**



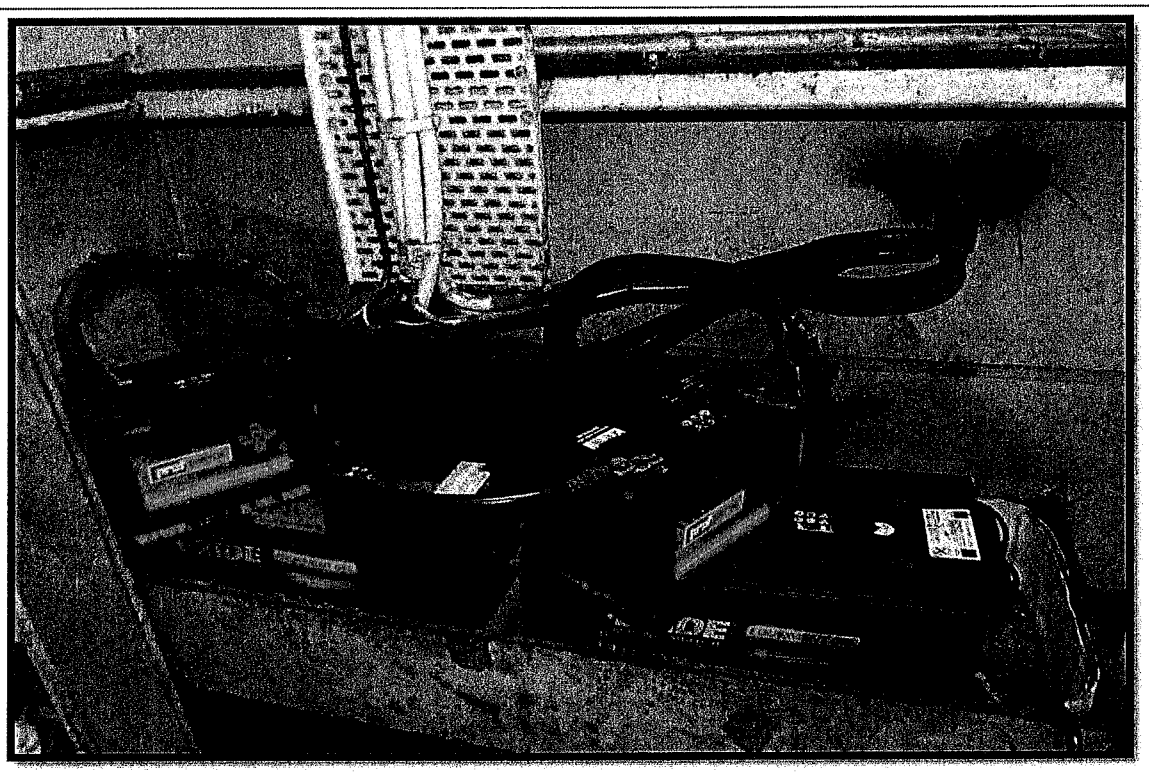
**TYPICAL SEA FASTENINGS WELDED TO DECK**

**MAIN DECK DAMAGE IN WAY OF SEAFASTENING**

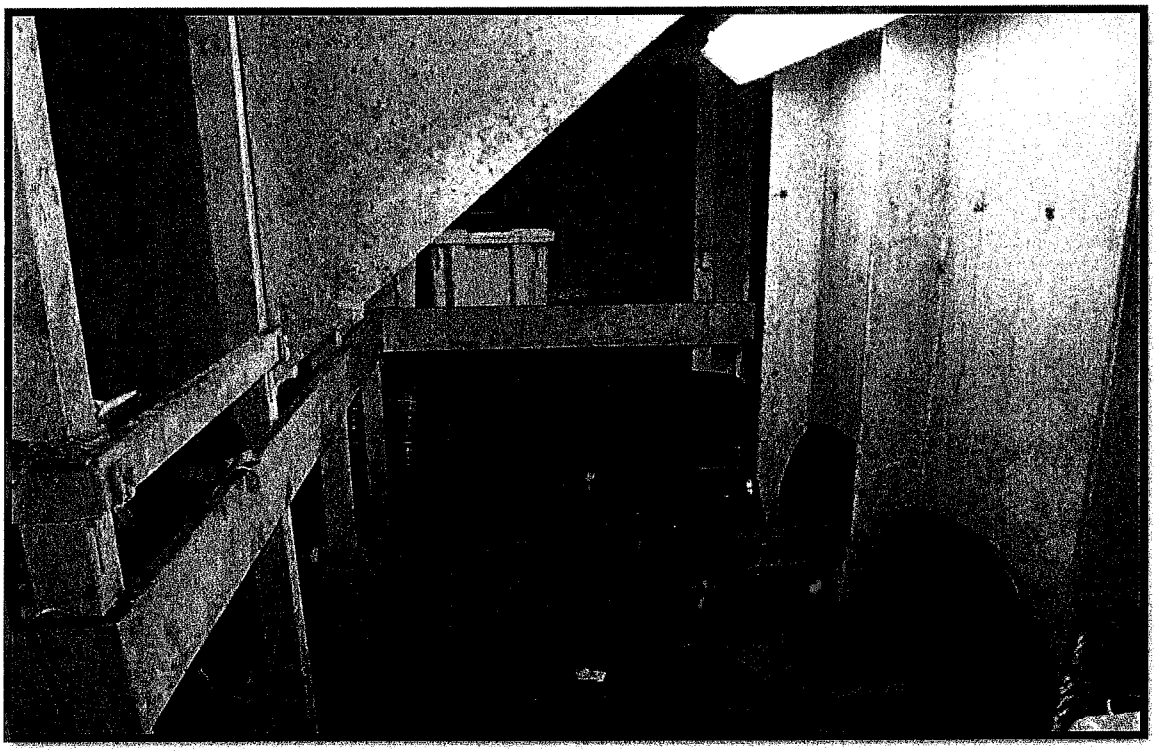
**MACHINERY SPACE LOBBY**



**MACHINERY SPACE STORAGE**

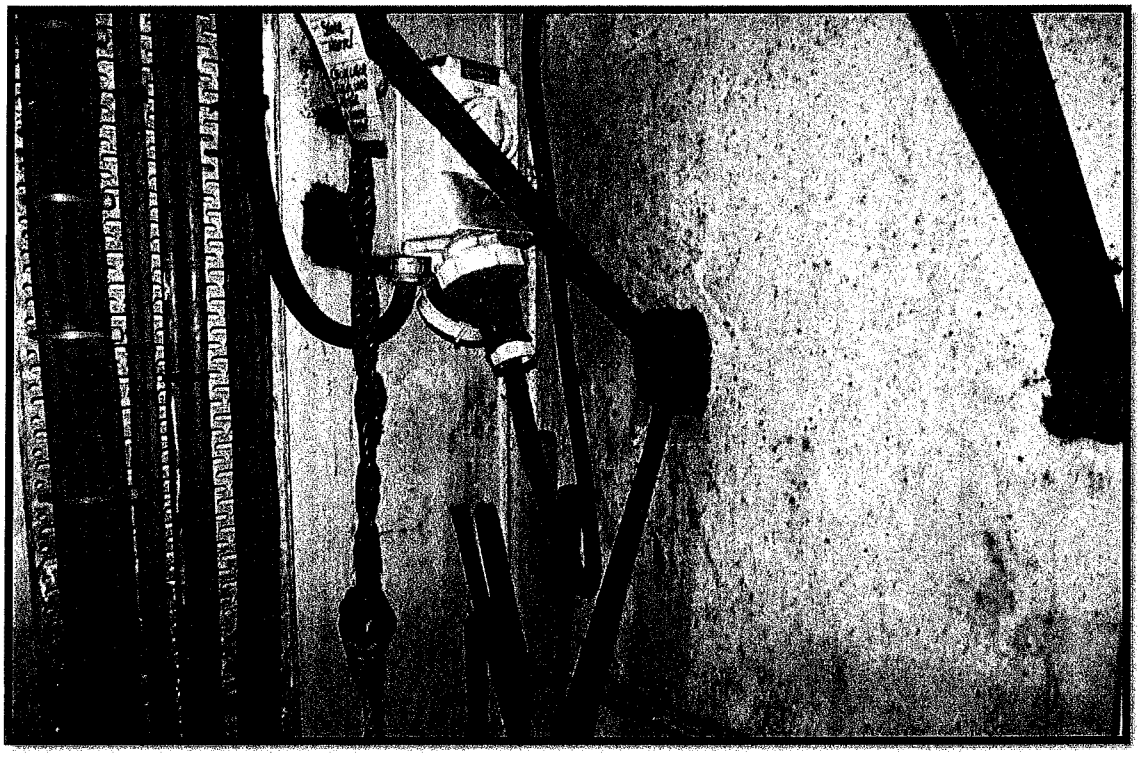


**BATTERIES**

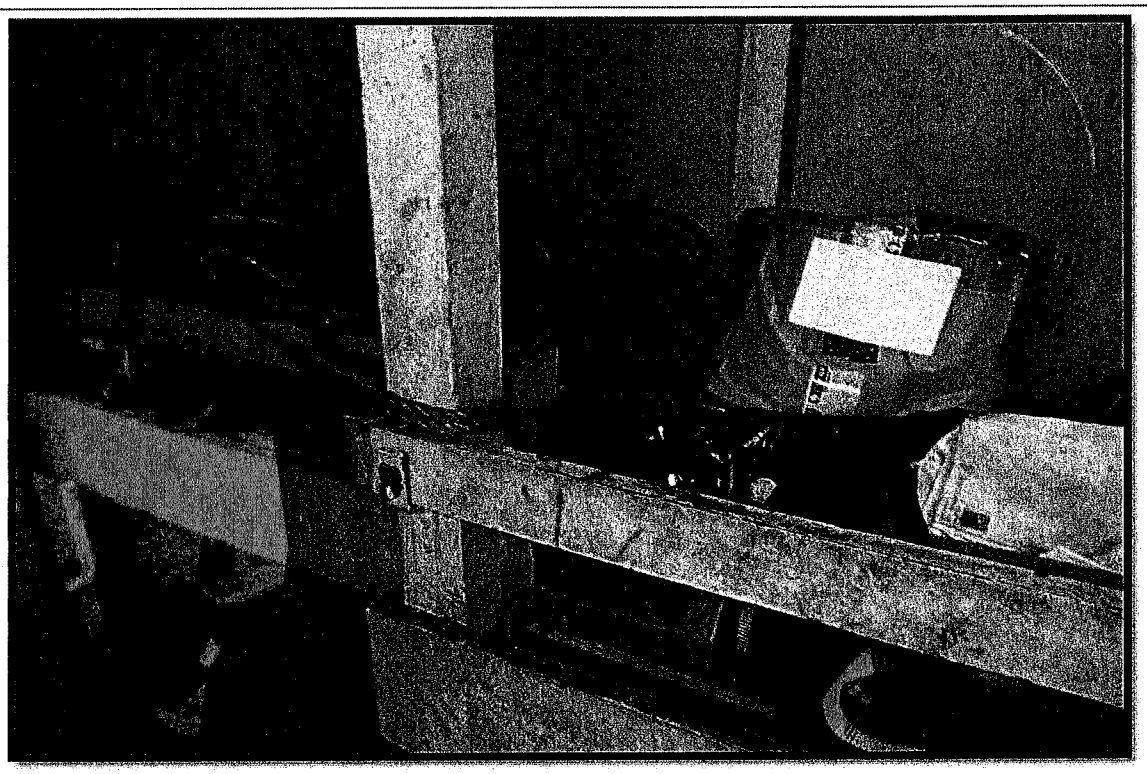


**MACHINERY SPACE STORAGE**

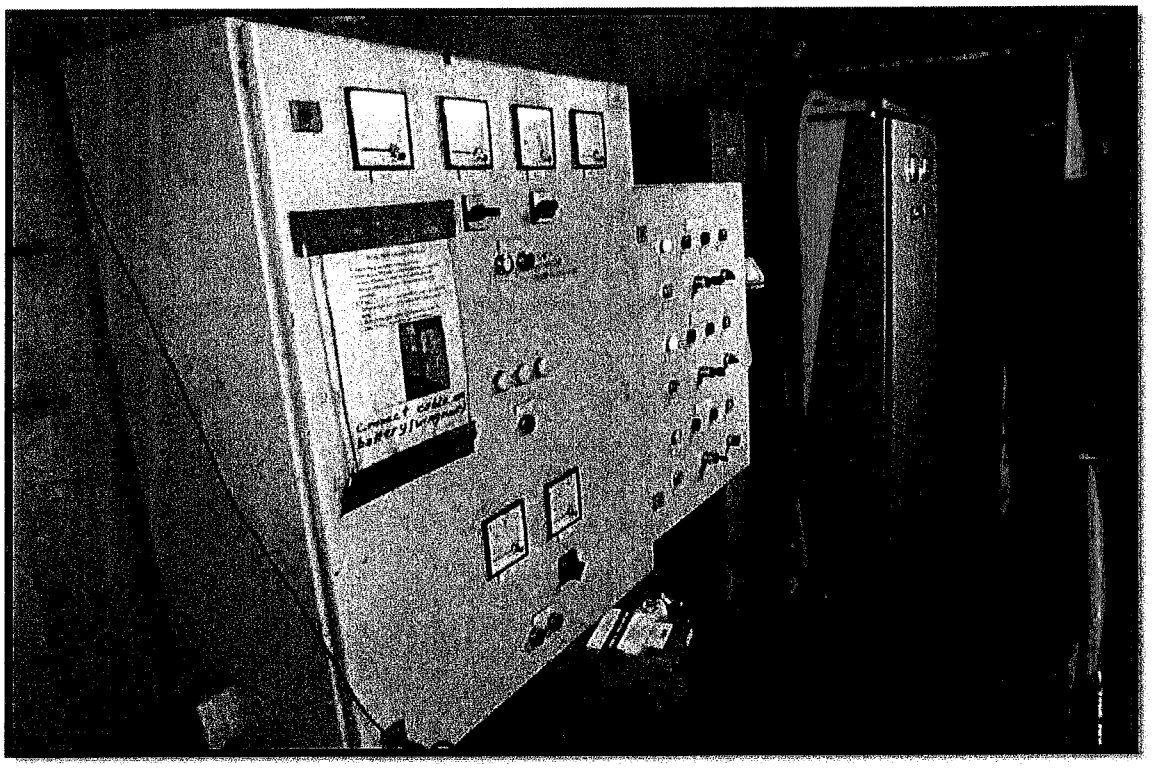
**STORAGE ROOM AIR CONDITIONING/HEATING**



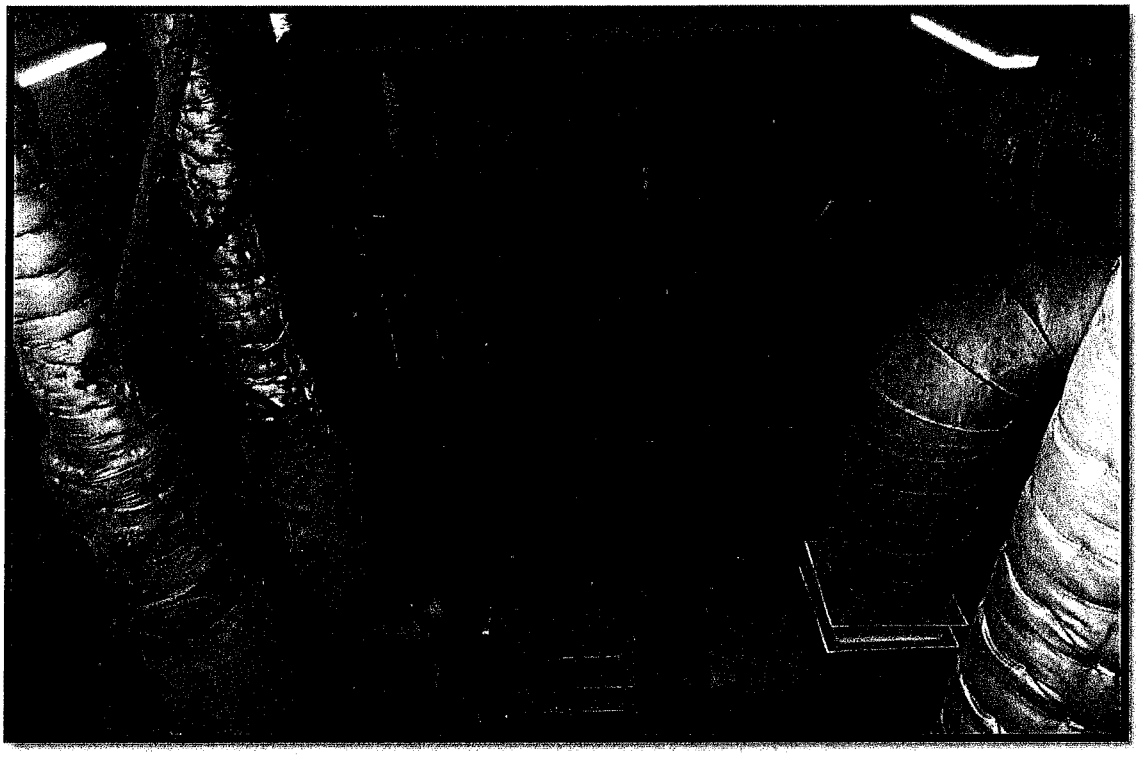
**SHORE POWER CONNECTION**



**MACHINERY SPACE STORAGE**

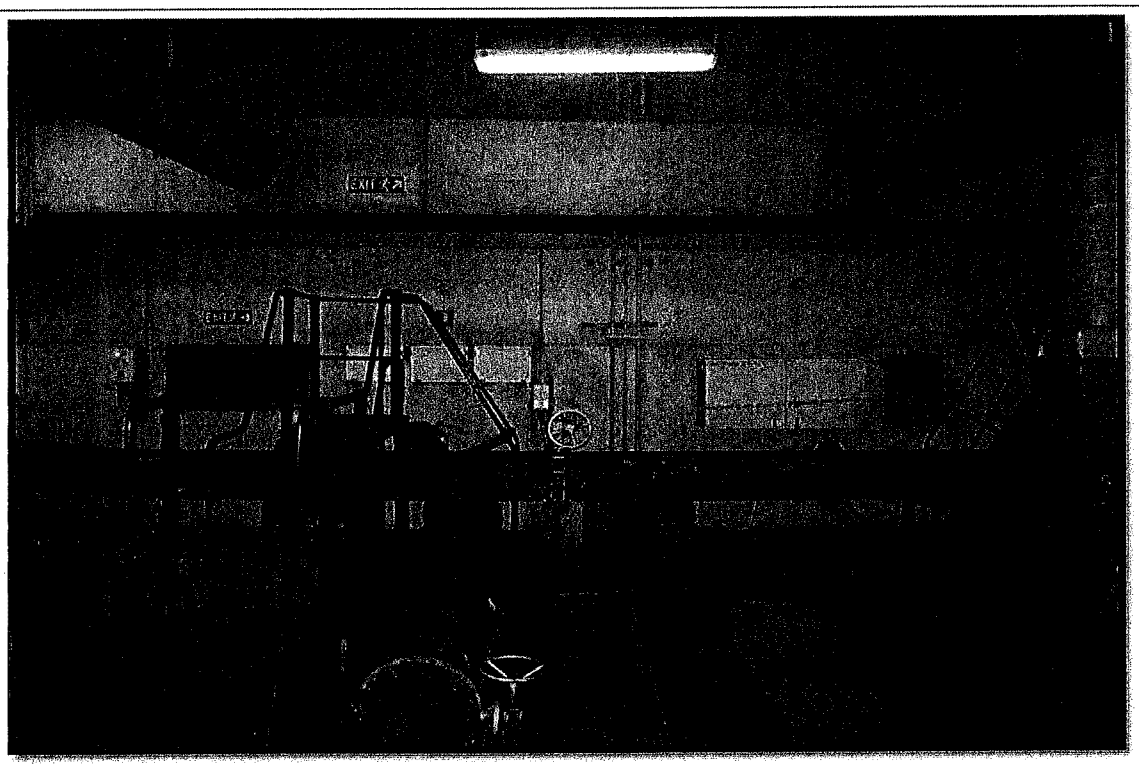


**ELECTRICAL PANELS**

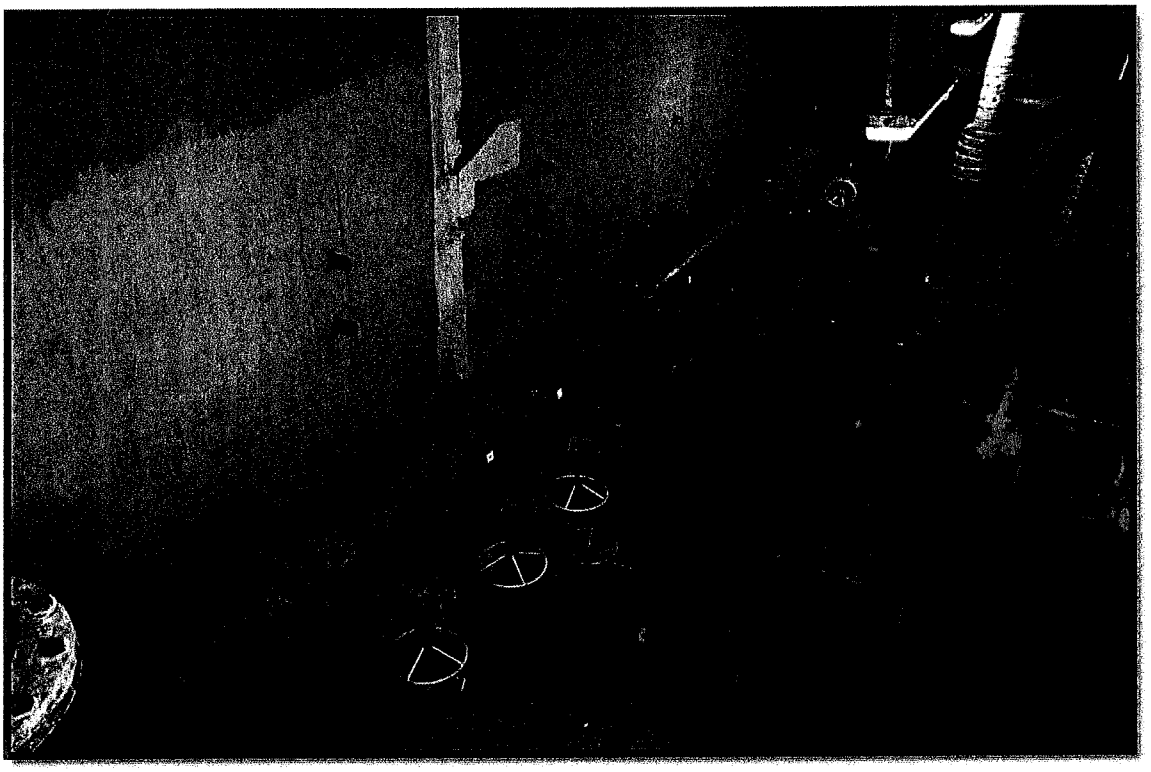


**MACHINERY SPACE LOOKING TO PORT**

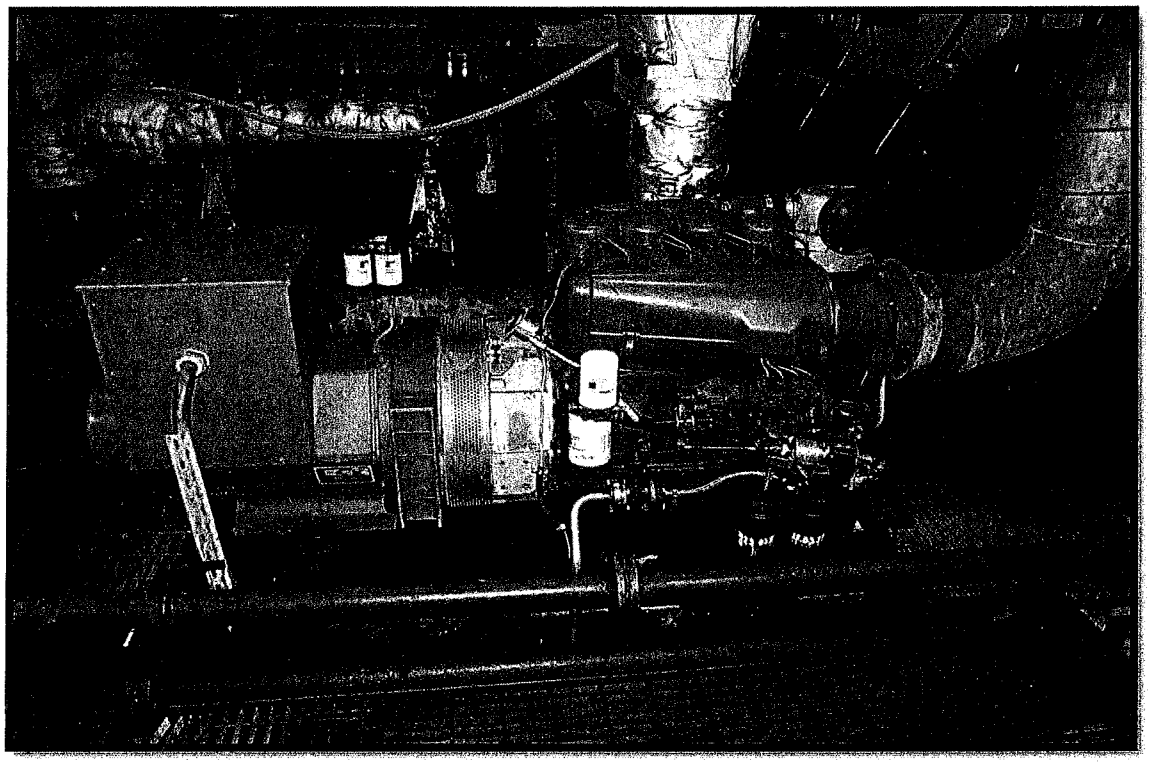
**MACHINERY SPACE LOOKING TO STARBOARD**



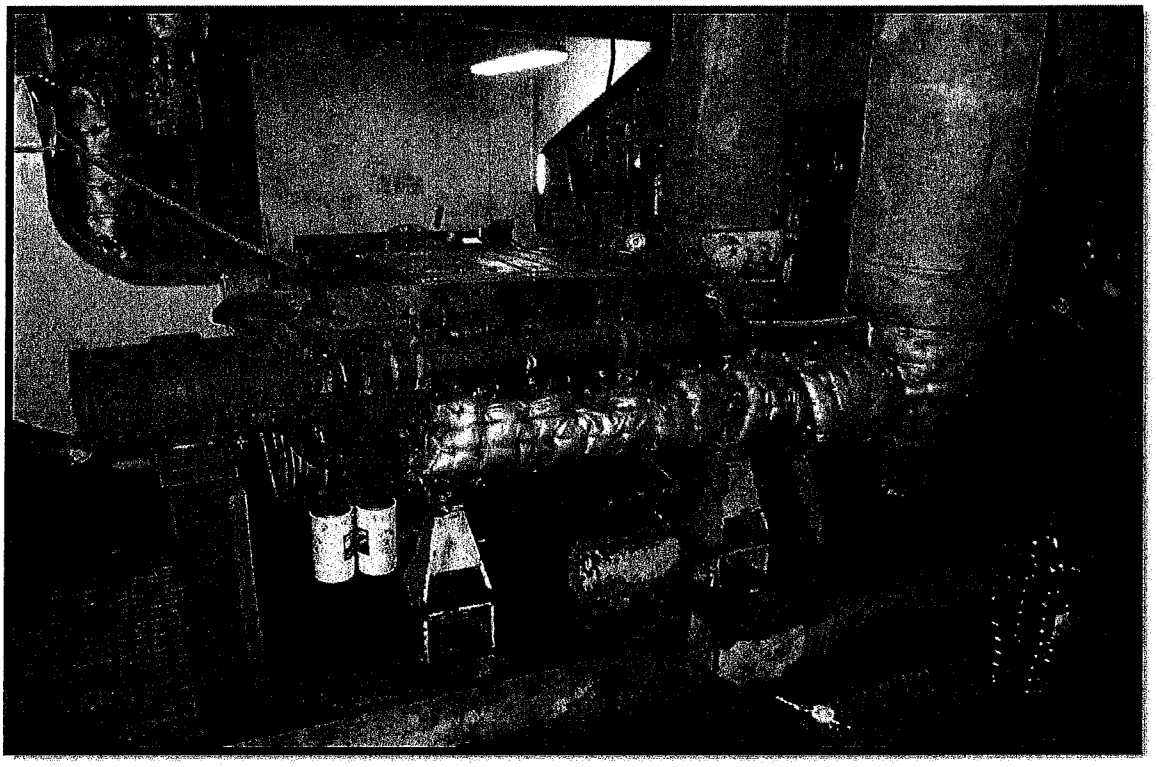

**MACHINERY SPACE LOOKING FORWARD**



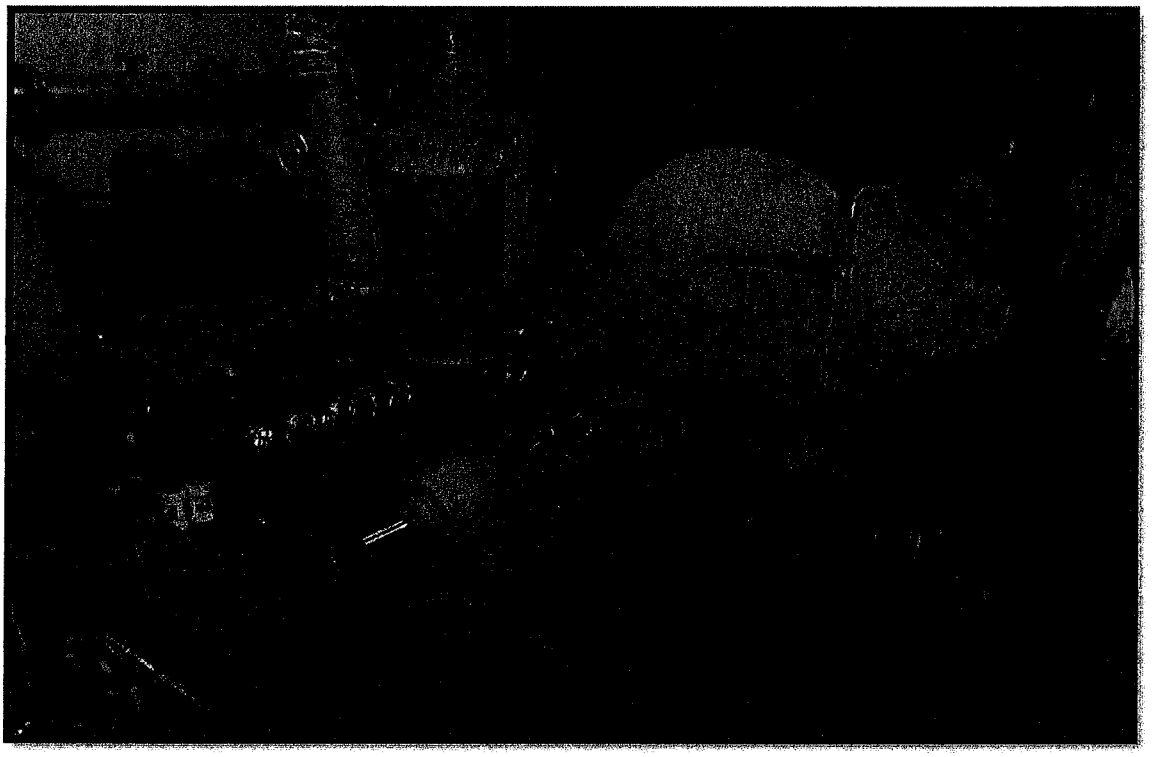
**MACHINERY SPACE LOOKING AFT**



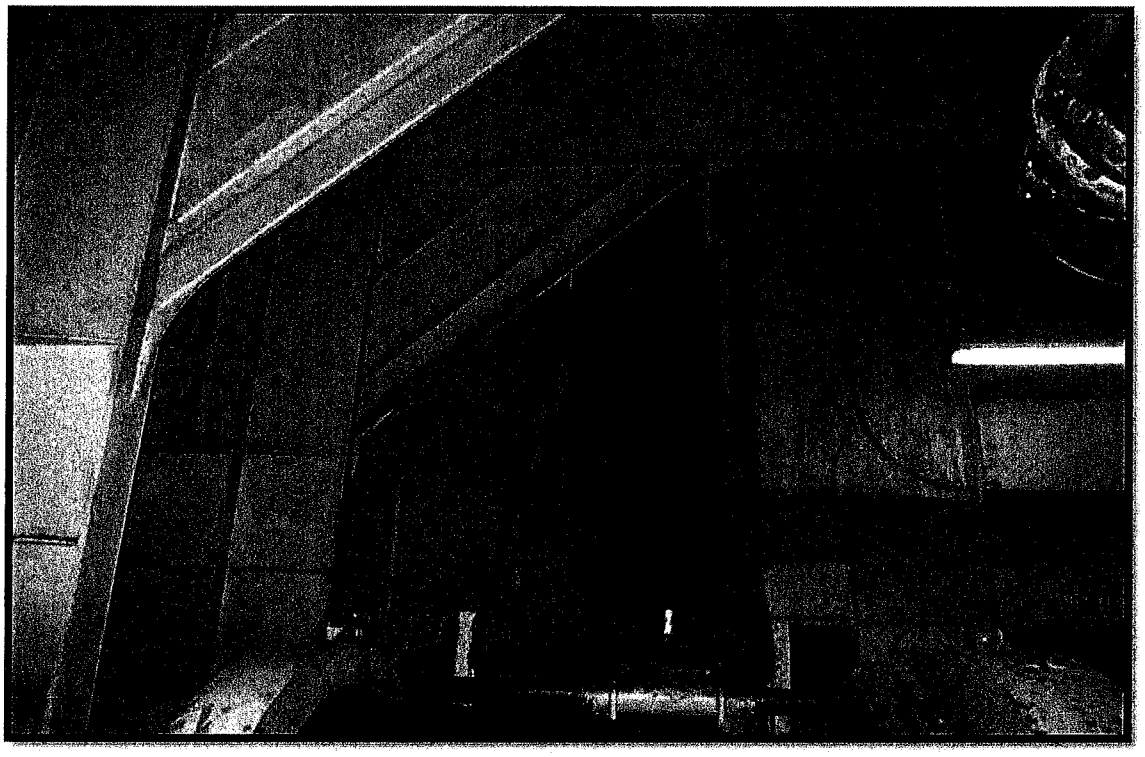
**GENSET**



**AUXILIARY ENGINE #1 / BALLAST PUMP #1**

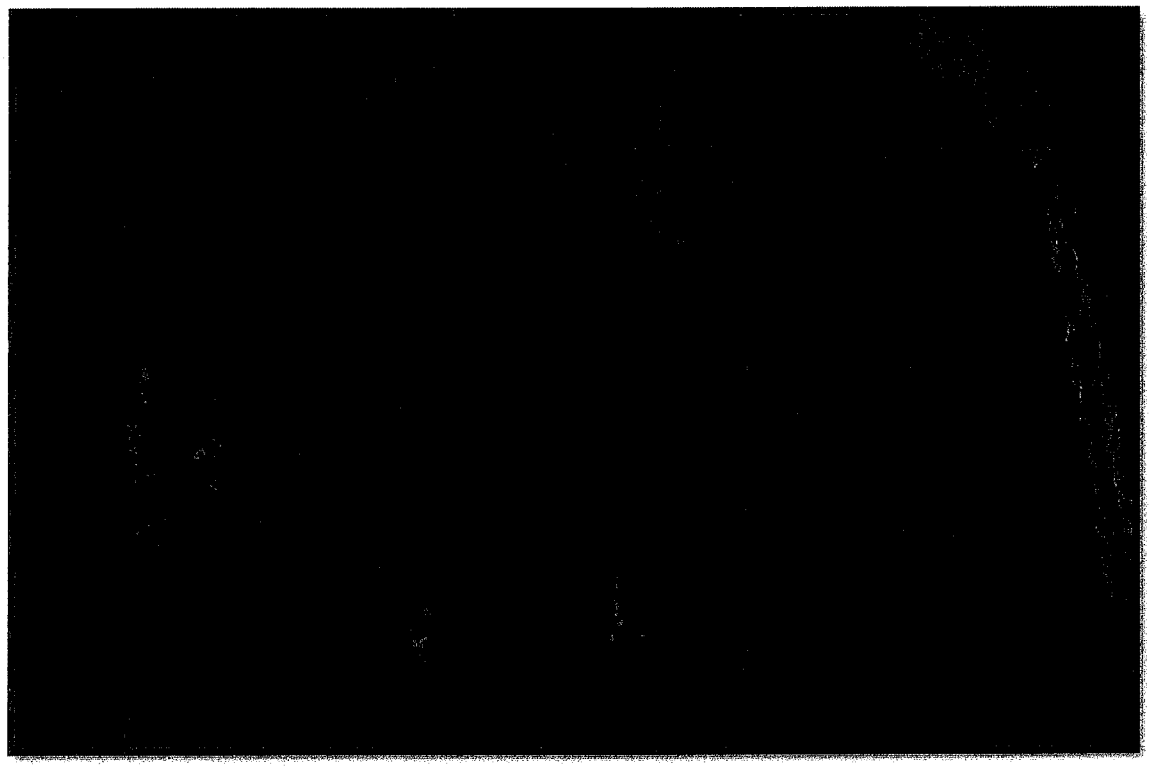


**AUXILIARY ENGINE #2 / BALLAST PUMP # 2 / ANCHOR WINCH**



**ANCHOR WIRE GUARD**

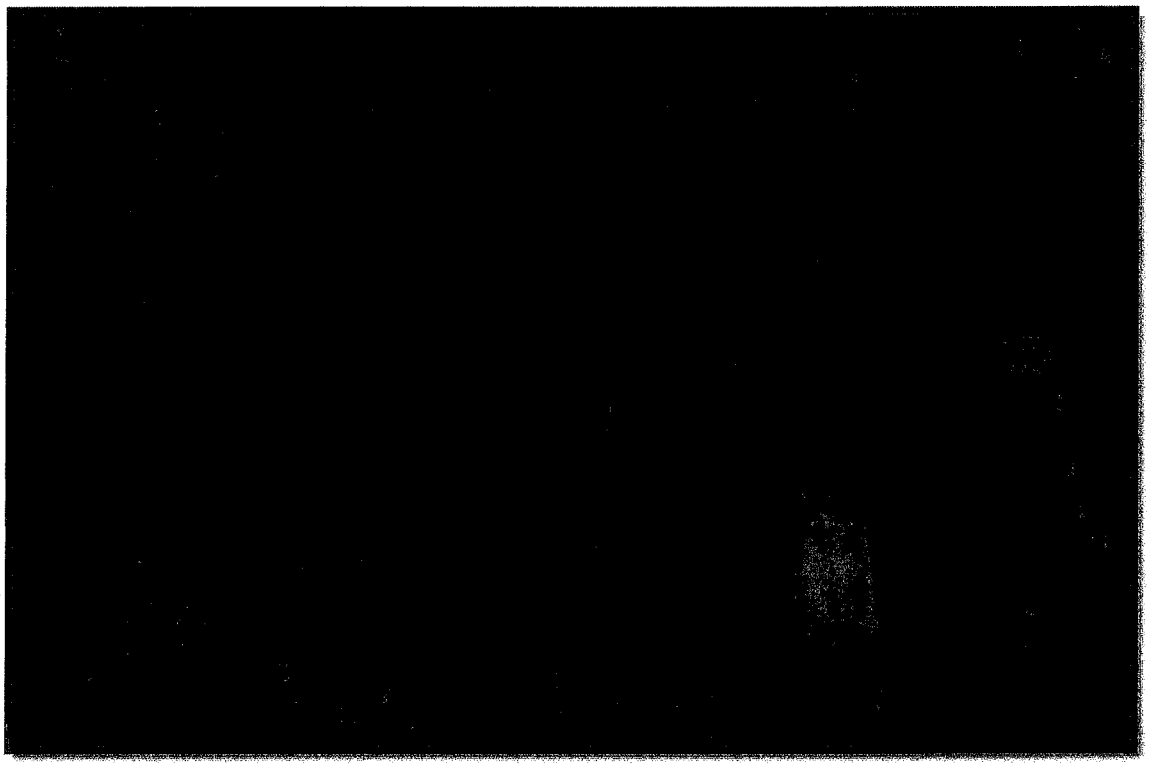
**PICTURES**
**TYPICAL BALLAST TANK**



**STARBOARD BALLAST TANK – HULL SIDE STRUCTURE**

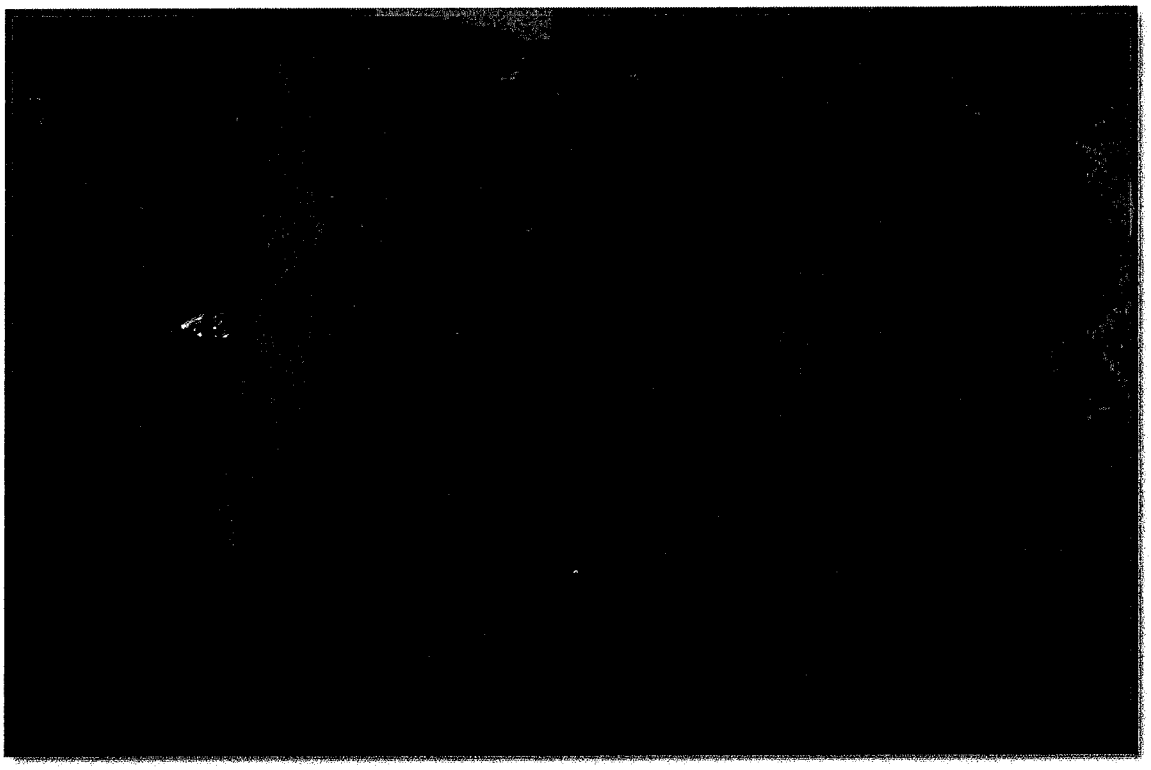
**STARBOARD BALLAST TANK – DECK STRUCTURE**

**STARBOARD BALLAST TANK – BOTTOM STRUCTURE**

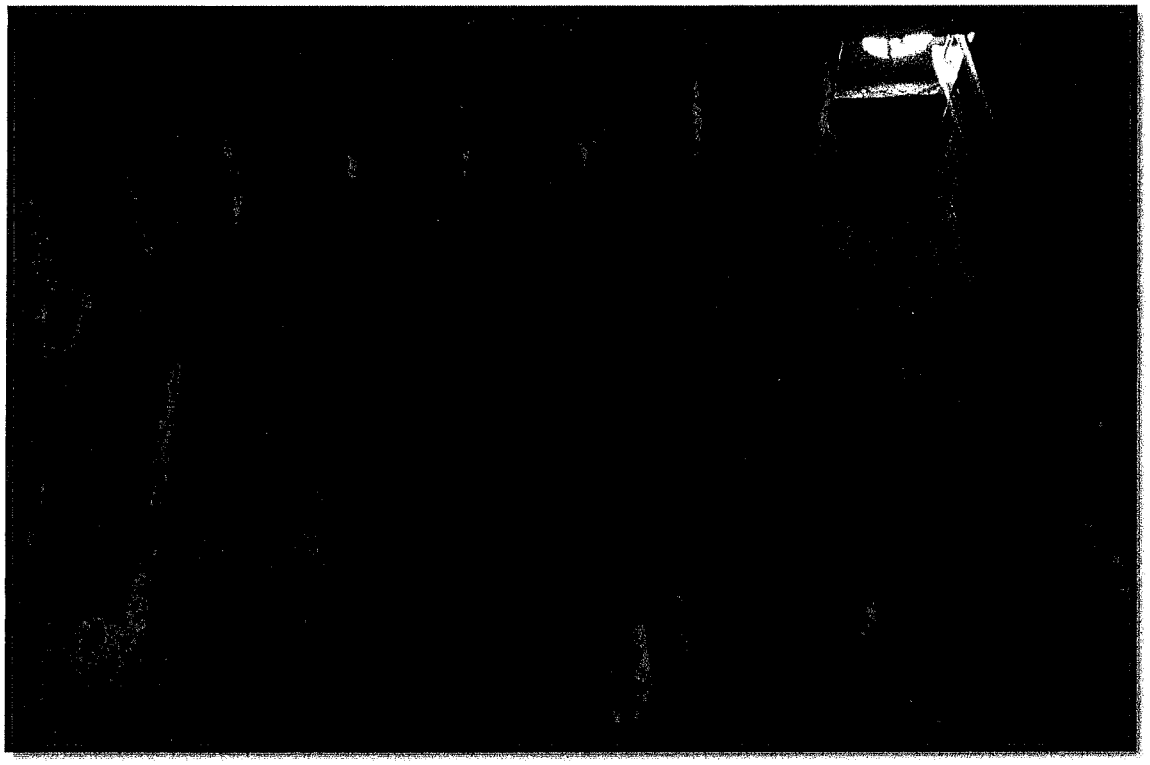


**STARBOARD BALLAST TANK – TRANSVERSE BULKHEAD STRUCTURE**

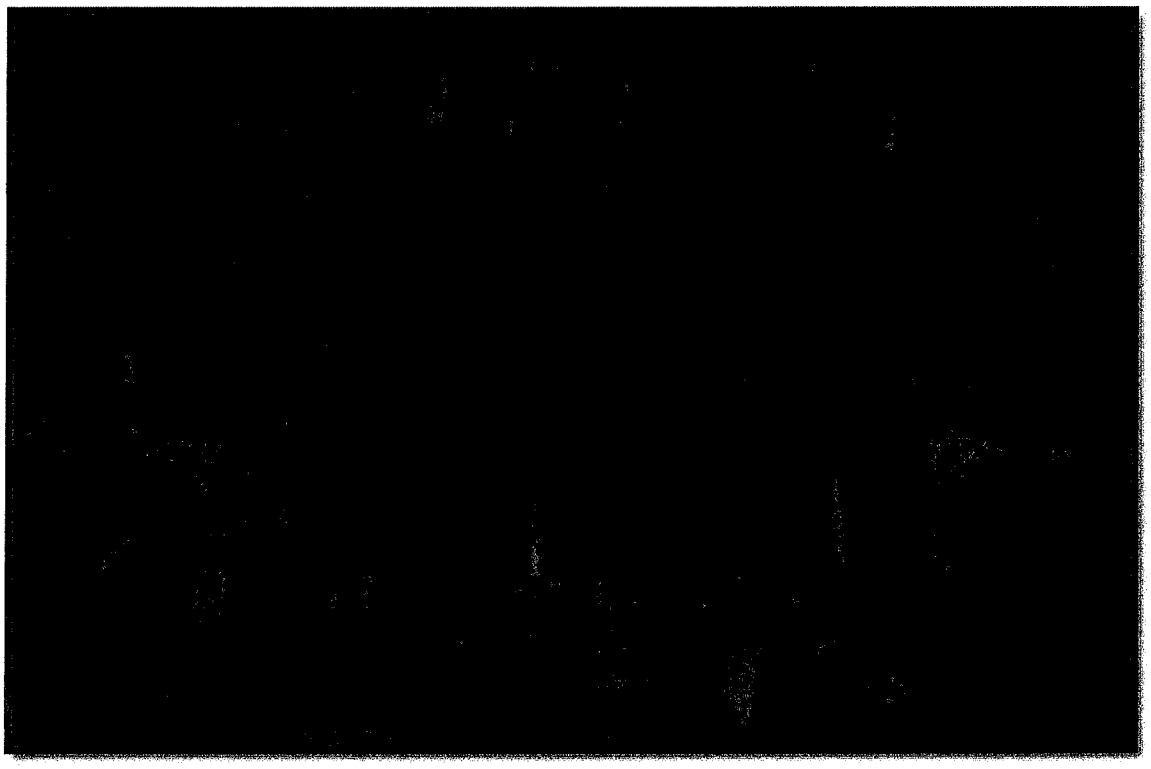
**STARBOARD BALLAST TANK – LONGITUDINAL BULKHEAD**



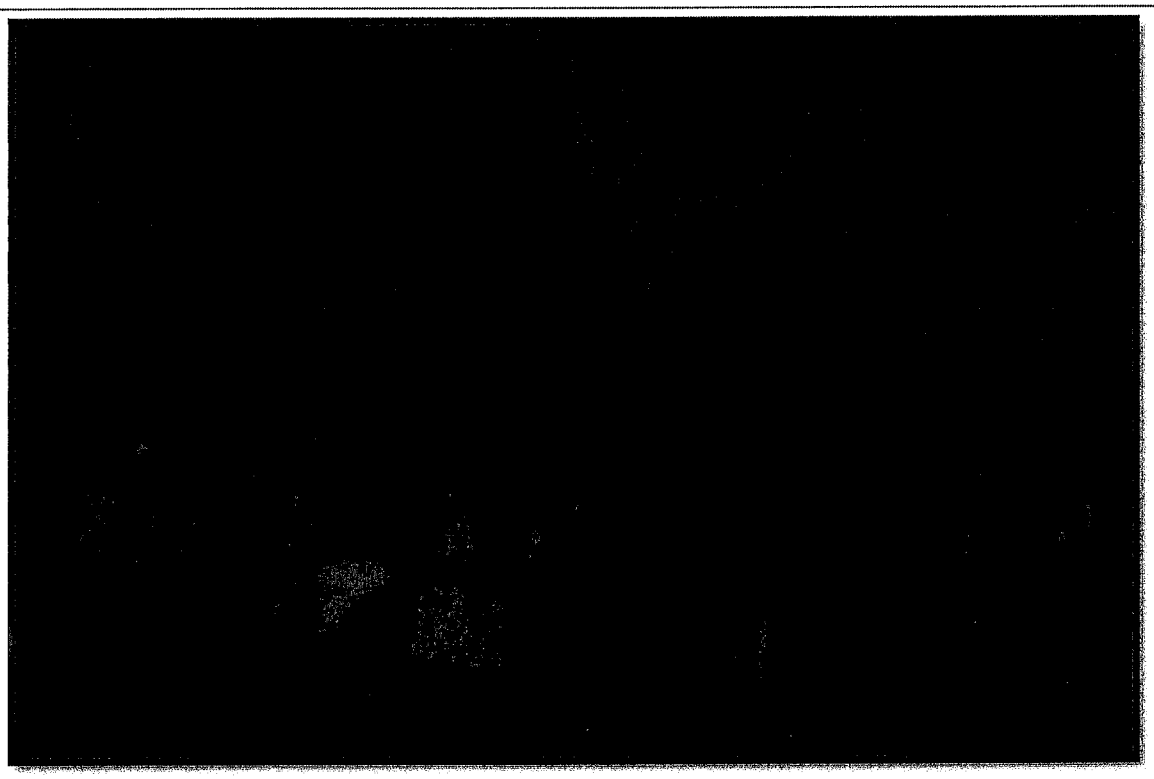
**STARBOARD BALLAST TANK – HULL SIDE LONGITUDINALS AND WEB FRAMES**



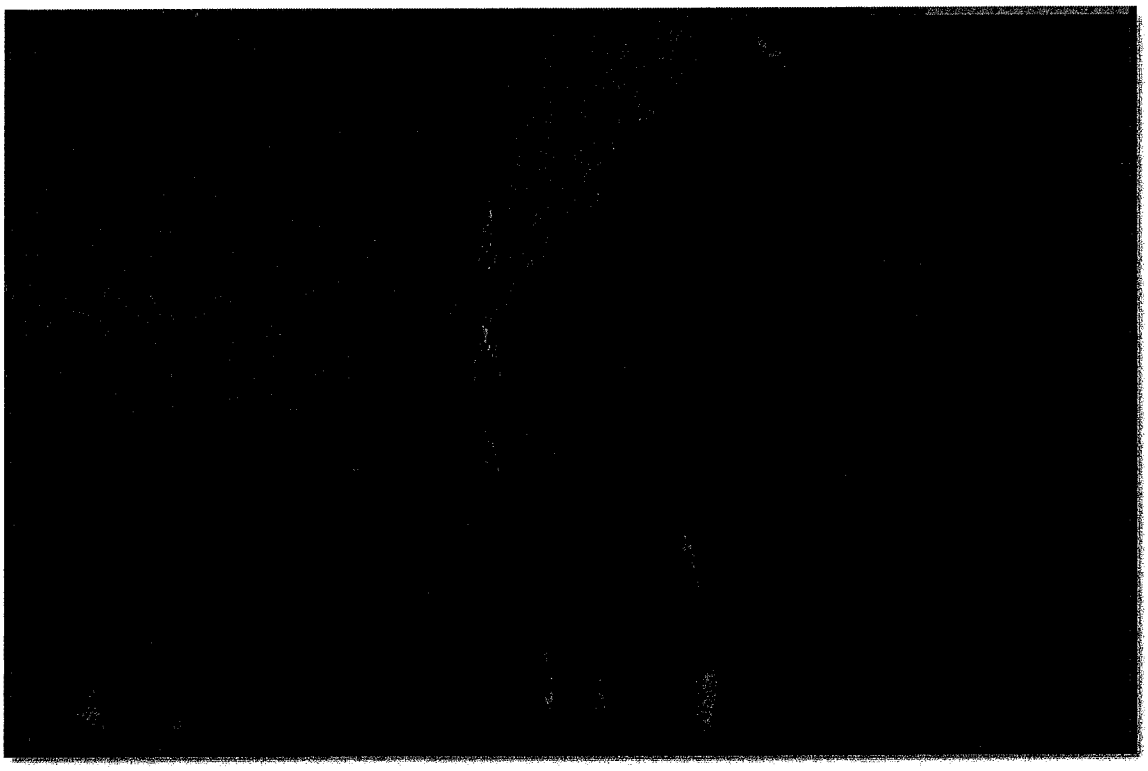
**STARBOARD BALLAST TANK – TRANSVERSE BULKHEAD STRUCTURE**



**CENTER BALLAST TANK – TRANSVERSE BULKHEAD STRUCTURE**

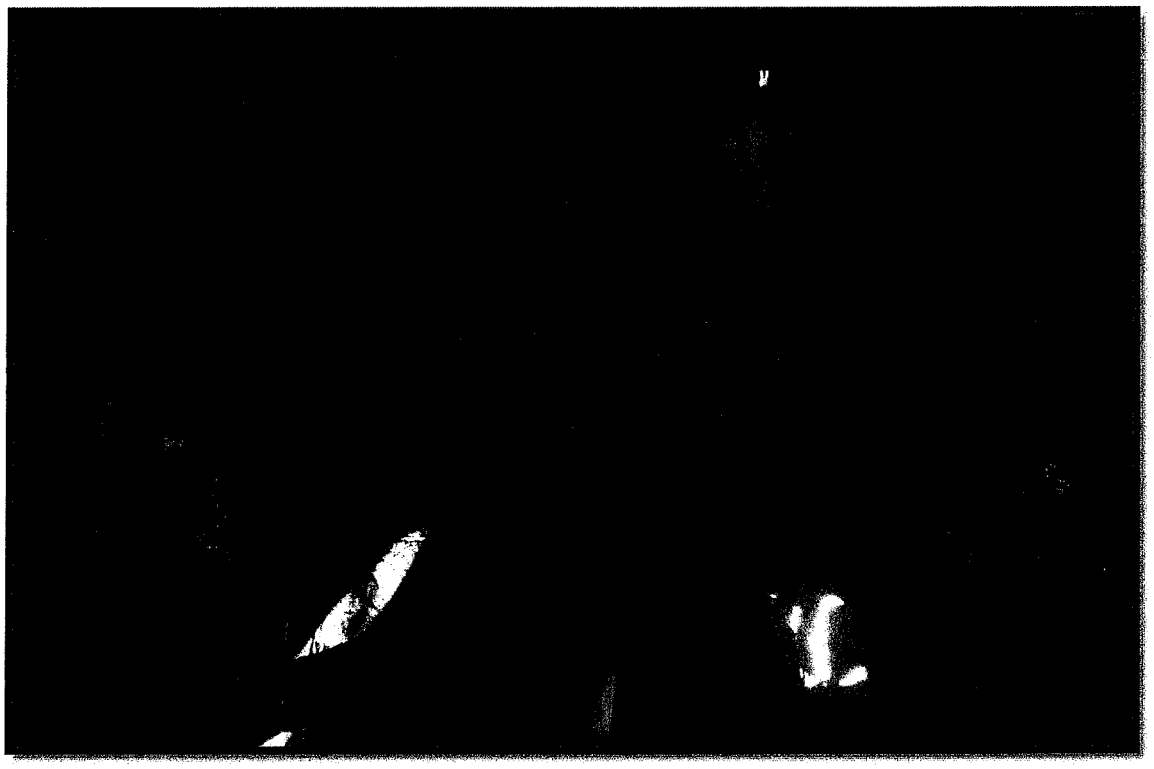


**CENTER BALLAST TANK – CENTERLINE BULKHEAD STRUCTURE**

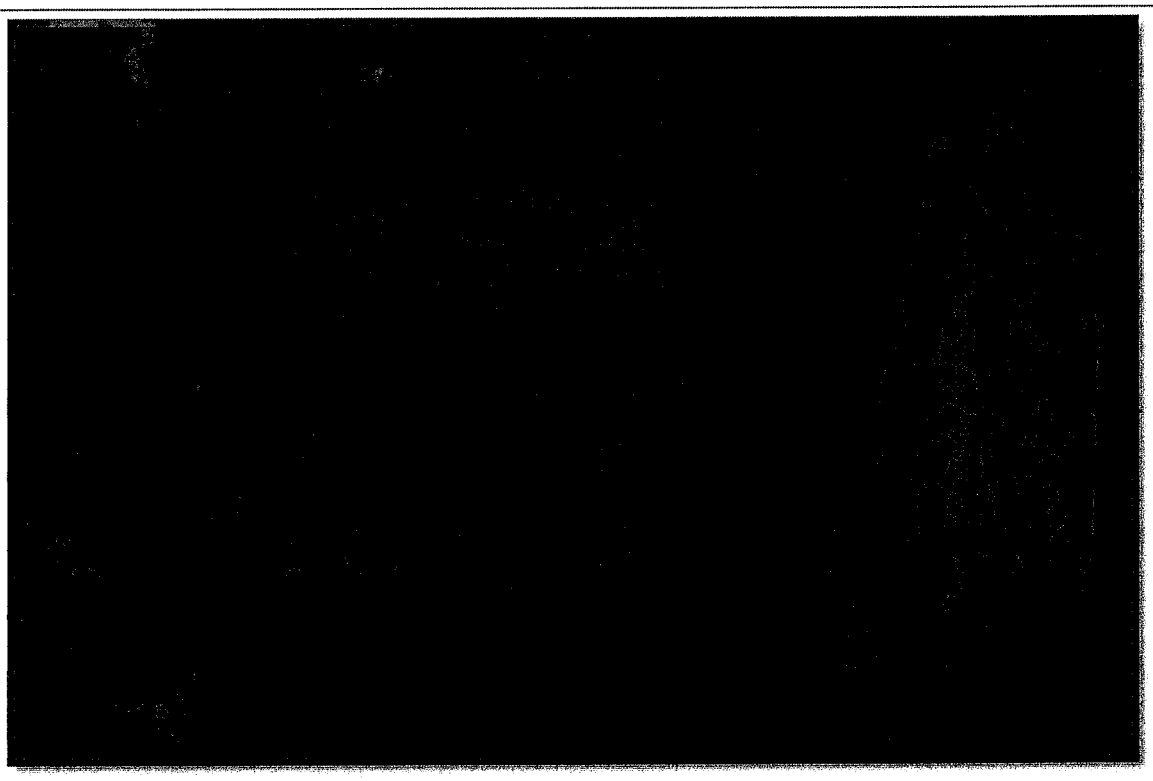


**CENTER BALLAST TANK – CENTERLINE BULKHEAD STRUCTURE**

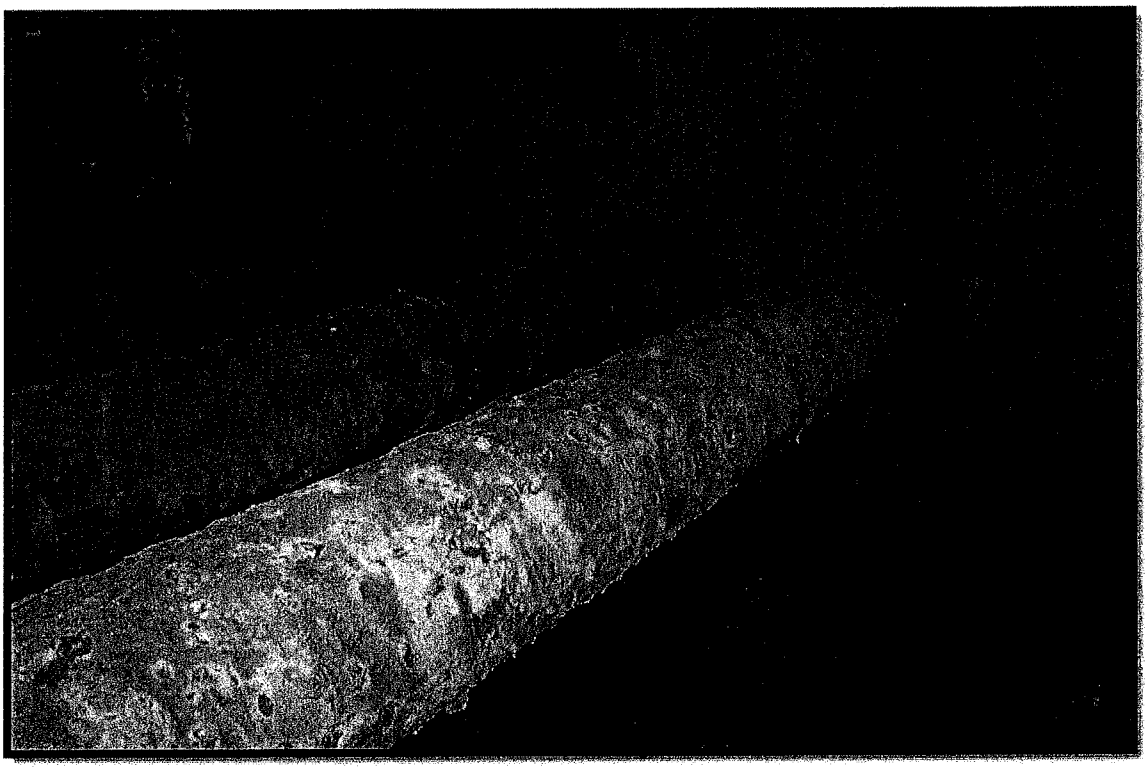
**CENTER BALLAST TANK – DECK STRUCTURE**



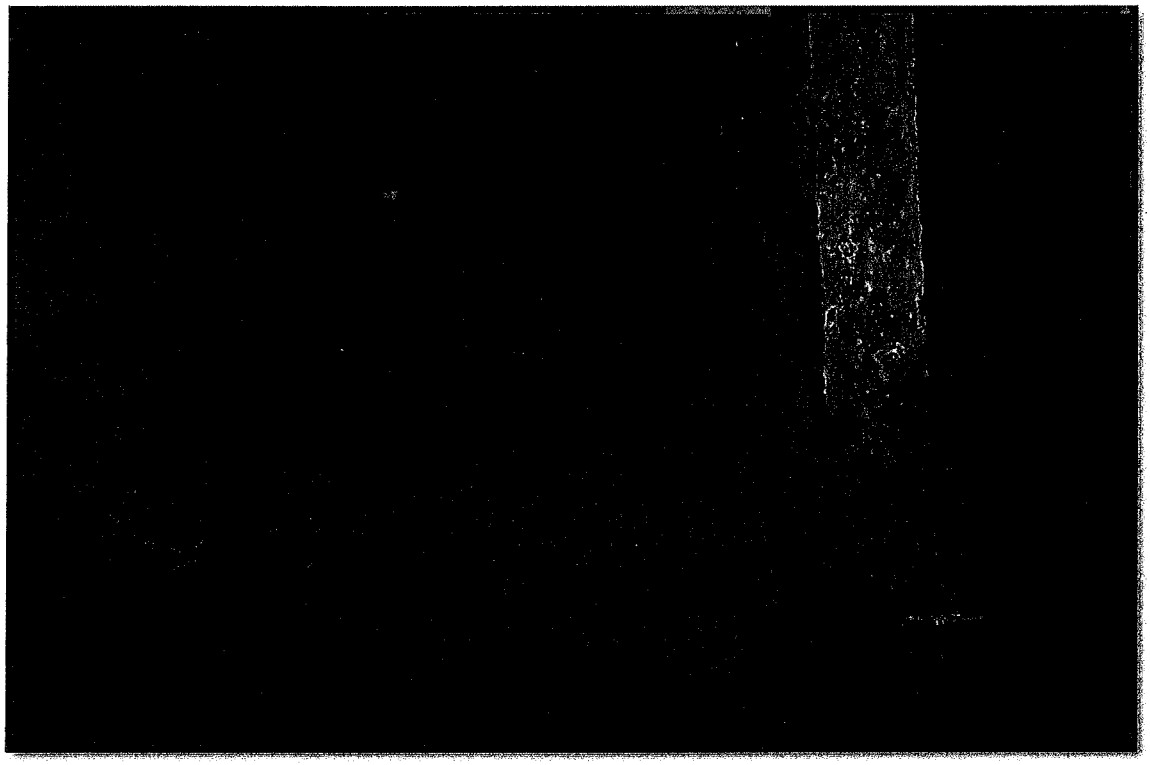
**CENTER BALLAST TANK – TRANSVERSE BULKHEAD**



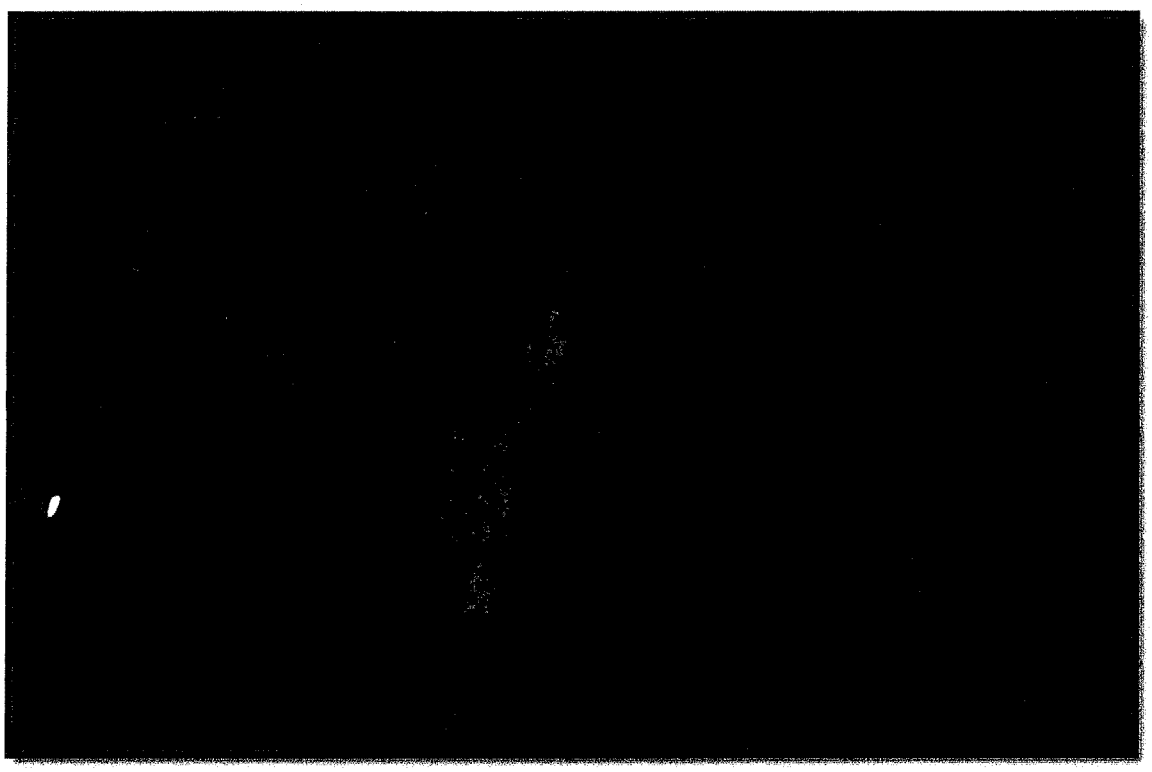
**CENTER BALLAST TANK – BOTTOM STRUCTURE**



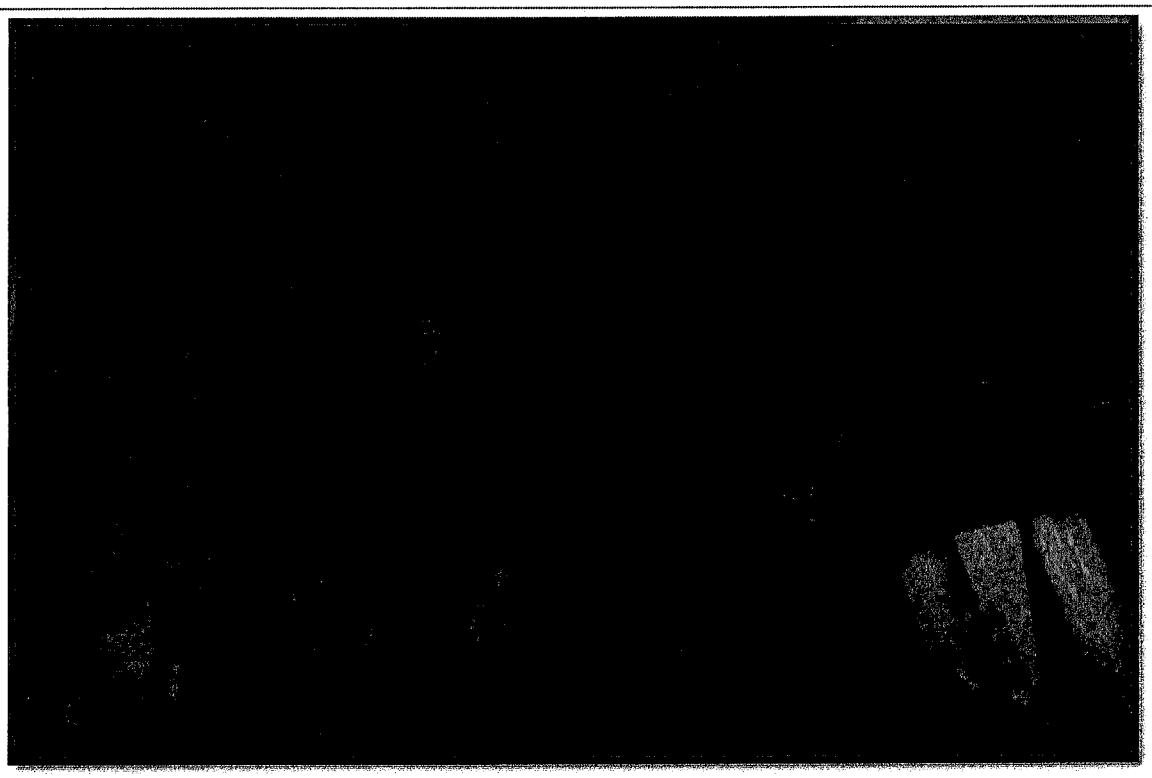
**CENTER BALLAST TANK – BALLAST PIPES**



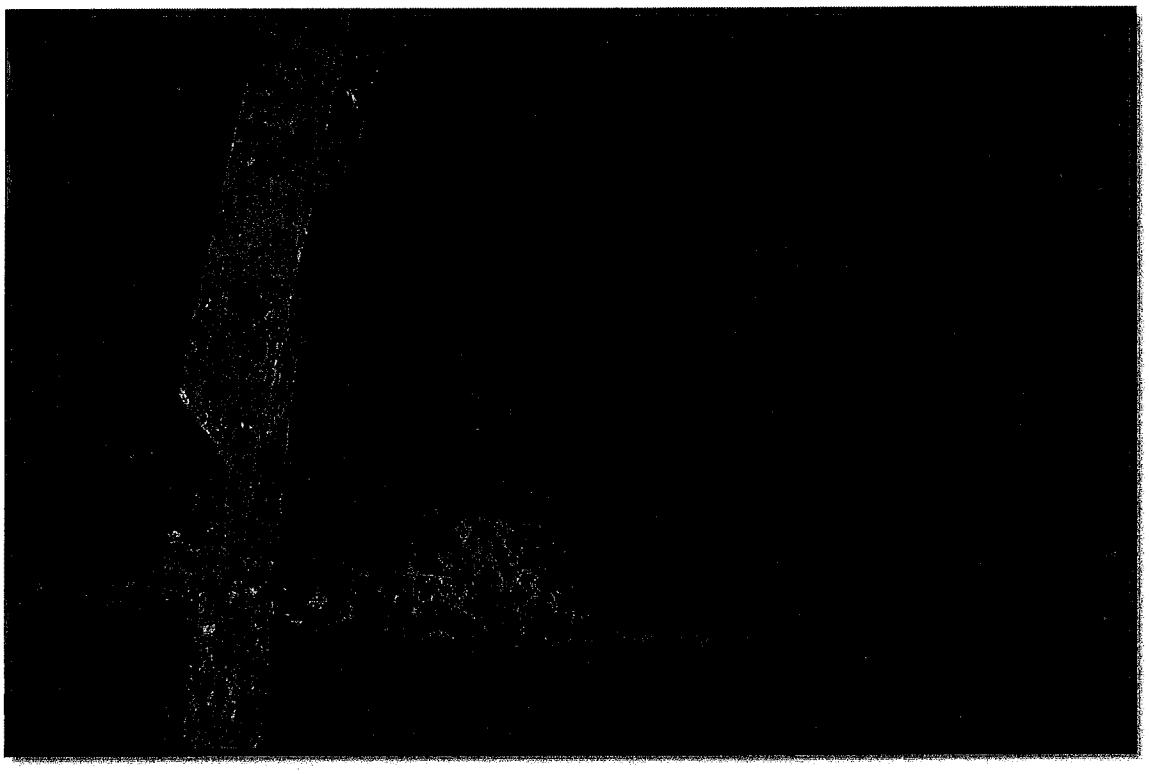
**PORT BALLAST TANKS – HULL SIDE STRUCTURE**



**PORT BALLAST TANK – WATERTIGHT LONGITUDINAL BULKHEAD**

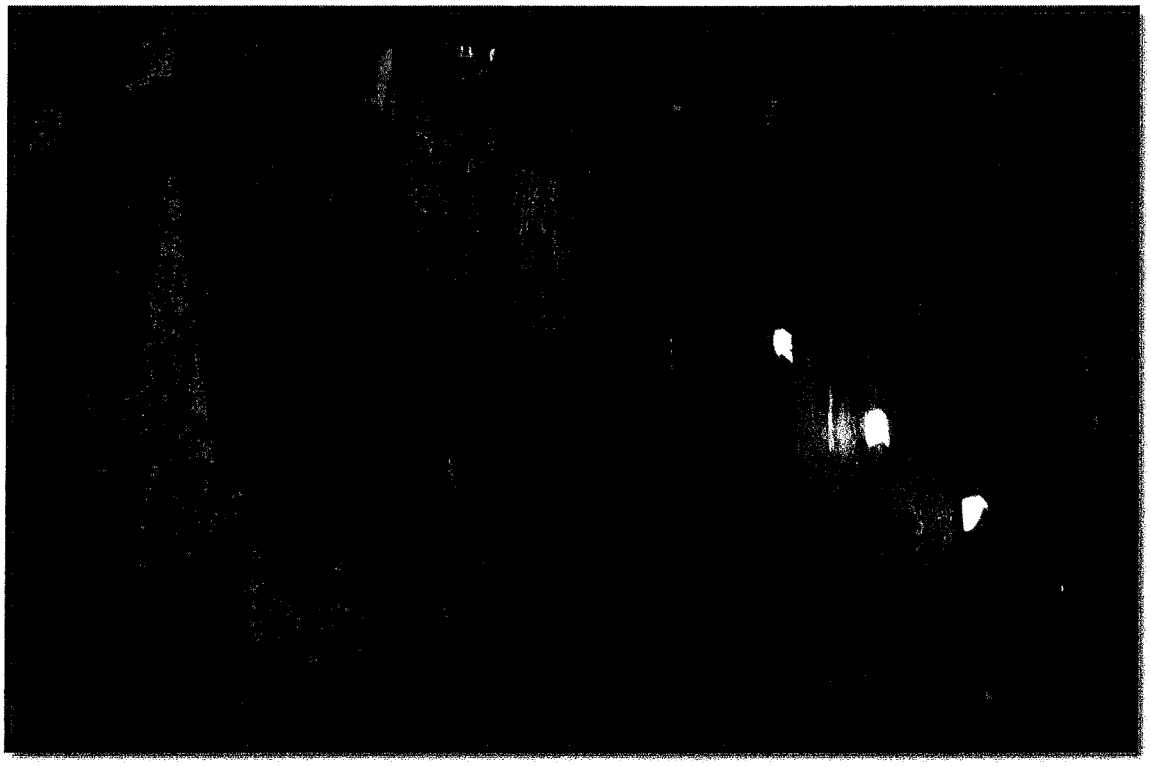


**PORT BALLAST TANK – HULL AND DECK STRUCTURE**

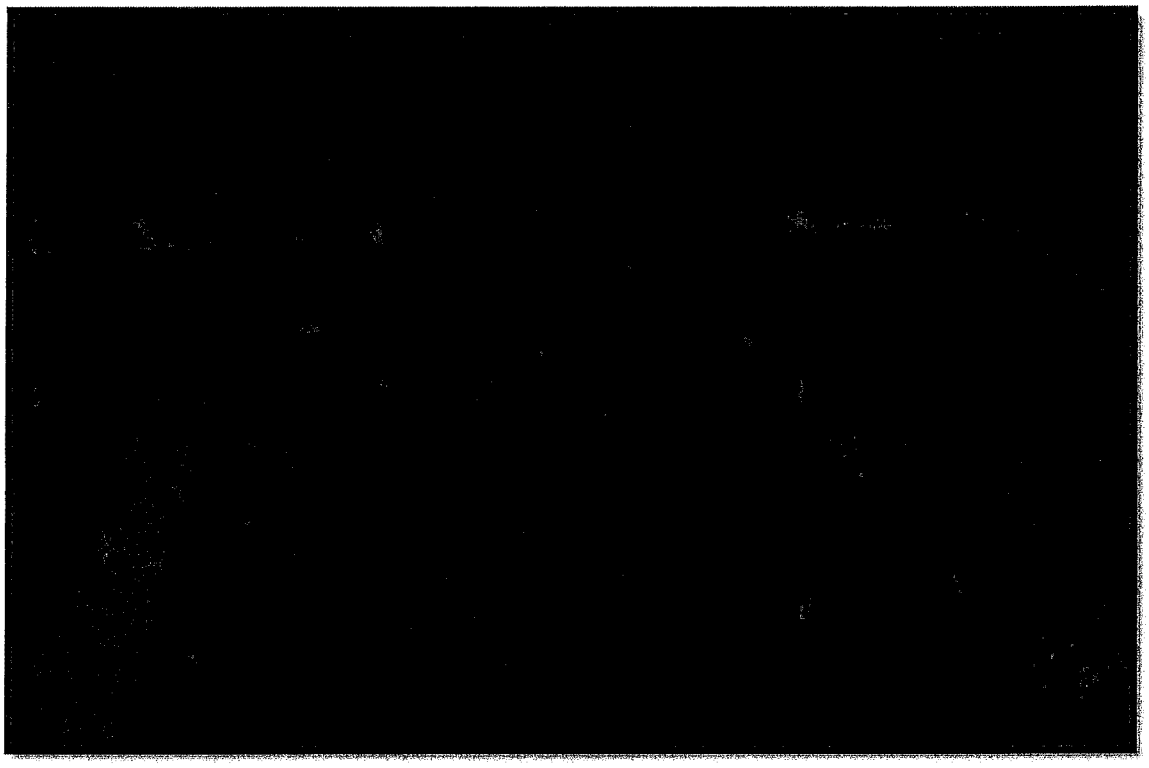


**PORT BALLAST TANK – HULL SIDE LONGITUDINALS AND WEB FRAMES**

**PORT BALLAST TANK – TRANSVERSE WATERTIGHT BULKHEAD**

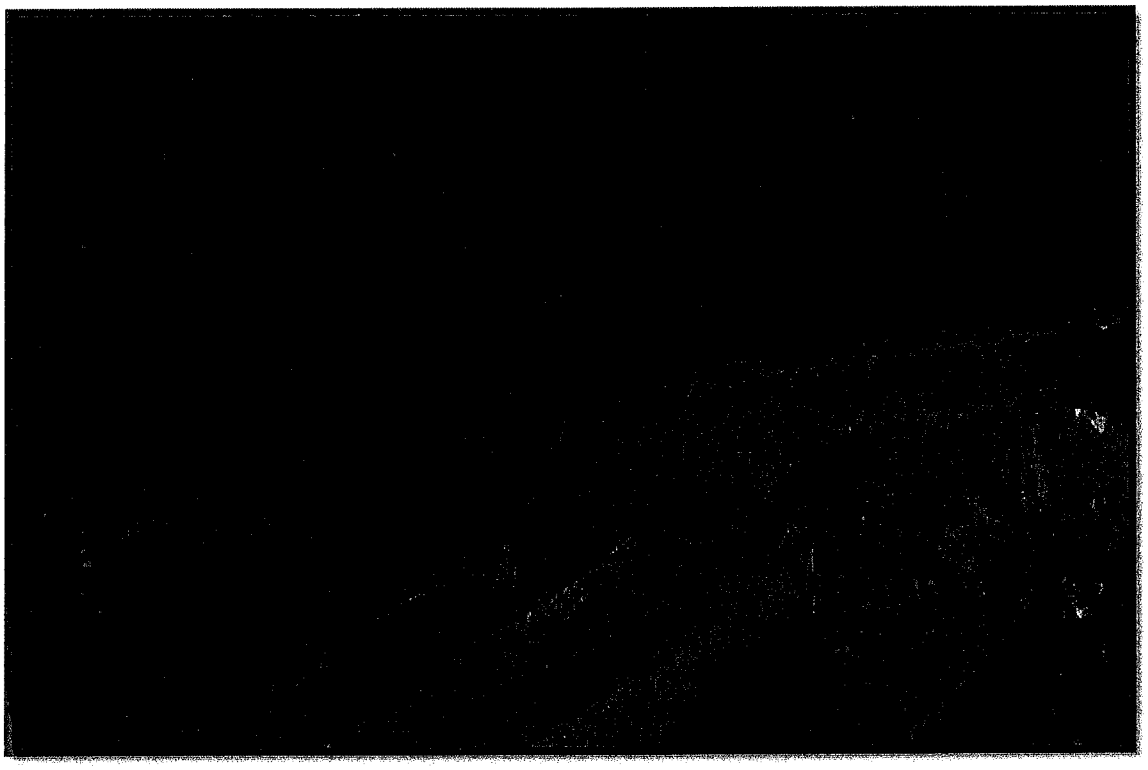


**PORT BALLAST TANK – TRANSVERSE WATERTIGHT BULKHEAD**

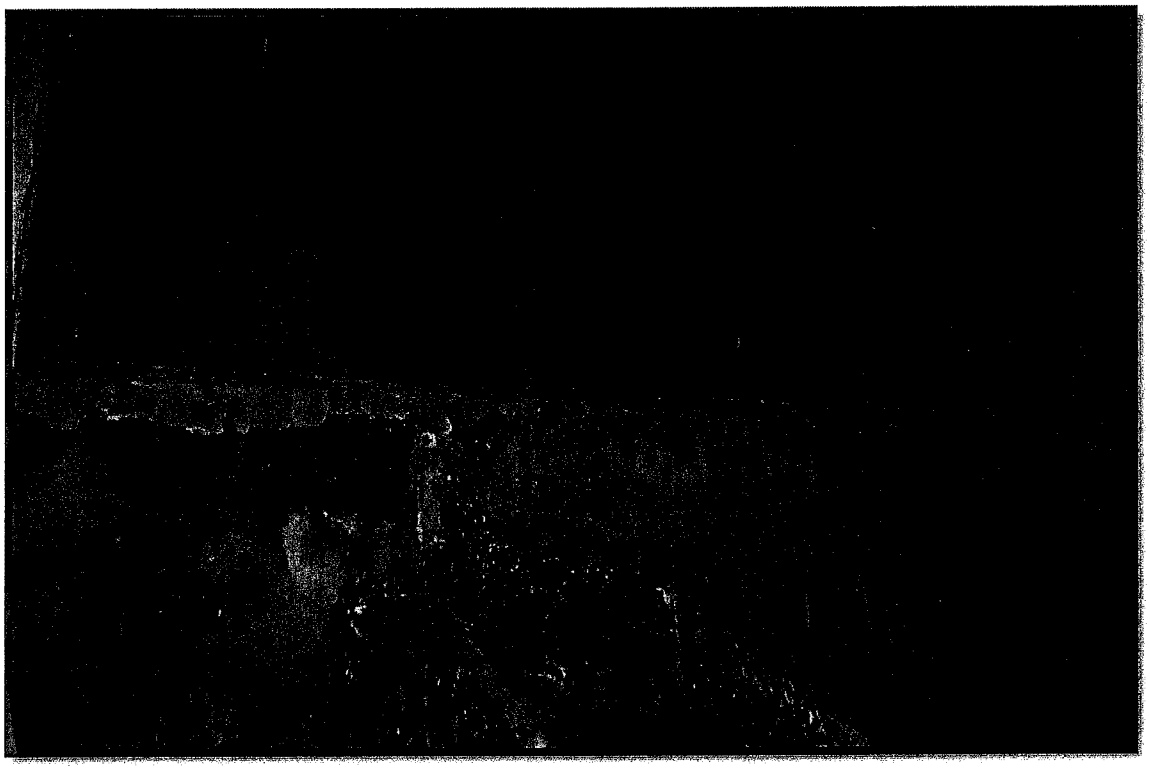


**PORT BALLAST TANK – BOTTOM STRUCTURE**

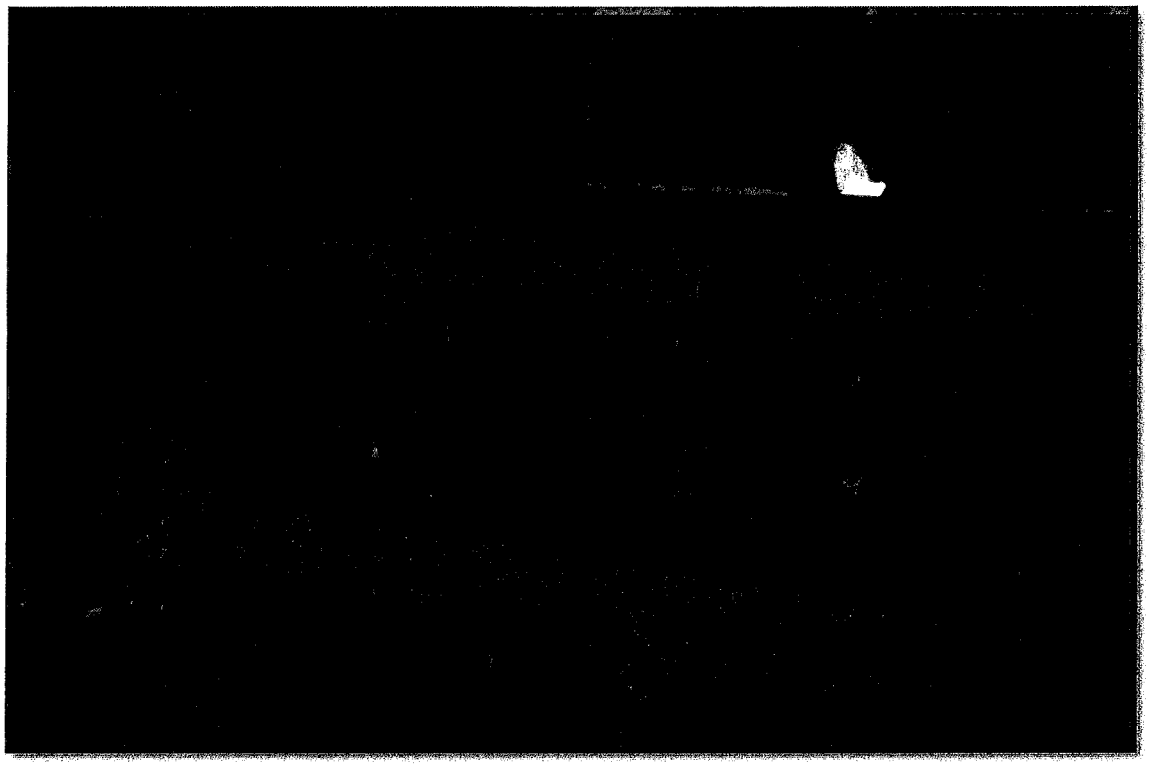
**PICTURES**
**VOID SPACES**



**PORT SIDE VOID – HEAD LOG STRUCTURE**

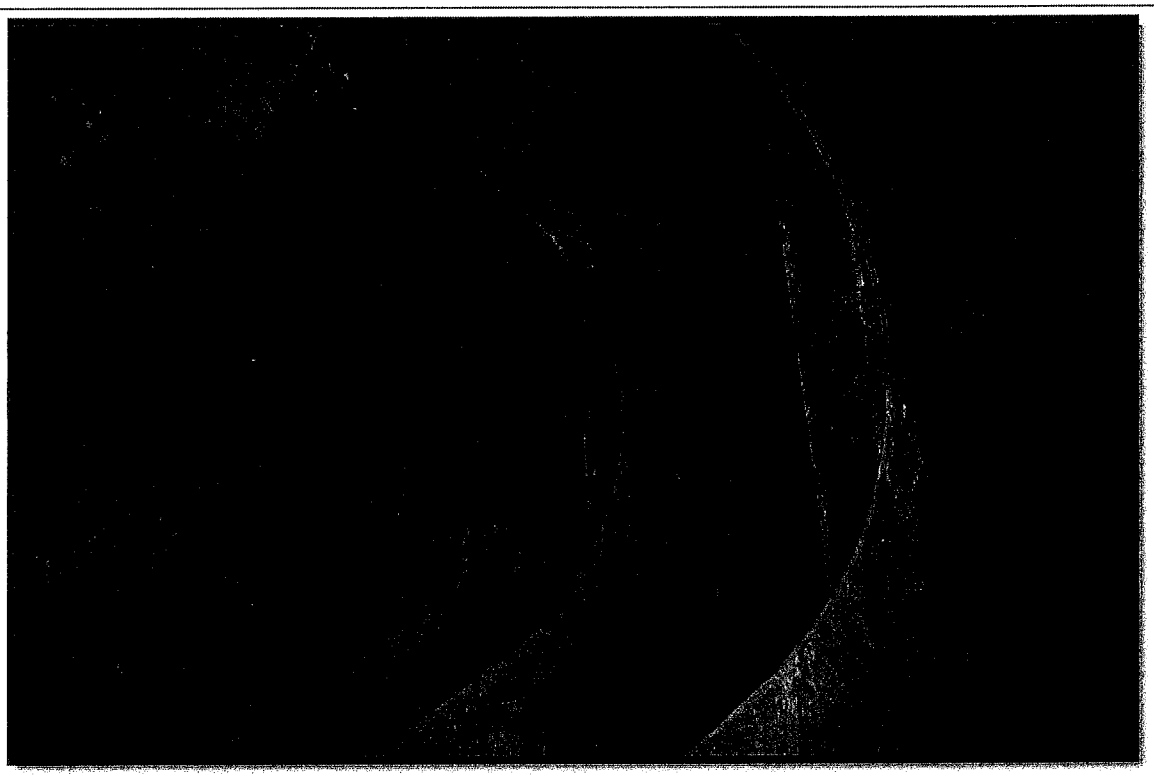


**PORT SIDE VOID – HEAD LOG STRUCTURE**

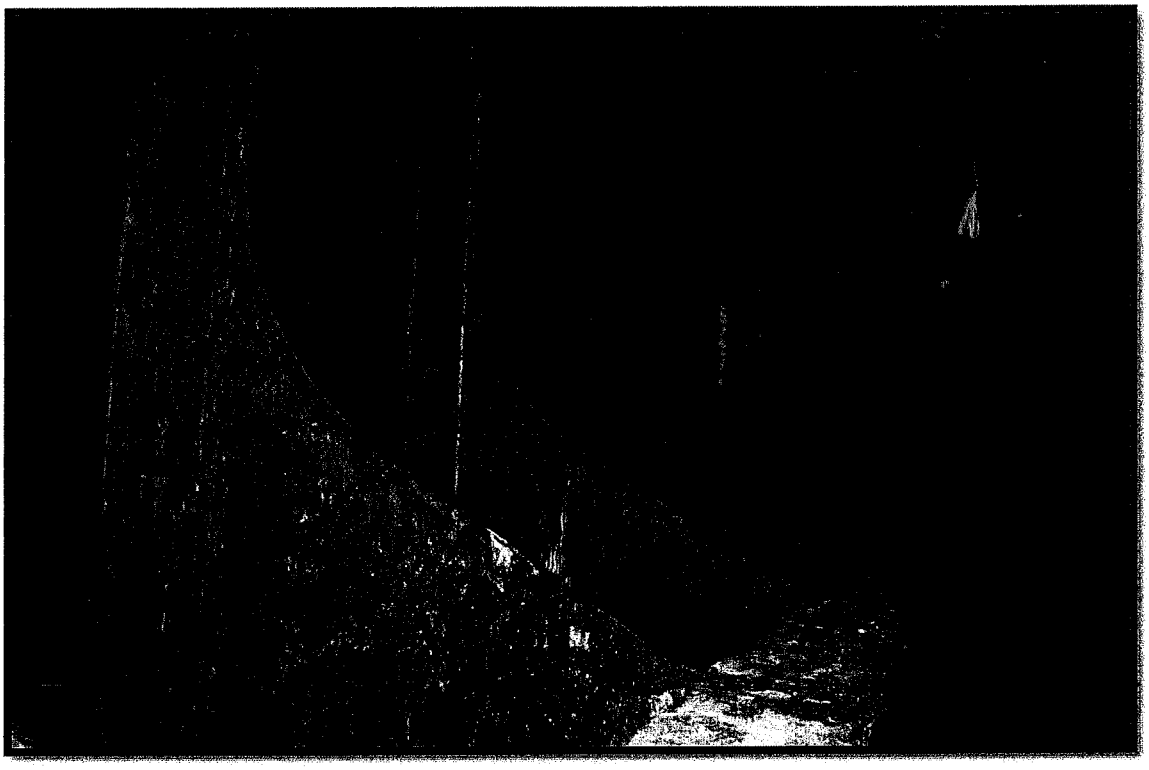


**PORT SIDE VOID – BOTTOM STRUCTURE**

**PORT SIDE VOID – SEA CHEST AND SEA SUCTION PIPING**



**STARBOARD SIDE VOID – HEAD LOG STRUCTURE**



**STARBOARD SIDE VOID – HEAD LOG STRUCTURE**

**STARBOARD SIDE VOID – RAKED BOW STRUCTURE**

**STARBOARD SIDE VOID – SEA CHEST ABD SEA SUCTION PIPING**

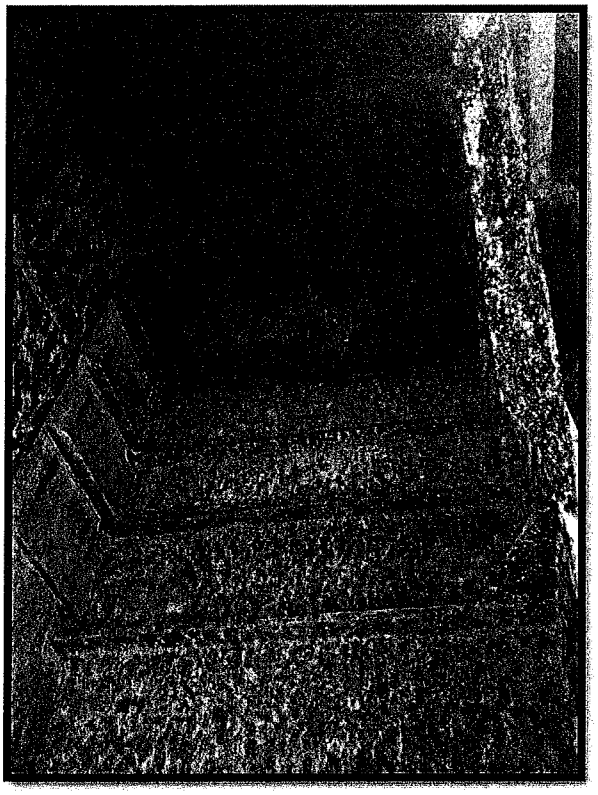
**CENTER VOID – CENTERLINE BULKHEAD**

**CENTER VOID – HEAD LOG STRUCTURE**

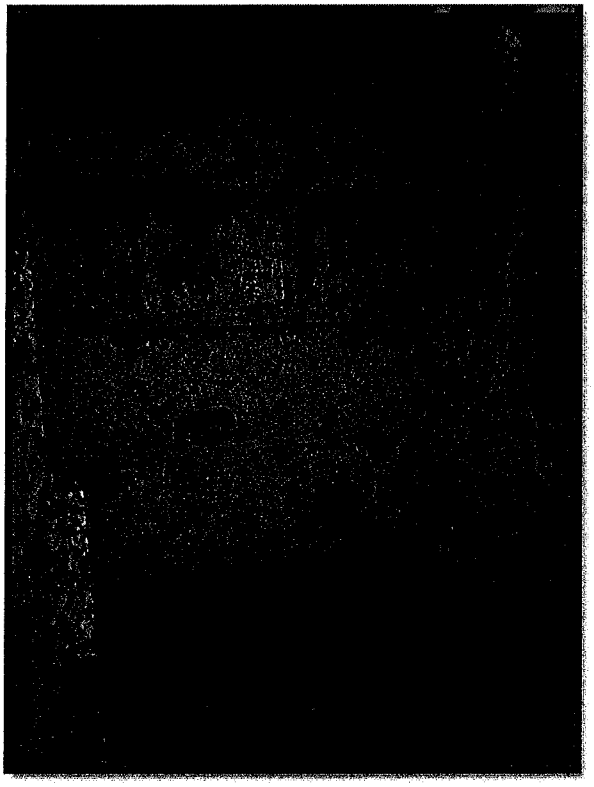
**CENTER VOID – WATERTIGHT LONGITUDINAL BULKHEAD**

**CENTER VOID – AFT WATER TIGHT BULKHEAD**

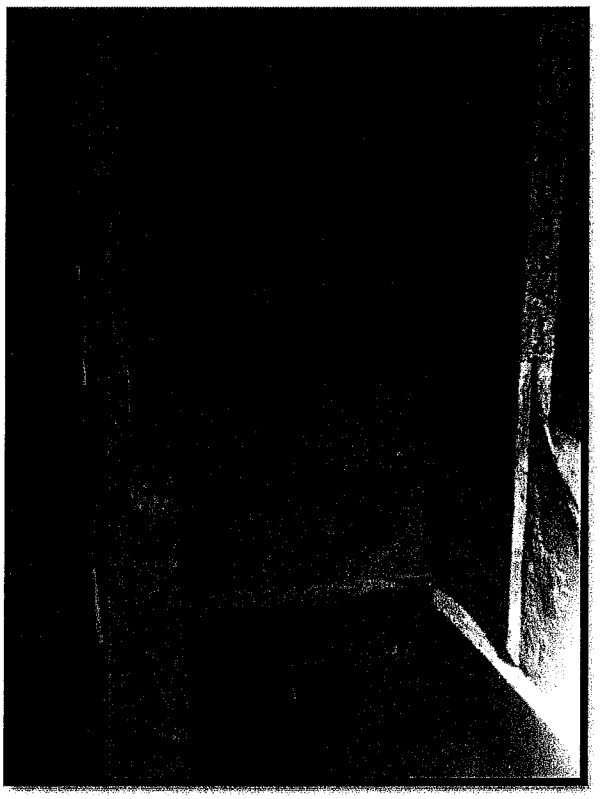
**PICTURES**
**NOTED DAMAGE**



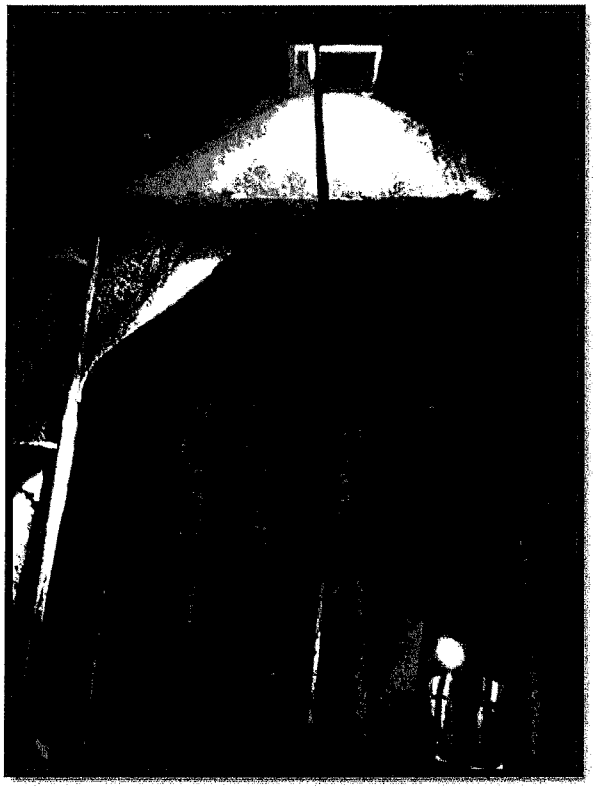
**BALLAST TANK #7P – MAIN DECK / SIDE SHELL BRACKET DEFORMATION**



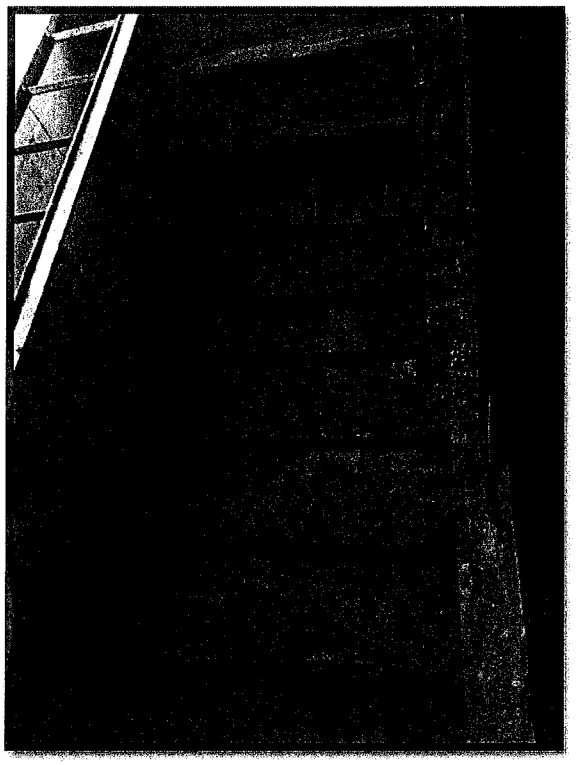
**BALLAST TANK #7C – CENTERLINE BULKHEAD DAMAGE**



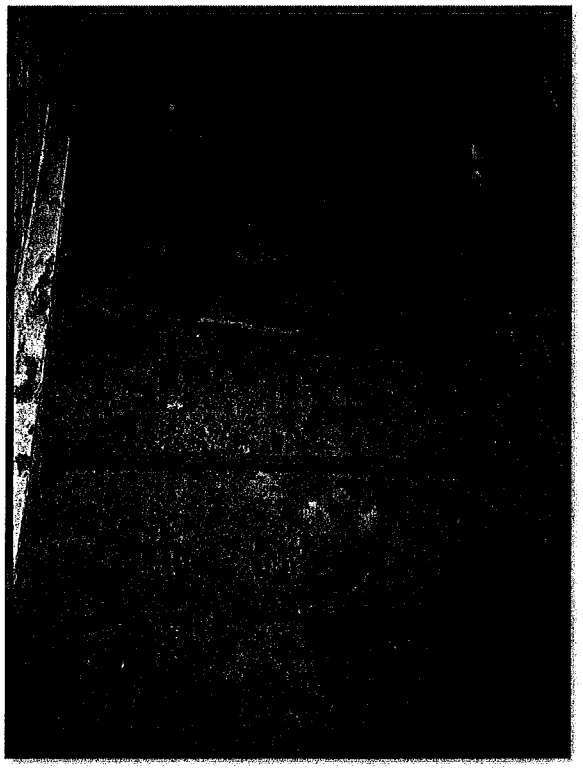
**BALLAST TANK #7C – CENTERLINE BULKHEAD DAMAGE**



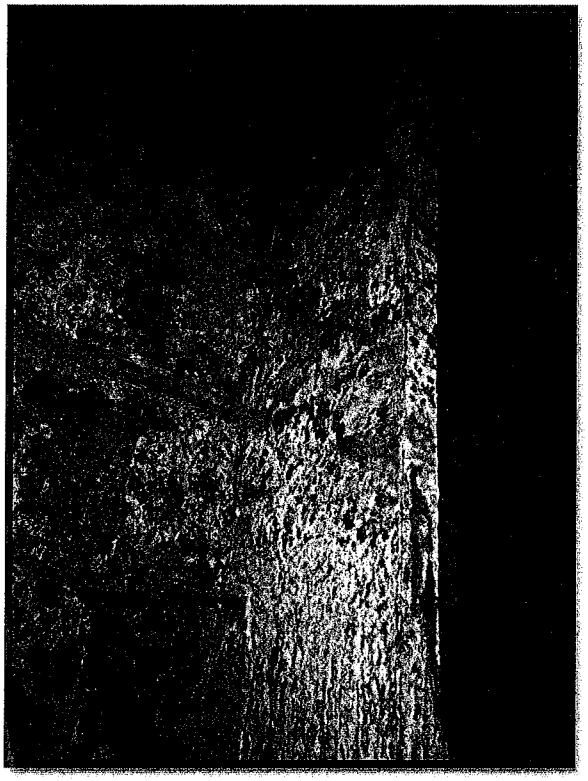
**BALLAST TANK #7S – POTENTIAL BOTTOM DAMAGE (LADDER DEFORMATION)**



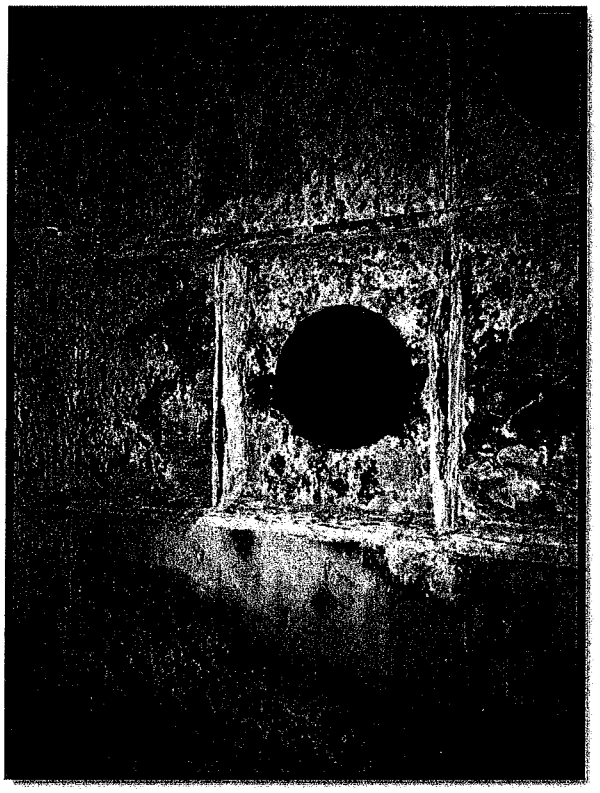
**BALLAST TANK #6C – WATERTIGHT LONGITUDINAL BULKHEAD CORROSION**



**BALLAST TANK #6C – CORROSION DAMAGE ON LONGITUDINAL BULKHEAD STRUCTURE**



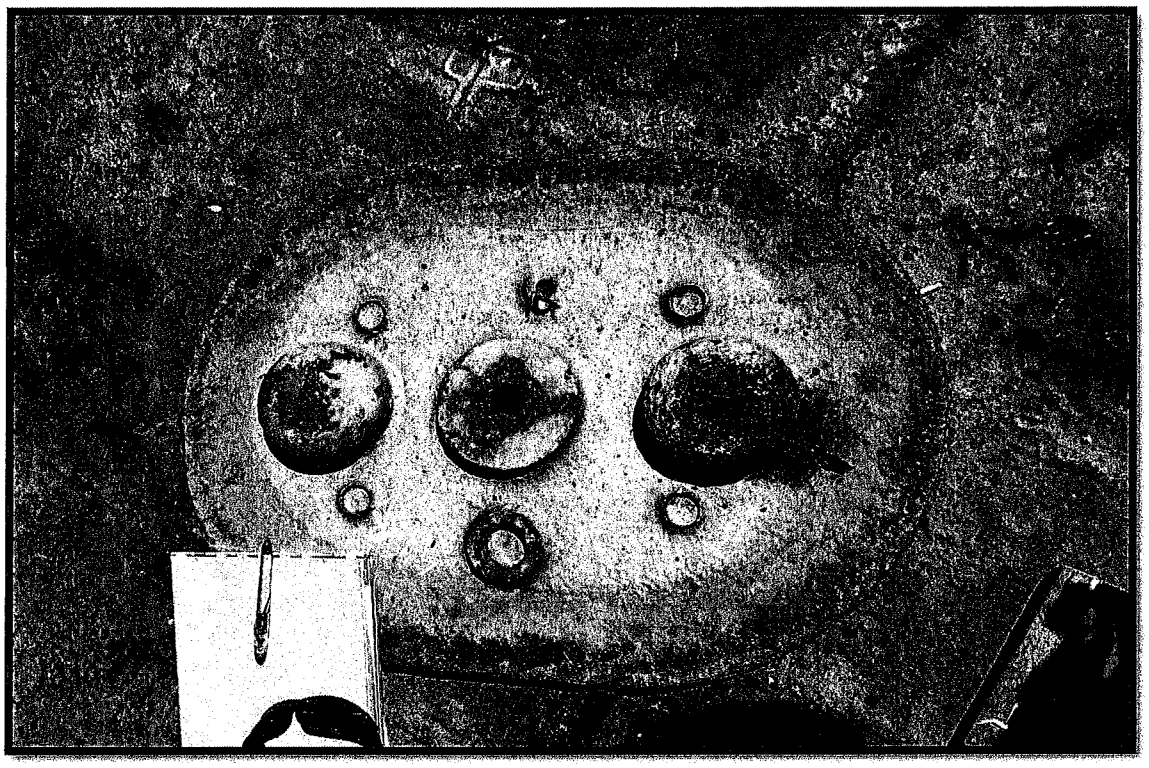
**BALLAST TANK #6C – CENTERLINE BULKHEAD AND WEB FRAME CORROSION DAMAGE**



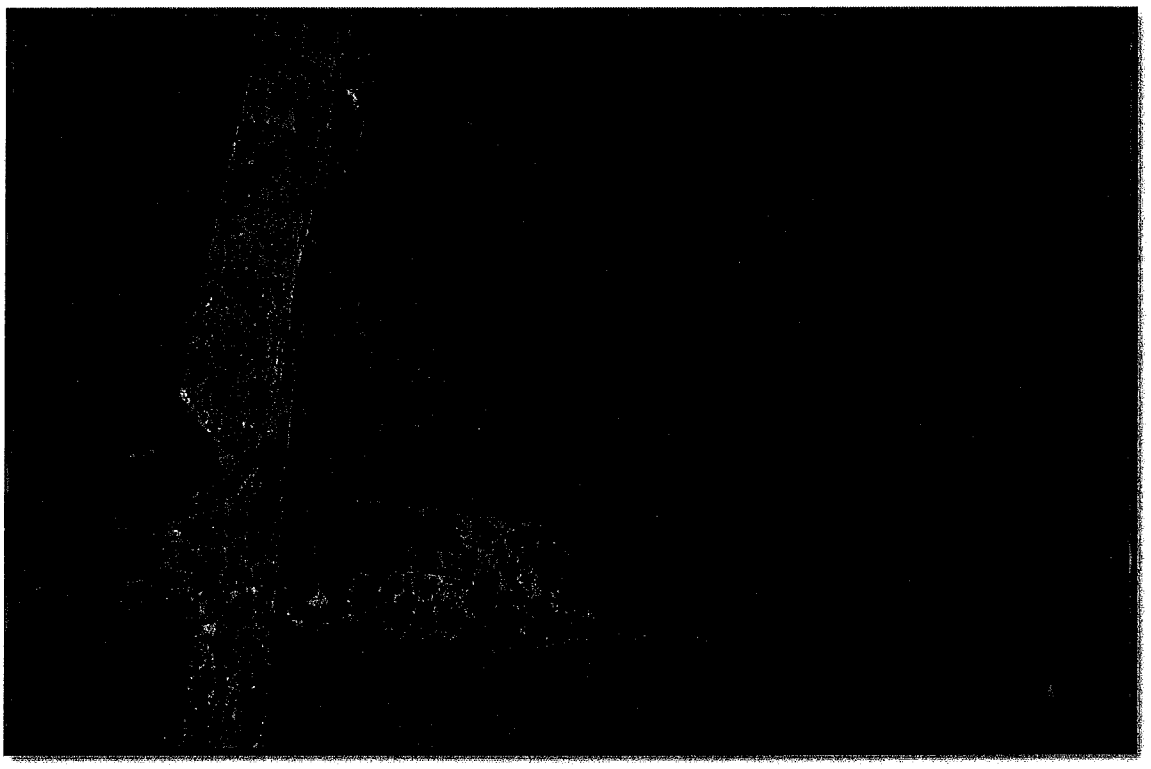
**BALLAST TANK #6C – CENTERLINE BULKHEAD DAMAGE**

**BALLAST TANK #5S – BOTTOM STRUCTURE CATWALK DAMAGE**

**BALLAST TANK #4P – MAIN DECK DAMAGE**

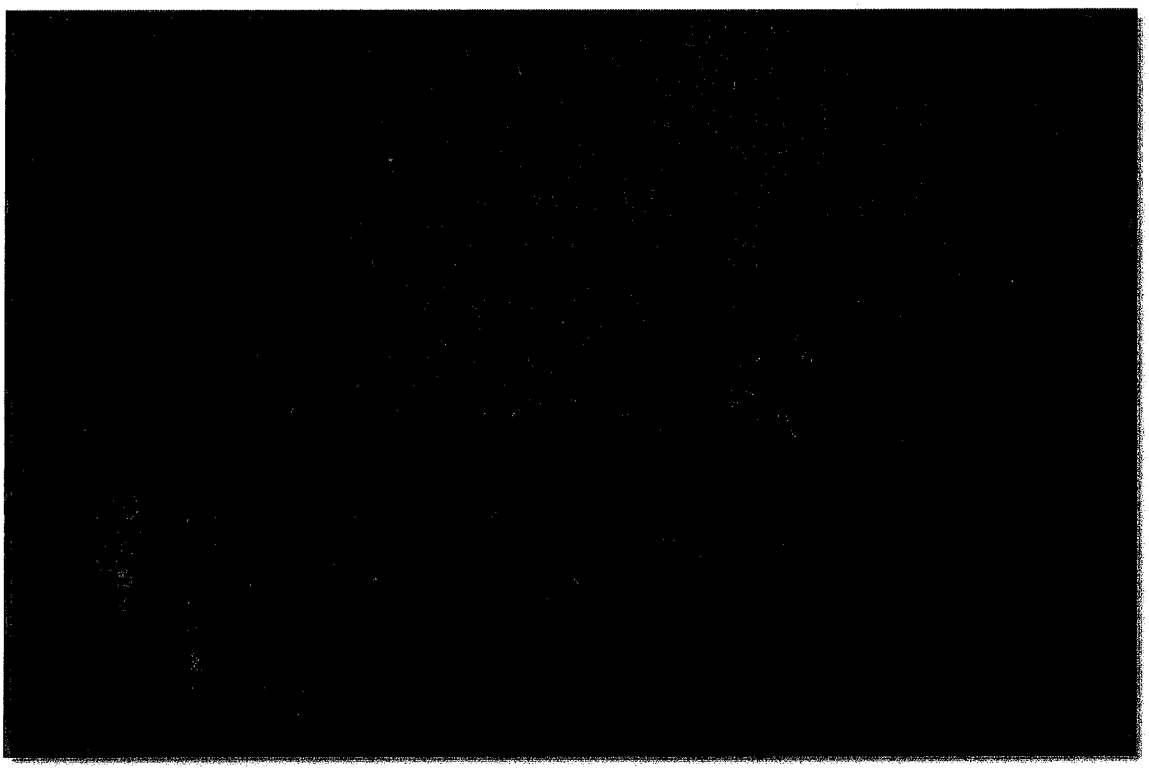


**BALLAST TANK #4P – HATCH COVER COROSION DAMAGE**



**BALLAST TANK #3P – MAIN DECK/SIDE SHELL BRACKET DEFORMATION**

**BALLAST TANK #1P – HULLSIDE LONGITUDINAL DEFORMATION (ISOLATED)**



**BALLAST TANK #1C – CENTERLINE BULKHEAD CORROSION DAMAGE**

## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Monday, October 24, 2022 4:27 PM
**To:** Deborah Hutchings
**Subject:** FW: 0082EP-Barge Second Visit Daily Progress Report RevB
**Attachments:** 0082EP-DPR0002_RevB-Daily Progress Report-Nov 26, 2021.pdf

Photos ofside shell damage

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Sunday, December 5, 2021 10:29 AM
**To:** Anthony Barclay <barclayanthony0@gmail.com>
**Subject:** FW: 0082EP-Barge Second Visit Daily Progress Report RevB

**From:** Toby Butler <toby.butler@ams-ink.ca>
**Sent:** December 2, 2021 8:50 AM
**To:** Jason Flood <jflood@canadafluorspar.com>
**Cc:** Dick Spellacy <richardspellacy@hotmail.com>
**Subject:** 0082EP-Barge Second Visit Daily Progress Report RevB

Jason

A minor revision to the report for the second visit to the barge. Photo titles for ballast tank No.5 were incorrectly named ballast tank No.6

This Type-O has been corrected, the revised report is attached

Regards

**Toby Butler**
Vice President / Naval Architect
Phone (709) 746-4328
Email Toby.Butler@ams-ink.ca
Web www.ams-ink.ca

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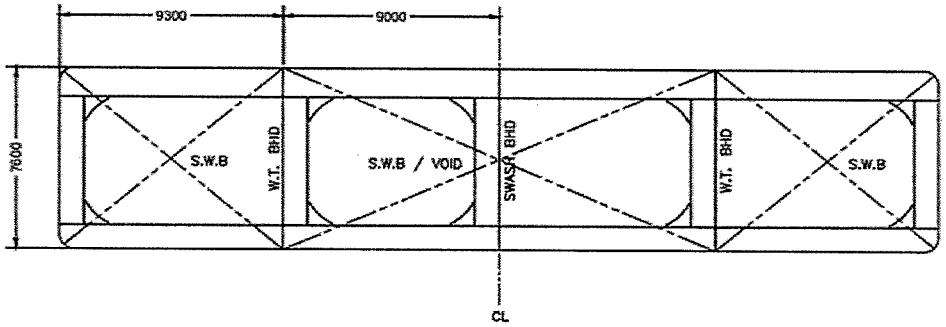



TYP WEB FRAME (IN WAY OF TANKS)
LOOKING FWD

NOTES:

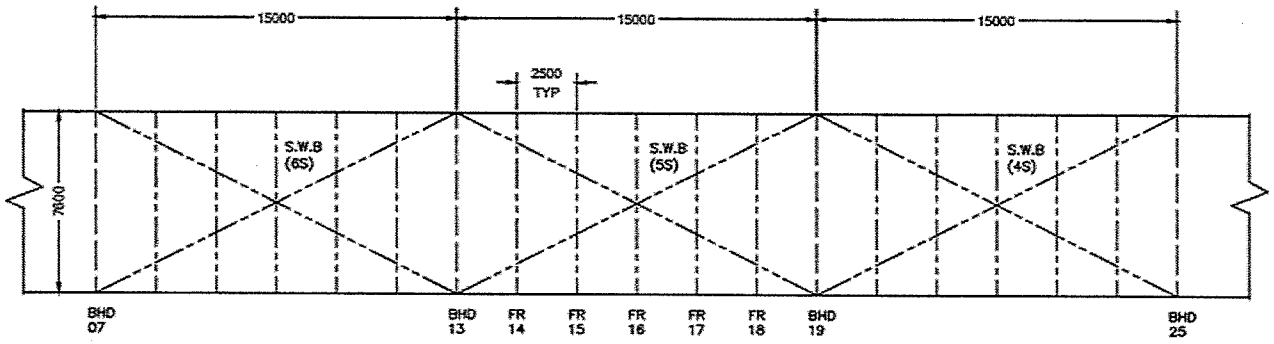
| REV. | DATE | DESCRIPTION | DRAWN | CHECKED | APPROVED | CONSULTANT | XXXXXX |
|---|---|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
|---|---|---|---|---|---|
| 00 | 0082EP | SKETCH | NTS : NTS | 01 of 03 | A |

A3




ELEVATION VIEW (IN WAY OF TANK 5S)
LOOKING PORT

FORWARD

NOTES:

| REV. | DATE | DESCRIPTION | DRAWN | CHECKED | APPROVED | CONSULTANT | XXXXXX |
|---|---|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
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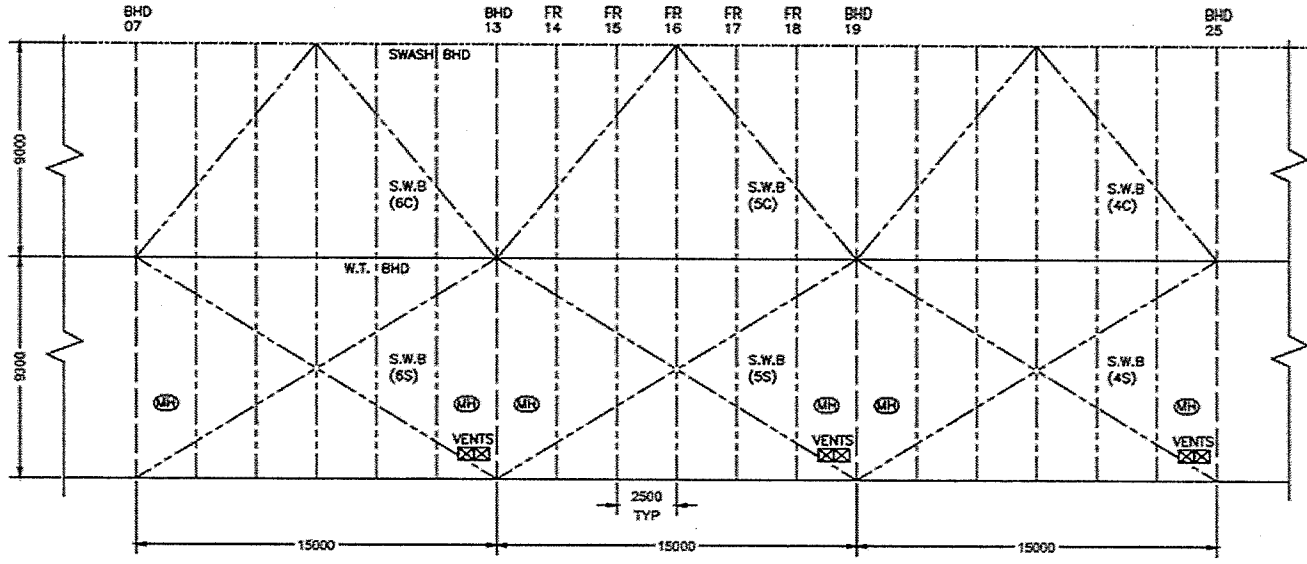
| 00 | 0082EP | SKETCH | NTS : NTS | 02 of 03 | A |

A3




PLAN VIEW (IN WAY OF TANK 5S)
LOOKING DOWN

NOTES:

| REV. | DATE | DESCRIPTION | DRAWN | CHECKED CONSULTANT | APPROVED | APPROVED XXXXXX |
|---|---|---|---|---|---|---|

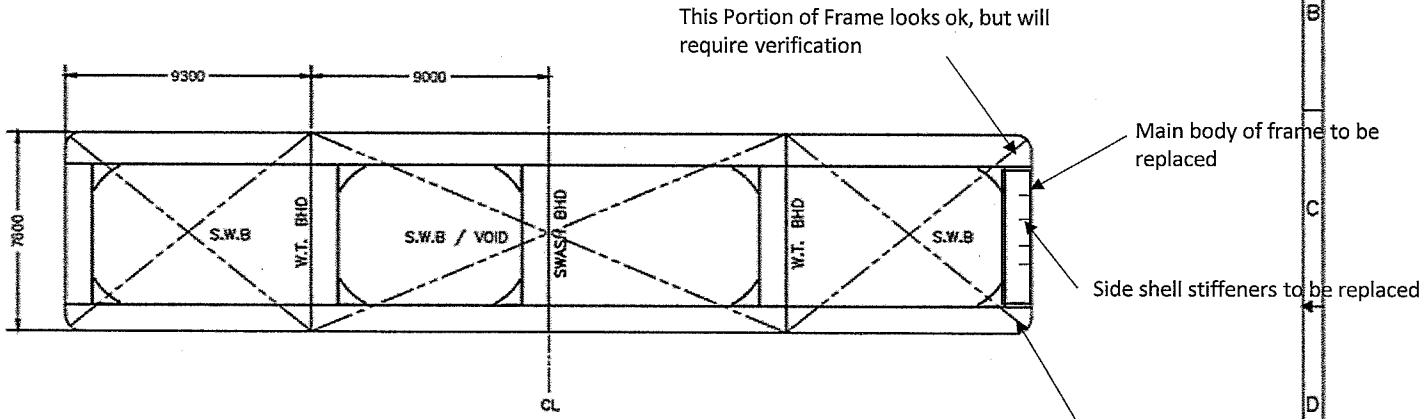
AMS Adaptive Marine Solutions Inc.

DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
|---|---|---|---|---|---|
| 00 | 0082EP | SKETCH | NTS : NTS | 03 of 03 | A |

# Fr14 Web Frame Replacement, Shell Stiffener Replacement

*This option acknowledges corrosion on other frames is not significant, does not mandate frame replacement and can be locally repaired with doublers or insert plates




TYP WEB FRAME (IN WAY OF TANKS)
LOOKING FWD

This Portion of Frame looks ok, but will require verification

NOTES:

| REV. | DATE | DESCRIPTION | DRAWN | CHECKED CONSULTANT | APPROVED | XXXXXX |
|---|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
|---|---|---|---|---|---|
| 00 | 0082EP | SKETCH | NTS : NTS | 01 OF 03 | A |

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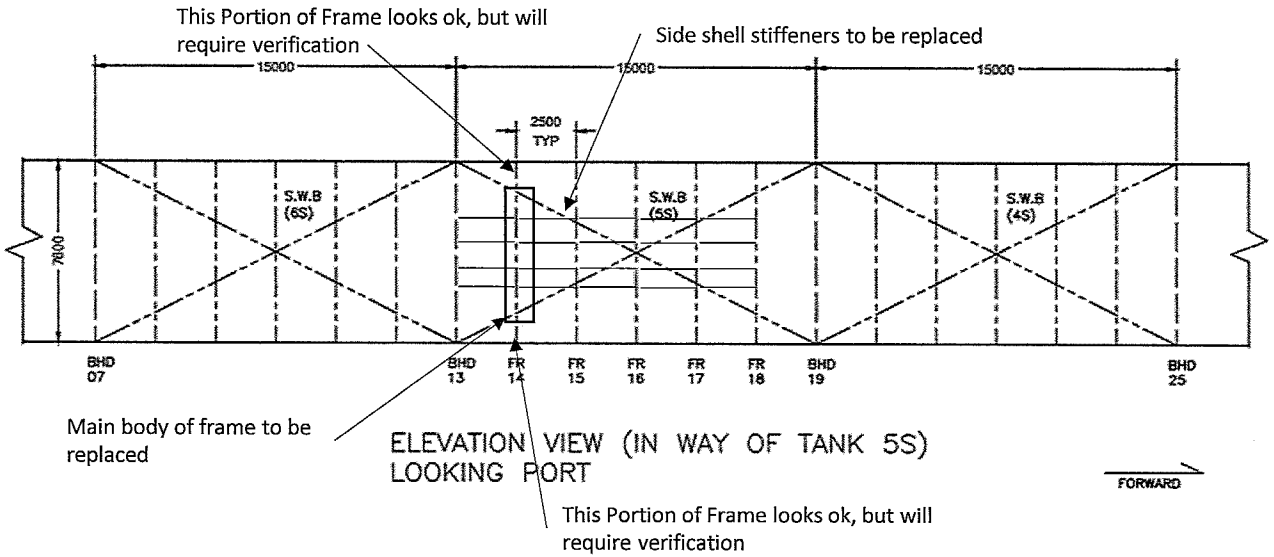


NOTES:

| REV. | DATE | DESCRIPTION | DRAWN | CHECKED | APPROVED | CONSULTANT | 100XXX |
|---|---|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
|---|---|---|---|---|---|
| 00 | 0082EP | SKETCH | NTS : NTS | 02 of 03 | A |

# Fr14 Web Frame Replacement, Shell Stiffener Replacement

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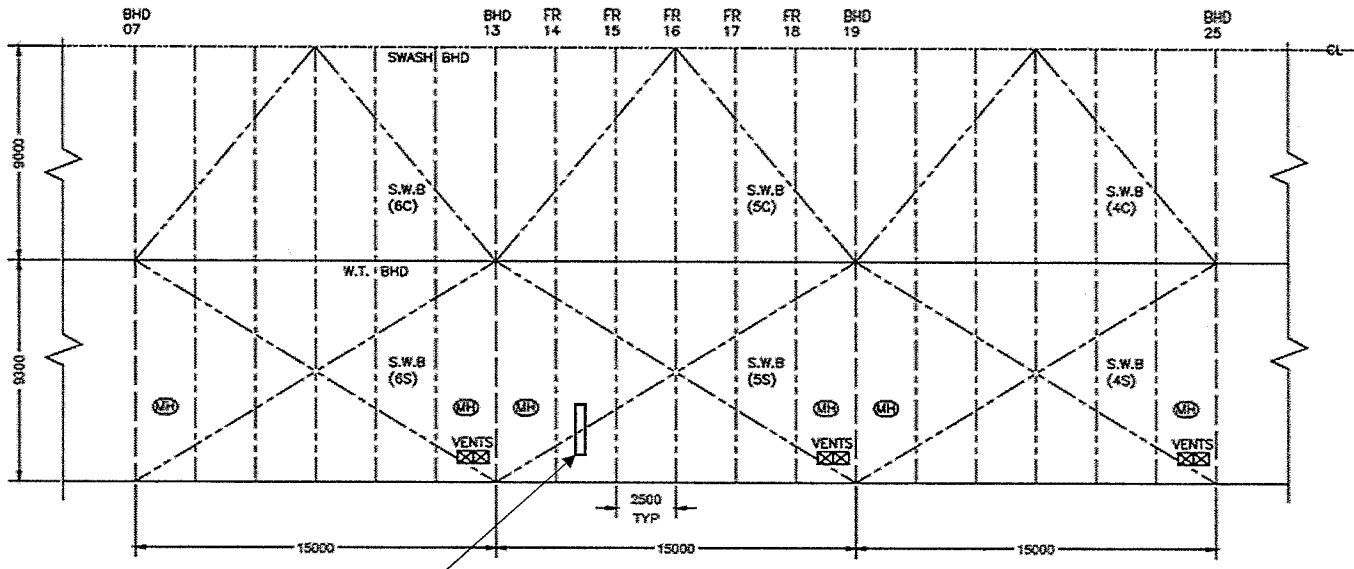



Slot in deck to lower new vertical frame in place
This cut to be clear of deck radius

PLAN VIEW (IN WAY OF TANK 5S)
LOOKING DOWN

NOTES:

| REV. | DATE | DESCRIPTION | DRAWN | CHECKED CONSULTANT | APPROVED | XXXXXX |
|---|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

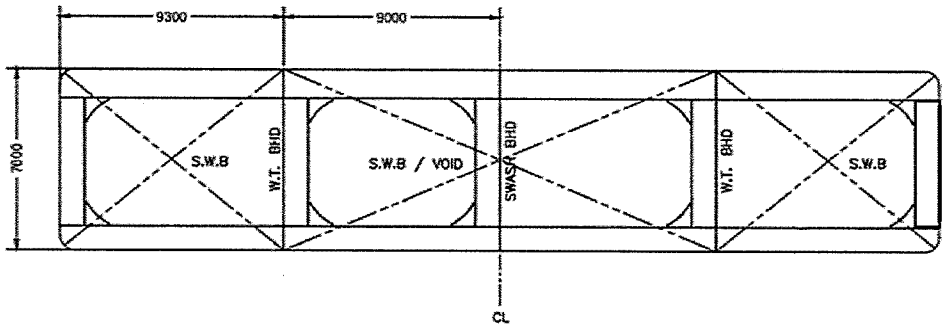
DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
|---|---|---|---|---|---|
| 00 | 0082EP | SKETCH | NTS : NTS | 03 OF 03 | A |

# Side Shell Panel Replacement

New side shell panel fabricated in a shop shipped to site and installed
Panel will contain all Webs and stiffeners that need replacement

*This option acknowledges corrosion on other frames is significant and mandates frame replacement




TYP WEB FRAME (IN WAY OF TANKS)
LOOKING FWD

NOTES:

| REV. | DATE | DESCRIPTION | DRAWN | CHECKED / APPROVED CONSULTANT | XXXXXX |
|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
|---|---|---|---|---|---|
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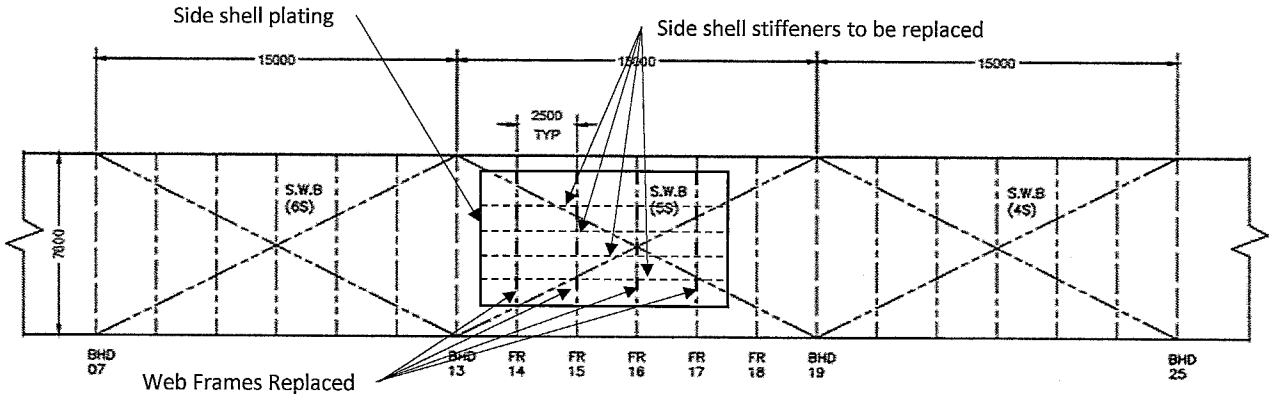


ELEVATION VIEW (IN WAY OF TANK 5S)
LOOKING PORT

FORWARD

NOTES:

| REV. | DATE | DESCRIPTION | DRAWN | CHECKED CONSULTANT | APPROVED | APPROVED XXXXXX |
|---|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
|---|---|---|---|---|---|
| 00 | 0082EP | SKETCH | NTS : NTS | 02 of 03 | A |

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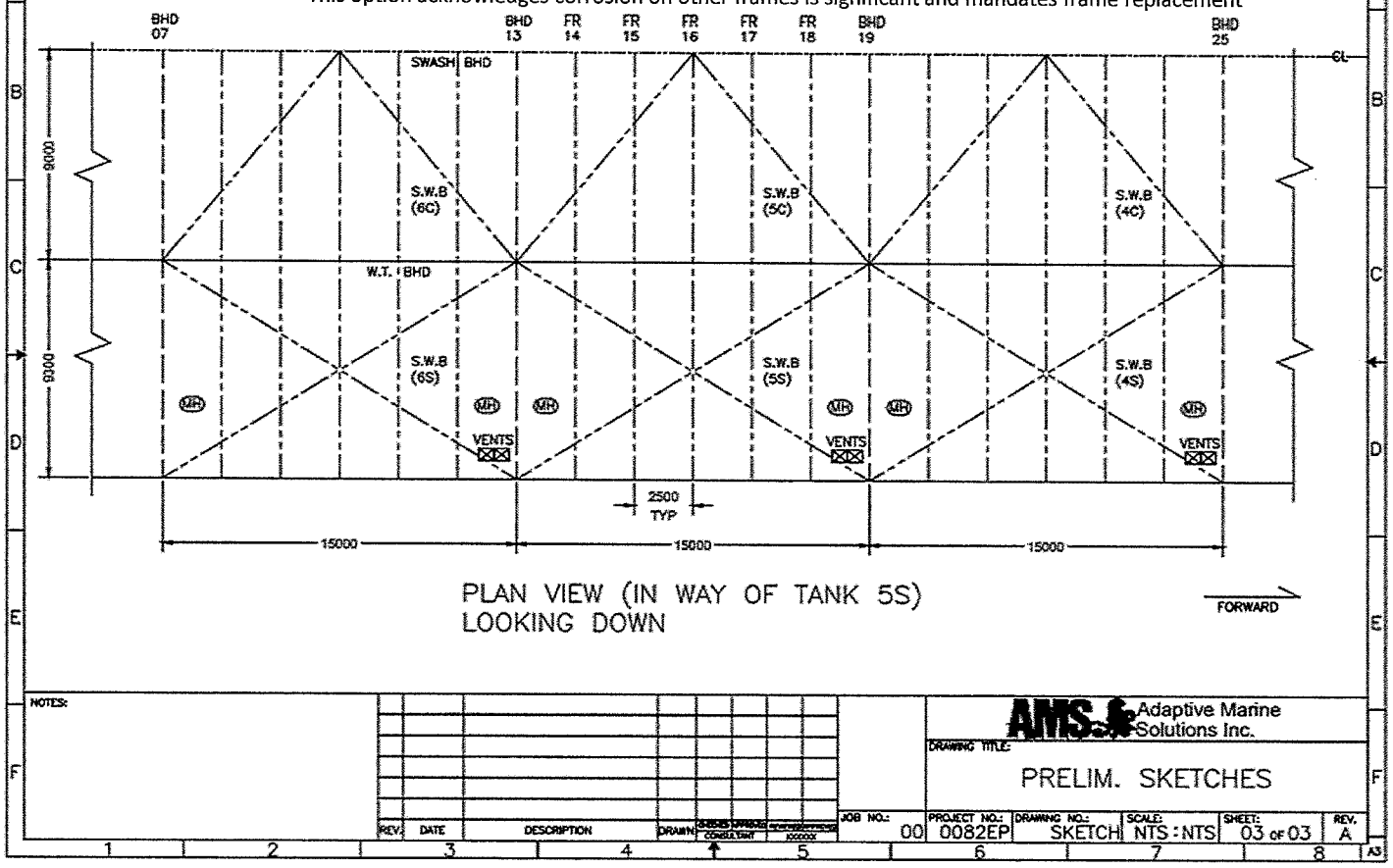

## Initial activities

Day 1, Monday November 15, 2921.

John Norman survey team down to barge and test and run all bilge system components including pumps, Effect repairs on unserviceable pump, run and test anchor winch, list all tanks with blanked off air vents and propose a plan to rectify defects or nominate alternate venting arrangements. Total 7days

Day 1 Appoint engineer from ORMI to inspect winches and report, total of 7 days. Jason/Dick

Day 1 Compile safety plan with possible bridging document to anchor handling vessel operator. CFI safety department, John, Dick

Day2 to Day 15, November 13 Receive full inspection proposal from AMS, seek approval from Management and initiate, proposal to take a total of 8 days from day of mobilization. Jason

Day 2 to 4 Approach Horizon and Atlantic Towing for indicative quote to pick up, run and test anchor spread, explore both time and fixed sum approach and consider the test pull contained in the Baird report.

**Day 10, Enough information regarding the structural condition of the barge to assemble a final cost and submit the plan to management for go/no go decision**

**Day 11 Commence any structural work necessary to set barge up for work necessary to go forward**

**Day 28 Mobilize AHTS vessel to pick up chain and proceed to St. Lawrence**

## Parallel Activities

Approach Paul Antle regarding use of welders on barge while in shipyard. Dick

Obtain quote from suitable agent for time and price to mobilize winches to barge. Jason??

Determine whether a sea bed ROV survey is necessary. Jason, Dick

Review issues raised by John and determine if drilling in a pile anchor for the starboard bow is an option, Jason, Dick, John.

Obtain quotes for installation of winches, have survey team check for structural suitability. Jason, John and Dick

Obtain firm price for anchors and chain from Pennecon also quote for flaking chain out and assist with loading onto the vessel and also quote for loading the anchors on to the vessel. Jason

Day 15 Review AMS report and determine structural integrity of barge Jason Dick John and Pat

Obtain quotes from local suppliers for anchor handling jewelry such as Kenter links, pennants and shackles.

DESCRIPTION OF THE WORK ON THE BARGE h404

In October 2021, Inaminka was contacted by CFI to assist them in resolving the difficulties surrounding the condition and usage of the above barge at the port of Blue Beach outside of St. Lawrence. Initial meetings revealed that Cfi had imported the barge to act as a loading facility at the CFI facility at Blue Beach. The initial meeting at Blue Beach revealed that CFI had actually conducted a small number of cargo movements during the late spring and summer months but during periods of adverse weather, found it was impossible to leave the barge alongside as the prevailing swell was producing adverse movement of the barge alongside culminating in significant damage to its starboard making it impossible to leave barge in situ after cargo operations.

IMS was asked to

1) Assess the condition of the barge both externally and internally to ensure that the existing structure was sufficient to continue as planned. To accomplish this, it was agreed by all parties that a physical inspection, both internal and external, of the barge where she was currently moored in Marystown was necessary. As this inspection meant entry into confined spaces (the tanks), it was decided to retain a local inspection company to perform the inspection of the internals while IMS made and assessment of the externals. This was a complex procedure as the protocol for confined space entry meant that we had to have the tanks to be investigated ventilated beforehand and during the inspection, two people had to be at the tank's entry manhole at all times, one suited up with breathing apparatus at hand in case a rescue was needed, and one person manning the winch in case a recovery was required. At the same time, CFI in the form of myself and our naval architect Mr. Anthony Barclay, conducted a physical assessment of the barges external structure as well as fixtures and fittings on the deck as well as a preliminary inspection of the barge's machinery spaces.

2) Once these actions had been completed, the following documents were presented to CFI management;

   i) A report from the inspection company, (attached)
   ii) Repair options (attached)
   iii) Repair cost estimates, (attached)
   iv) Preliminary mooring plan for year round operations (attached)
   v) Modifications to the barge necessary to achieve the mooring plans specified in (iv) above including the equipment that had to be fitted to the barge to achieve the foregoing.
   vi) Detailed designs of the deck strengthening necessary to accommodate the two new tugger winches that would be required.

vii) A detailed list of the cost and location of the equipment necessary to achieve these moorings.

viii) The barge has some 3,000 tonnes of untreated ballast water on board and an assessment of the proposed treatment plan was also completed as part of this process.

ix) On December 15th, another visit was made to the barge to ascertain the veracity of all the plans and to initiate the ballast transfer plans

x) **At the December 15th meeting Richard Spellacy was appointed master of the barge and as such supervised the transfer of the ballast. This appointment was never rescinded and as a matter of course Captain Spellacy then continued to function as the barge master during the period up to and including January 31st, reporting directly to CFI as needed. From January 31st. There was no structured management however Richard Spellacy continued to act as master of the barge for the month of February, maintained contact with the Receiver while away on another job during March and For the month of April and most of May attempted to locate alternative moorings for the barge and also facilitated a potential sale of the barge by putting the potential purchaser in touch with the Monitor and then maintaining contact with the purchaser to ensure that all the conditions required by each party were met. Subsequent to that, contact was maintained with the Monitor and occasionally the mine Manager.**

3. Once all of the above had been submitted and approved, IMS worked with the CFI management to compile a detailed plan, schedule and cost of the process. This was a quite complex document (attached) comprising as it did the engagement of a high powered anchor handling vessel to lay the mooring, the location and cost of the anchors and chains as well as two new tugger winches in addition to various shackles chains buoys and pennant wires.

These activities were then supplemented with finalizing the location of the anchors and chains, the two extra winches and reviewing a completed ballast plan as approved by Transport Canada.

In the afternoon of January 6th, a Teams meeting was called to discuss the current condition and status of the barge 404 as it lay alongside Marbase in Marystown. A review of all of the data available from various internal inspections in tank numbers 7S, 6S and 5S as well as the result of extensive monitoring of both the draft marks and the internal water levels of the three tanks that were opened lead to agreement between all parties in that while there was a fairly significant indentation in the side of tank 5S, that damage had not impaired the barges watertight integrity.

A detailed inspection of this indentation this tank revealed that there was significant damage and wastage in the way of frame number 14 and although the transverse strength of the barge has been impaired in this area, this impairment did not affect the proposed usage of the barge as a dock. To offset this localized impairment. it was generally agreed that after the installation of the cargo loading system on the deck, the barge could be moved some 10/15m to the south on the berth and this would bring the transverse bulkhead between tanks number 5 and 6 onto the pier and that this would make up for the lack of transverse strength in the way of frame 14. Further on this matter, it was also agreed that the fendering arrangements in this area would be reviewed with a view towards installing either flat tires or one of the inflatable rubber fenders from the barges port side in that area.

Once this discussion had been held, I expressed the opinion which seemed to be supported by all parties that while we have received some high-level estimates on three courses of repair of that structural damage, at this point in time, spending money on repairs of this type would not be appropriate. Should CFI elect to proceed with the moorings as proposed, then the barge will be on site for between two and three years and if it was felt that the barge needed to be brought back into class as a precondition of sale then there would be ample time available to carry out that work.

Given that these activities were occasioned by some doubts as to the watertight integrity of the barge and also some concerns regarding the barge's structural integrity in that area, my recommendation is that the barge as is with the addition of the two winches, is fit for purpose and that the addition of the storm mornings as proposed in the attached documentation would resolve the issue of tug availability during times when inclement weather threatens to set in.

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **CFI St. Lawrence Barge Moorings**

**Page 1**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Week of Wednesday October 13 to Tuesday October 19** |
| 0800/1700 | Chase down data to assemble plan for barge, liaise with Ron Milmine on acceptability of CPE Express, procure charts for area, meet with Pat Gannon, Leo Power and Naval Architect Anthony Barclay re acceptability of plans, answer questions from management team on orientation of barge<br>**Total of 7 days** |
| | |
| | **Week of Wednesday October 20 to Tuesday October 26** |
| | Review concerns of project engineers and respond,<br>**total of 1.0 days** |
| | |
| | **Week of Wednesday October 27 to Tuesday November 02** |
| | Teleconference call with project staff out west devise new mooring plans and Liaise with Jason Flood et al<br>**Total 7.0 days** |
| | |
| | **Week of Wednesday November 03 to Tuesday November 09** |
| | Chasing down winches, chain etc. revising mooring plans to suit meeting in St. Lawrence with project staff and Consultant Norman, proceed to Bay Bulls and inspect anchors and chain<br>**Total of 7.0 Days** |
| | |
| | **Week of Wednesday November 10 to Sunday November 14 (part week)** |
| | Project meeting with all hands at St. Lawrence, review schedule, mooring plan, revise as appropriate<br>**Total of 5.5 Days** |
| | |
| | **Total days for period 27.5 days** |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 4** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy, Time sheet for balance of November**

| Time & Date | Description of Event |
|---|---|
| | **Friday November 19th** |
| 4 Hours | 1500/1900 Working with AMS on barge inspection plan |
| | |
| | **Sunday November 21st** |
| 4 hours | 1600/2000 Working with Naval Architect Barclay on inspection procedure |
| | |
| | **Monday November 22nd** |
| 13.5 hours | 0530/1900 Drive to Marystown and St. Lawrence and return, assist with preliminary inspection procedures on barge, inspect barge deck layout, Chase potential anchor handling jewellery sites. |
| | |
| | **Tuesday November 23rd** |
| 8.0 hours | 0800/1700 Meet with Naval architect and go over potential winch sites and further inspection procedures. Liaise with Jason and AMS rep re ongoing inspection work on barge |
| | |
| | **Wednesday November 24th** |
| 4 hours | 0800/1200 Review project documentation, emails etc., push for winch Review barge inspection report, note hole in #4Stbad, discuss same with jason |
| 3 hours | 1500/1800 Push for winch inspection quote, liaise with winch provider to get extra quote for winch wires |
| | |
| | **Thursday November 25th** |
| 4 hours | 0800/1200 Review winch inspection quote, pass on to Jason commence design of anchor winch pattern. |
| | |
| | **Friday November 26th** |
| 5 hours | 0800/1300 Reviewing anchor pattern details with Jason also discussion with John Norman regarding procedures and potential shore mooring legs |
| | |
| | **Monday November 29th** |
| 4 hours | 0900/1300 Liaise with winch supplier re winch lines, work with Kevin Doyle re Global Maritime proposal. Discuss potential ballast system issues with Jason. |
| 8 hours | 1400/2000 Do complete high level job list and pas to jason in preparation for tomorrow's meeting |

| | |
|---|---|
| | **Tuesday November 30th** |
| 3 hours | 0900/1200 review AMS correspondence and reports with Naval architect |
| 2 hours | 1200/1400, Conference call with Global Maritime U/K, |
| 3 hours | 1500/1800 Review results of conference call, assemble list of files to pass on to support quote Review barge mooring plan |
| | |
| | **Total of 65.5 hours** |
| | |
| | |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 5** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy December Time Sheet**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Wednesday December 1st.** |
| 4 hours | 1900/1200 Reviewing Global Maritime discussion with Tomas Serafinavicius of Global Aberdeen, reviewing tasks for tomorrow's meeting. |
| 3 hours | 1300/1600 Reviewing task list for upcoming meeting |
| | |
| | **Thursday December 2nd** |
| 4 hours | 0800/1200 Reviewing job list and preparing for PM teams meeting |
| 6 hours | 1300/1900 Teams meeting and working on upcoming task lists |
| | |
| | **Friday December 3rd** |
| 4 hours | 0900/1300 Receive and review Global Maritime proposal, send on to Jason for further discussion |
| 3 hours | 1400/1700 Discussions re various jobs with Jason et al |
| | |
| | **Sunday December 5th** |
| 3 hours | 1000/1300 Reviewing list from John Norman and working up extra tasks |
| 2 hours | 1400/1600 Working on mooring drawing with Barclay |
| | |
| | **Monday December 6th** |
| 4 hours | 0800/1200 working on task list for upcoming meeting, working on mooring diagram with Barclay, instructing same on winch seats |
| 5 hours | 1300/1800 various tasks, working on teams meeting with Jason and John |
| | |
| | **Tuesday December 7th.** |
| 3 hours | 1000/1300 working on alternate mooring diagram, chasing Jewellery |
| 2 hours | 1400/1600 Designing anchor spread |
| 2 hours | 1730/1930 Working on anchor spread |
| | |
| | **Wednesday December 8th.** |
| 3 hours | 1300/1600 Working on jewellery with Extreme East Rigging |
| | |
| | **Thursday December 9th.** |
| 4 hours | 1230/ 1630 Reviewing Jewellery quotes from Extreme East Rigging and instructing Barclay on Winch seat bid package preparation |

| | |
|---|---|
| | **Friday December 10th** |
| 4 hours | 1100/1500 Organizing nest weeks trip for barge and compiling anchor design |
| | |
| | **Monday December 13th.** |
| 2 hours | 0900/1100 Compiling anchor spread design |
| 4 hours | 1200/1600 Anchor system design meeting with C. Gaetz |
| | |
| | **Tuesday December 14th.** |
| 3 hours | O900/1200 various items regarding tomorrows trip |
| 6 hours | 1400/2000 Anchor spread design |
| | |
| | **Wednesday December 15th.** |
| 13 Hours | 0600/1900 Drive to Marystown monitor ongoing procedures at Marbase |
| | |
| | **Thursday December 16th.** |
| 12 hours | 0700/1900 Monitor ongoing ballast transfer operation at barge and return to St Johns |
| | |
| | **Friday December 17th.** |
| 2 hours | 0800/1000 Prepare and meet with John Norman |
| 4 hours | 1000/1400 Finalise anchoring plan and prepare for distribution to all hands, monitor ongoing ballast operations |
| | |
| | **Monday December 20th** |
| 2 hours | 0800/1000 Ballast water control |
| 4 hours | 1300/1700 Ballast water control and repair preparations |
| | |
| | **Tuesday December 21st** |
| 4 hours | 0800/1200 Ballast water control operations |
| 3 hours | 1400/1700 Ballast control and repair options |
| | |
| | **Wednesday December 22nd.** |
| 3 hours | 099/1200 Reviewing repair options with Butler and Barclay |
| | |
| | **Thursday December 23rd.** |
| 5 hours | 1200/1700 Reviewing repair options and final report with Butler et al |
| | |
| | **Friday December 24th.** |
| 2 hours | 0900/1100 Preparing final repair options updating Jason |
| | |
| | **Monday December 27th** |
| 2 hours | 1000/1200 Working with Barclay, Butler et al on final repair options. |
| 2 hours | 1400/1600 Obtaining quotes from Delmar on anchor handling jewellery |
| | |
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| | |
|---|---|
| | **Tuesday December 28th** |
| 2 hours | 1100 /1300 Chasing up repair estimates |
| | |
| | **Thursday December 30th** |
| 2 hours | 0900/1100 Chasing down alternate marine solutions |
| 7 hours | 1300/2000 Compiling repair option report |
| | |
| | |
| | **Total Hours for December 140** |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 5** **CFI St. Lawrence Barge Moorings**

**Anthony Barclay December Time Sheet**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Wednesday December 13th.** |
| 8 hours | 0800/1600 Finalising design of winch seats and obtaining pricing for same |
| | |
| | **Monday December 20th** |
| 8 hours | 0800/1700 Reviewing damage survey reports and preparing specification for remedial options |
| | |
| | **Wednesday December 22nd** |
| 4 hours | 0900/1300 Continue reviewing damage survey reports and preparing specification for remedial options |
| | |
| | **Thursday December 30th** |
| 10 Hours | 0800/1900 Cost estimation work for repairs |
| | |
| | |
| | **Total for December, 30 Hours** |
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# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 6** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy January Time Sheet**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Monday January 3rd** |
| 2 hours | 1300/1500 Working on repair estimates. |
| | |
| | **Tuesday January 4th** |
| 4 hours | 0800/1200 Working on repair estimates with Messrs Barclay, Pitt and Jason |
| 5 hours | 1300/1800 Working on repair estimates with Messrs Barclay and Pitt |
| | |
| | **Wednesday January 5th** |
| 2 hours | 1000/1200 Finalising repair quotes with Barclay and Pitt |
| 2 hours | 1600/1800 e and resubmitting repair work |
| | |
| | **Thursday January 6th** |
| 4 hours | 0900/1300 Continue working on Repair options and prepare for upcoming teams meeting meting |
| 4 hours | 1400/1900 Teams meeting with Jason, John and Pat et al on repair options |
| | |
| | **Friday January 7th** |
| 2 hours | 1000/1200 Working on mooring options. |
| 3 hours | 1400/1700 Working on mooring drawing with Barclay as well as repair costs |
| | |
| | **Sunday January 9th** |
| 2 hours | 1000/1200 Working on task list for upcoming meetings, |
| 5 hours | 1800/2300 working on mooring plan as well as way forward |
| | |
| | **Monday January 10th.** |
| 3 hours | 1000/1300 working on alternate mooring diagram, chasing Jewellery |
| 2 hours | 1400/1600 Designing anchor spread |
| 2 hours | 1730/1930 Working on anchor spread and finalizing so-ordinates |
| | |
| | **Tuesday January 11th.** |
| 3 hours | 0800/1200 Working on moorings, preparing for afternoon meeting |
| 3 hours | 1300/1600 Visit Pennecon site and inspect anchors and chains with Master of Arctic, deliver mooring plan for his critique |

| | |
|---|---|
| | **Tuesday January11th (Cont.)** |
| 3 hours | 1600/1900 Teams meeting on moorings and final costs |
| | |
| | **Wednesday January 12th** |
| 1 hour | 1000/1400 Working with Global Maritime on new procedures proposal, sourcing data for same |
| 4 hours | 1200/1600 Working on mooring spread and value of chain on offer |
| | |
| | **Thursday January 14th.** |
| 2 hours | 0900/1100 Compiling anchor spread design |
| 4 hours | 1200/1400 Anchor system design |
| 1 hour | 1500/1600 Meeting with John Norman |
| 2 hours | 1600/1800 Finalizing anchor spread costs |
| | |
| | Total 65 hours |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 6** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy January Time Sheet 15/31st**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Saturday January 15th** |
| 2 hours | 1500/1700 Phone calls to Texas, trying to locate jewellery at appropriate prices |
| | |
| | **Monday January 17th** |
| 3 hours | 0900/1200 Working on anchor plans pair o-ordinating mooring procedures with Global Maritime |
| 3 hours | 1300/1600 Working on mooring plan |
| | |
| | **Tuesday January 18th** |
| 4 hours | 0800/1200 Chasing down alternative anchor and chain proposals from Europe |
| 3 hours | 1300/1600 Chasing down alternative anchor suppliers locally, liaising with Damen shipyards regarding utility vessels. |
| | |
| | **Wednesday January 19th** |
| 4 hours | 1000/1200 and 1399/1500 Continue working on alternative anchor supply options, clarify ballast control options with Horizon |
| | |
| | **Thursday January 20th** |
| 5 hours | 0800/1300 Working on mooring options. Teams meeting with Global Maritime UK, review Multi-Cat Oderin in harbour |
| 3 hours | 1400/1700 sourcing alternative anchoring operations |
| | |
| | **Friday January 21st** |
| 5 hours | 0900/1200 and 1400/1600 Reviewing Intermoor proposal, reviewing ballast proposals redoing mooring spread and sending to all concerned |
| | |
| | **Monday January 24th.** |
| 3 hours | 0900/1200 Reviewing mooring plans |
| 3 hours | 1300/1600 Meet with Horizon, redoing anchor spread |
| 2 hours | 1730/1930 Working on anchor spread and finalizing co-ordinates sending new drawings to all concerned |
| | |
| | **Tuesday January 25th** |
| 2 hours | 0900/1100 Working on moorings and ballast control issues |

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|---|---|
| | |
| | **Wednesday January 26th** |
| 1 hour | 1000/1100 reviewing various items on mooring spread |
| 2 hours | 1400/1600 Working on mooring spread and value of chain on offer |
| | |
| | **Thursday January 27th.** |
| 4 hours | 1200/1500 Travel to Bay Bulls and review available jewellery |
| 3 hours | 1500/1800 Reviewing costs with Pennecon |
| | |
| | **Friday January 28th** |
| 3 hours | 0900/1200 Reviewing Ballast plan comments and rental prices from Pennecon |
| | |
| | **Saturday January 29th** |
| 1 hour | Reviewing Loading costs from Pennecon |
| | |
| | **Sunday January 30th** |
| 8 hours | 1000/1200 and 1300/1900 Finalising and sending budget |
| | |
| | Monday January 31st |
| 2 hours | 0900/1000 and 1700/1800 Budget and project discussions with Jason Flood |
| | |
| | **Total of 66 hours** |
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# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 5** **CFI St. Lawrence Barge Moorings**

**Anthony Barclay December Time Sheet**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Wednesday December 13th.** |
| 8 hours | 0800/1600 Finalising design of winch seats and obtaining pricing for same |
| | |
| | **Monday December 20th** |
| 8 hours | 0800/1700 Reviewing damage survey reports and preparing specification for remedial options |
| | |
| | **Wednesday December 22nd** |
| 4 hours | 0900/1300 Continue reviewing damage survey reports and preparing specification for remedial options |
| | |
| | **Thursday December 30th** |
| 10 Hours | 0800/1900 Cost estimation work for repairs |
| | |
| | |
| | **Total for December, 30 Hours** |
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# EXPENSE REPORT

Sheet No. 1

| | | | | | |
|---|---|---|---|---|---|
| Location | Newfoundland | Rig | Barge | Name | Richard Spellacy |
| Job Category | consultant | Client | CFI | W/Order# | RQN0012966 |
| Start Date(s): | Oct 12,20 At | | Hrs. | Job Description | Barge Moorings |
| Completion Date(s): | 21 08 202 At | | Hrs. | Total Days Attended | 29 |

| Item No. | Date | Description | Foreign Cash | Co. Credit Card $ | Cash $ | Exchange Rate (If Appl.) | Total Can$ $ |
|---|---|---|---|---|---|---|---|
| 1 | 10-29-21 | St. Lawrence /return 700K at $0.60/K | | | | | 420.00 |
| 2 | 11-12-21 | St. Lawrence /return 700K at $0.60/K | | | | | 420.00 |
| 3 | 11-05-21 | Bay Bulls /return 90K@$0.60/K | | | | | 54.00 |
| 4 | | | | | | | |
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| 24 | | | | | | | |
| 25 | | | | | | | |
| | | | 0.00 | 0.00 | 0.00 | | |
| | | **C/FWD Totals** | | | | | 894.00 |

| | |
|---|---|
| Less: Billed to Company | |
| Amount Due Employee | 894.00 |

ERROR

Signed _____ Date 06-07-15 Authorize _____

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 6** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy January Time Sheet**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Monday January 3rd** |
| 2 hours | 1300/1500 Working on repair estimates. |
| | |
| | **Tuesday January 4th** |
| 4 hours | 0800/1200 Working on repair estimates with Messrs Barclay, Pitt and Jason |
| 5 hours | 1300/1800 Working on repair estimates with Messrs Barclay and Pitt |
| | |
| | **Wednesday January 5th** |
| 2 hours | 1000/1200 Finalising repair quotes with Barclay and Pitt |
| 2 hours | 1600/1800 e and resubmitting repair work |
| | |
| | **Thursday January 6th** |
| 4 hours | 0900/1300 Continue working on Repair options and prepare for upcoming teams meeting meting |
| 4 hours | 1400/1900 Teams meeting with Jason, John and Pat et al on repair options |
| | |
| | **Friday January 7th** |
| 2 hours | 1000/1200 Working on mooring options. |
| 3 hours | 1400/1700 Working on mooring drawing with Barclay as well as repair costs |
| | |
| | **Sunday January 9th** |
| 2 hours | 1000/1200 Working on task list for upcoming meetings, |
| 5 hours | 1800/2300 working on mooring plan as well as way forward |
| | |
| | **Monday January 10th.** |
| 3 hours | 1000/1300 working on alternate mooring diagram, chasing Jewellery |
| 2 hours | 1400/1600 Designing anchor spread |
| 2 hours | 1730/1930 Working on anchor spread and finalizing so-ordinates |
| | |
| | **Tuesday January 11th.** |
| 3 hours | 0800/1200 Working on moorings, preparing for afternoon meeting |
| 3 hours | 1300/1600 Visit Pennecon site and inspect anchors and chains with Master of Arctic, deliver mooring plan for his critique |

| | |
|---|---|
| | **Tuesday January11th (Cont.)** |
| 3 hours | 1600/1900 Teams meeting on moorings and final costs |
| | |
| | **Wednesday January 12th** |
| 1 hour | 1000/1400 Working with Global Maritime on new procedures proposal, sourcing data for same |
| 4 hours | 1200/1600 Working on mooring spread and value of chain on offer |
| | |
| | **Thursday January 14th.** |
| 2 hours | 0900/1100 Compiling anchor spread design |
| 4 hours | 1200/1400 Anchor system design |
| 1 hour | 1500/1600 Meeting with John Norman |
| 2 hours | 1600/1800 Finalizing anchor spread costs |
| | |
| | Total 65 hours |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 6** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy January Time Sheet 15/31st**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Saturday January 15th** |
| 2 hours | 1500/1700 Phone calls to Texas, trying to locate jewellery at appropriate prices |
| | |
| | **Monday January 17th** |
| 3 hours | 0900/1200 Working on anchor plans pair o-ordinating mooring procedures with Global Maritime |
| 3 hours | 1300/1600 Working on mooring plan |
| | |
| | **Tuesday January 18th** |
| 4 hours | 0800/1200 Chasing down alternative anchor and chain proposals from Europe |
| 3 hours | 1300/1600 Chasing down alternative anchor suppliers locally, liaising with Damen shipyards regarding utility vessels. |
| | |
| | **Wednesday January 19th** |
| 4 hours | 1000/1200 and 1399/1500 Continue working on alternative anchor supply options, clarify ballast control options with Horizon |
| | |
| | **Thursday January 20th** |
| 5 hours | 0800/1300 Working on mooring options. Teams meeting with Global Maritime UK, review Multi-Cat Oderin in harbour |
| 3 hours | 1400/1700 sourcing alternative anchoring operations |
| | |
| | **Friday January 21st** |
| 5 hours | 0900/1200 and 1400/1600 Reviewing Intermoor proposal, reviewing ballast proposals redoing mooring spread and sending to all concerned |
| | |
| | **Monday January 24th.** |
| 3 hours | 0900/1200 Reviewing mooring plans |
| 3 hours | 1300/1600 Meet with Horizon, redoing anchor spread |
| 2 hours | 1730/1930 Working on anchor spread and finalizing co-ordinates sending new drawings to all concerned |
| | |
| | **Tuesday January 25th** |
| 2 hours | 0900/1100 Working on moorings and ballast control issues |

| | |
|---|---|
| | |
| | **Wednesday January 26th** |
| 1 hour | 1000/1100 reviewing various items on mooring spread |
| 2 hours | 1400/1600 Working on mooring spread and value of chain on offer |
| | |
| | **Thursday January 27th.** |
| 4 hours | 1200/1500 Travel to Bay Bulls and review available jewellery |
| 3 hours | 1500/1800 Reviewing costs with Pennecon |
| | |
| | **Friday January 28th** |
| 3 hours | 0900/1200 Reviewing Ballast plan comments and rental prices from Pennecon |
| | |
| | **Saturday January 29th** |
| 1 hour | Reviewing Loading costs from Pennecon |
| | |
| | **Sunday January 30th** |
| 8 hours | 1000/1200 and 1300/1900 Finalising and sending budget |
| | |
| | Monday January 31st |
| 2 hours | 0900/1000 and 1700/1800 Budget and project discussions with Jason Flood |
| | |
| | **Total of 66 hours** |
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| | |

**November 4th 2021**

**Emergency moorings project to date.**

1. **1. Plan.**

The aim of this project team is to design, provide and install a set of emergency anchors that will hold the barge in inclement weather. This system must be able to be safely activated and draw the barge off the dock without the use of tugs and the barge must be able to be brought back to the dock without the use of tugs. To accomplish this, we propose to lay one anchor out in such a distance and direction that it enters the center holding ground in the middle of the harbor, a second bow anchor more closely aligned to the natural heading of the barge and a control anchor off the stern. We will need to install two winches to control the main bow and the stern anchors and our plan will be to use the existing anchor winch to control the inner anchor off the bow. To accomplish this, we will need to locate and purchase two winches for the principal anchors, the pennants of which will be sized to bring the eye of the chain up to the existing Smit brackets which will then be activated to hold the barge.

When the barge is ready to come back alongside, we will use line boat(s) to run lines out to the barge and then use shore side equipment to bring the barge alongside the dock

**2. Port Holding Ground.**

While it is a known fact that the near shore sea bed is pretty much rock, the consensus of opinion among personnel at Tuesday's meeting was that there is some reasonable holding ground further out towards the middle of the harbor and that also seems to be borne out by the sea bed photos that have been put forward. Further to this issue, the proposed principal seaward emergency anchor system will consist of up to 180 tonnes of anchors and chains and the maximum pull that we are looking for will be no more than 200 tonnes. Further, there will also be a second bow anchor running closer to the shoreline as well as a stabilizing anchor off the stern.

**3. Anchor System design and Warranty**

We have contacted Global Maritimes office in St. Johns and are currently awaiting a proposal from them for this work.

**4. Anchor handling vessels**

At the moment, the vessel of choice for this work is the Horizon Arctic as she can generate a pull of 200 tonnes or more if required, however, as far as I am aware, she will almost certainly be heading for the North sea by the end of this month and if we cannot move fast enough to meet that schedule, we will be compelled to use other vessels, one of which will be the Atlantic Osprey and I suspect that we will have to make that decision by the end of next week.

**5. Barge**

We have contacted Toby Butler of AMS inspection services in St. Johns to get a quote for a condition survey of the barge to ensure that there are no show stoppers and that we have suitable deck mounting capabilities for two winches, we are waiting for a reply to this enquiry at the moment.

**6. Winches**

Two suitable self-contained winches that have a single line pull of 42,000lbs each have been located and priced at a facility in Louisiana. We will need to see them up and running before we take delivery and I think that we have located an acceptable engineer located in that area through a company called ORMI in Texas.

**7. Anchors and chains**

Suitable material has been located at the Pennecon facility in Bay Bulls, I will make a physical inspection on the 5th.

**8. Bottom Survey**

Parameters for this activity will be submitted on the 5th.

**9. Installation of the barge on site.**

Once the anchoring system has been installed and the barge suitably prepared, we will contract the anchor handler that installed the anchors to bring the barge down from its current location and install it on site and assist in conducting preliminary operational tests.

**10 Warning and Operations system.**

Once everything has been completed to everyone's satisfaction, we will compile a warning and operating system that will allow the maximum of dockings and assist in designing a larger buoyed mooring system that will allow large vessels to tie up at the facility.

CFI Barge

Job list

The single job that is driving the whole schedule as of now is the completion of the transfer of the ballast in Tanks 6 and 7 Starboard to tanks #1 and 2 Port to allow the inspection of Tanks 6 and 7 for possible perforations or structural damage. Once the inspection is done and the report tendered a decision regarding possible repairs can be taken and the requested dimensions passed on to the naval architect to allow the design of the winch seatings. An inspection will also be undertaken on the steel condition under the Smit Brackets to ensure that these devices are safe and also, we will have to undertake an MPI inspection of the welds therein.

We estimate that these tasks to be completed by December 10th and thus Day one for this exercise will be Saturday December 11th.

1. Design of the winch seatings, this job is ongoing and will be completed once the surveyors report on the underside deck structural members is passed to the Naval Architect. Job completed by Day 4, cost $3,000, firm price
2. inspect winches. Quote received from ORMI for approximately C$2,000 will be complete by Day 4.
3. Winch purchase and assembly, quote received for purchased for US$120,00 from HOSS winch company of Bourg La. In the USA, allow another US$20,000 to skid mount the units and connect up the PU to the winch. Allow US$2,000 to purchase and fit 25mm wires to both units, wires will be approximately 100m long. Note that separate HPU units have been specified for each winch as there will be a horizontal separation of approximately 110m between the winches and piping from one HPU to both winches will be expensive and trying to use both winches at once will drastically reduce the power to each winch. To assemble these winches and have them ready to ship will take a minimum of two weeks, to pack and ship these units will take at least a further week. Realistic estimate for the winches to arrive at the barge location, 18 days from Day 1. Need to get a quote for shipping these items as well as the anchor handling jewelry from the USA.
4. Obtain quote for crane and forklift. Note that we will need to place a forklift on the barge to move the winch seatings as well as the winch down to the bow of the barge, either that or end for end the barge on the dock. We will need union labor to operate the crane. Jason?
5. Fabricate winch seatings 10 days.
6. Fit winch seatings, allow 7 days, This activity will be timed to complete either when the winches arrive on side or a day after
7. Fit winches and test, Total cost will depend upon the cost and availability of a crane to lift them aboard the barge in the shipyard and fit them. Estimate 3 working days for this job, complete on day 21 from day 1.
8. Purchase of Anchor handling jewelry. Need quote from either Delmar or Intermoor in Fourchon if not available locally. List to be drawn up and local availability checked out and in necessary get a quote from whatever source is selected. This job will run coincidentally with the winches. Dick to do.
9. Assemble list of required shackles, chains and wires for deck handling of ropes etc. Dick to do

10. ROV survey of the seabed in the way of proposed anchor chain paths. Jason has in hand
11. Notify CCG of proposed anchor pattern, Dick to do.
12. Obtain proper chain handling plan. – Proposal and quote have been requested from Global Maritime, Dick to follow up estimate completion 7 days from Day1
13. Assemble complete set of procedures for job. Dick to do, estimate three days plus one for revisions.
14. Shoreside connection for starboard bow anchor to be finalized. Jason to follow up
15. Decision to be taken on running stern anchor chain to anchor or shore bollard, Jason and Dick to follow up.
16. Finalize purchase of anchors and chain from Pennecon, Jason has in hand. (check on their available jewelry).
17. Obtain quote from Pennecon for loading out of the chain and anchors. Jason to do
18. Hire of anchor handling vessel to lay chain. At the moment, we have been advised that the Atlantic Kingfisher may be here early January, failing which we have been advised that the Horizon Arctic can be her by mid to late March. I have been advised that the maximum price for this vessel all in to pick up the anchors, chain and jewelry from Bay Bulls, lay the anchor pattern and bring the barge down from Marystown will be a maximum of C$750, 000 but could be less, they have offered a lump sum which would be the best route to go. The Kingfisher will be cheaper but we will have a problem getting the final test pull required.

**November 4th 2021**

**Emergency moorings project to date.**

1. **1. Plan.**

The aim of this project team is to design, provide and install a set of emergency anchors that will hold the barge in inclement weather. This system must be able to be safely activated and draw the barge off the dock without the use of tugs and the barge must be able to be brought back to the dock without the use of tugs. To accomplish this, we propose to lay one anchor out in such a distance and direction that it enters the center holding ground in the middle of the harbor, a second bow anchor more closely aligned to the natural heading of the barge and a control anchor off the stern. We will need to install two winches to control the main bow and the stern anchors and our plan will be to use the existing anchor winch to control the inner anchor off the bow. To accomplish this, we will need to locate and purchase two winches for the principal anchors, the pennants of which will be sized to bring the eye of the chain up to the existing Smit brackets which will then be activated to hold the barge.

When the barge is ready to come back alongside, we will use line boat(s) to run lines out to the barge and then use shore side equipment to bring the barge alongside the dock

**2. Port Holding Ground.**

While it is a known fact that the near shore sea bed is pretty much rock, the consensus of opinion among personnel at Tuesday's meeting was that there is some reasonable holding ground further out towards the middle of the harbor and that also seems to be borne out by the sea bed photos that have been put forward. Further to this issue, the proposed principal seaward emergency anchor system will consist of up to 180 tonnes of anchors and chains and the maximum pull that we are looking for will be no more than 200 tonnes. Further, there will also be a second bow anchor running closer to the shoreline as well as a stabilizing anchor off the stern.

**3. Anchor System design and Warranty**

We have contacted Global Maritimes office in St. Johns and are currently awaiting a proposal from them for this work.

**4. Anchor handling vessels**

At the moment, the vessel of choice for this work is the Horizon Arctic as she can generate a pull of 200 tonnes or more if required, however, as far as I am aware, she will almost certainly be heading for the North sea by the end of this month and if we cannot move fast enough to meet that schedule, we will be compelled to use other vessels, one of which will be the Atlantic Osprey and I suspect that we will have to make that decision by the end of next week.

**5. Barge**

We have contacted Toby Butler of AMS inspection services in St. Johns to get a quote for a condition survey of the barge to ensure that there are no show stoppers and that we have suitable deck mounting capabilities for two winches, we are waiting for a reply to this enquiry at the moment.

**6. Winches**

Two suitable self-contained winches that have a single line pull of 42,000lbs each have been located and priced at a facility in Louisiana. We will need to see them up and running before we take delivery and I think that we have located an acceptable engineer located in that area through a company called ORMI in Texas.

**7. Anchors and chains**

Suitable material has been located at the Pennecon facility in Bay Bulls, I will make a physical inspection on the 5th.

**8. Bottom Survey**

Parameters for this activity will be submitted on the 5th.

**9. Installation of the barge on site.**

Once the anchoring system has been installed and the barge suitably prepared, we will contract the anchor handler that installed the anchors to bring the barge down from its current location and install it on site and assist in conducting preliminary operational tests.

**10 Warning and Operations system.**

Once everything has been completed to everyone's satisfaction, we will compile a warning and operating system that will allow the maximum of dockings and assist in designing a larger buoyed mooring system that will allow large vessels to tie up at the facility.

Prior to mobilization, the appropriate number of anchors (either 3 or 4) to be moved to the dock side and the anchor chain flaked out ready to be hauled on board and marked however is determined to be appropriate. Notice will also have to be given to the authorities of our intent and timetable.

Anchoring timetable

Port of Mobilization,

Pennecon Dock Bay Bulls (We will need an on-hire survey done)

Assume time of mob survey completion to be 0800 on day of hire

Day 1. 0800, Item 1. The chain, probably 5,000 meters to be heaved on board in three separate lockers, one locker for each anchor leg. Once this complete, the anchors will be lifted on board and secured.

Day2. 1700, vessel to depart Bay Bulls for St. Lawrence. Although it is only a twelve hour run with one of these vessels allow, 36 hours just in case we have weather on the way.

Day 4. 0800. Set up and ready to run anchors. (Note, we may have positioning surveyors unless all hands are happy with the ships GPS)

Day 7. 0800 all anchors run and tested, vessel departs to Marystown to pick up barge

Day 8. 0800 barge leaves Marystown en route to St. Lawrence, 1500 Barge arrives off St. Lawrence, stand by and wait for daylight

Day 9, 0800 commence install barge onto anchor pattern 1400 all anchors secured on barge, commence warping barge to dock to install shore lines.

Day 9 and 10. Thoroughly test system to ensure that everything is working as it should. Vessel dismissed to St. Johns at 1700

Day11. 0800 Vessel arrives in St. Johns, off hire survey conducted.

Note in this schedule we are allowing up to 4 days downtime due to weather therefore expect a total of a 15 day hire

| | |
|---|---|
| Vessel Time, 10 days at $75,000/day | $750,000 |
| Anchors and chains | $400,000 |
| Procedures | $65,000 |
| Jewelry | $100,000 |
| Mooring Master | $65,000 |
| 5 days contingency stand by charter hire | $375,000 |
| Fuel | $125,000 |
| Contingency | $220,000 |
| **Total** | **$2,100,000** |

## Anchor specifications

Basic anchoring specifications.

Anchors #1 and 2 will be secured by 2 x 18mt Stevpris anchors with flukes set to sand (?). These two anchors will be linked by 185 m of 76mm stud link chain connected by Kenter* links each end and shackled in to their respective anchor strings by appropriately sized Kenter* links.

- Where Kenter link is specified in this document, that link may in fact be replaced by pear links.

All directions referred to in this document will be from the anchor or strong point towards the barge and are expressed in degrees (T).

Anchor #1 to 700m of 76mm studded link chain coupled to two 80m x 45 mm pennants connected to the anchor chain and each other by 55T SWL shackles run initially at a heading of 187° (T) and initially connected to an anchor buoy by a 50m long x 30mm riser pennant. Once this anchor is connected and the barge heaved out to its storm location, the riser pennant and the two 80m long 45mm pennants are retrieved, the eye of the anchor will be at the smit bracket and connected with a final length of 700m of chain coupled to the anchor with a direction of 180° (T0 from the anchor to the port aft corner of the barge.

Anchor #2 to 800m of 76mm studded link chain coupled to two 80m x 45 mm pennants connected to the anchor chain and each other by 55T SWL shackles run initially at a heading of 265° (T) and initially connected to an anchor buoy by a 50m long x 30mm riser pennant. Once this anchor is connected and the barge heaved out to its storm location, the riser pennant and the two 80m long 45mm pennants are retrieved, the eye of the anchor will be at the smit bracket and connected with a final length of 700m of chain coupled to the anchor with a direction of 272° (T) fromthe anchor to the port forward corner of the barge

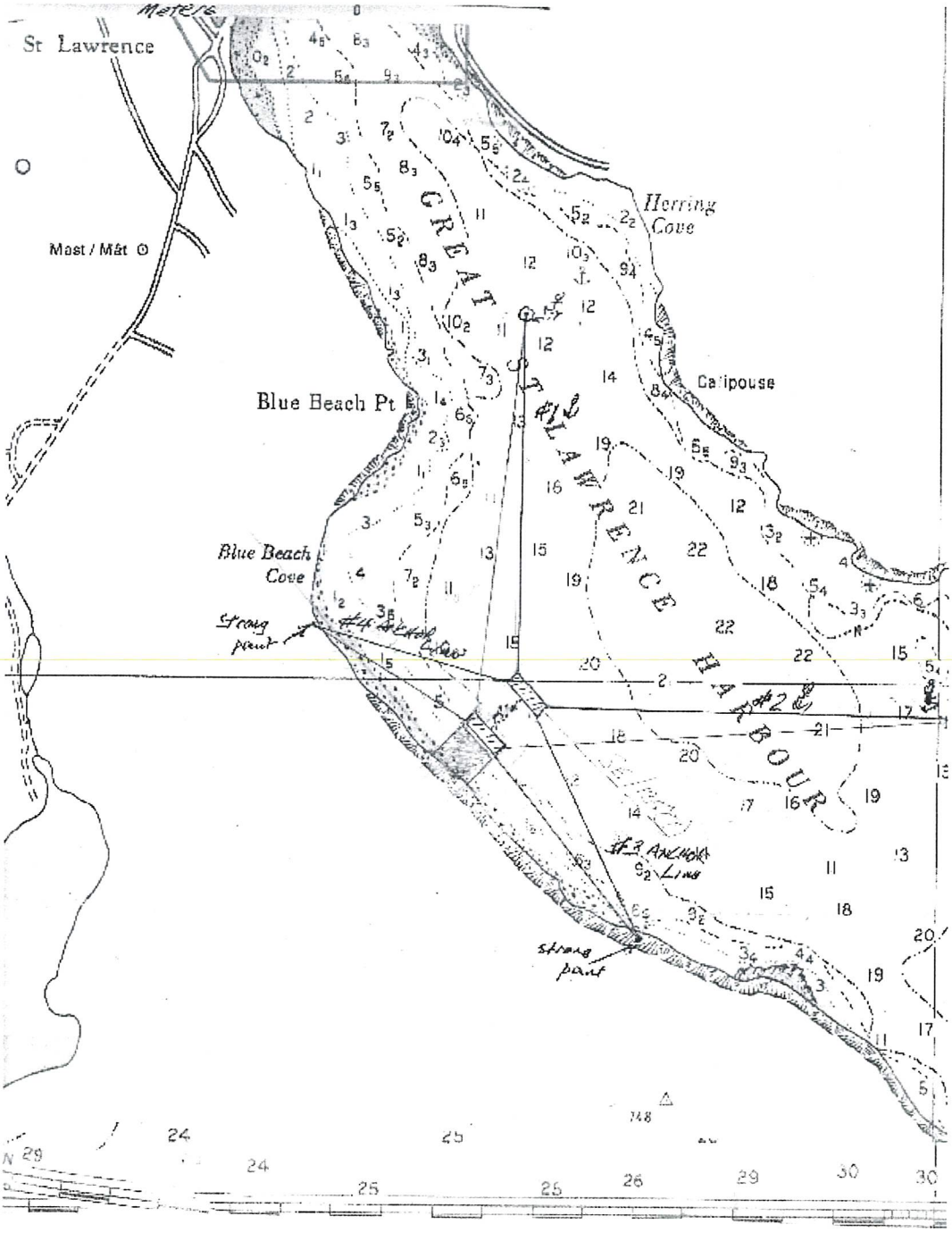
Anchors #3 and #4 will be connected to strong points on the shore and will be secured to a doubled sling fixed around a strong point connected to a fish plate and shackled into the connecting chain using 85TSWL shackles and held by a 120 TSWL shackle at the apex of the plate and joined into the connecting chain. The chain will be floated ashore from the AHTS vessel using Norwegian buoys (Floatation of one-meter diameter buoy is 486KG and will support up to 10 links of the 76mm chain) and pulled ashore by excavators.

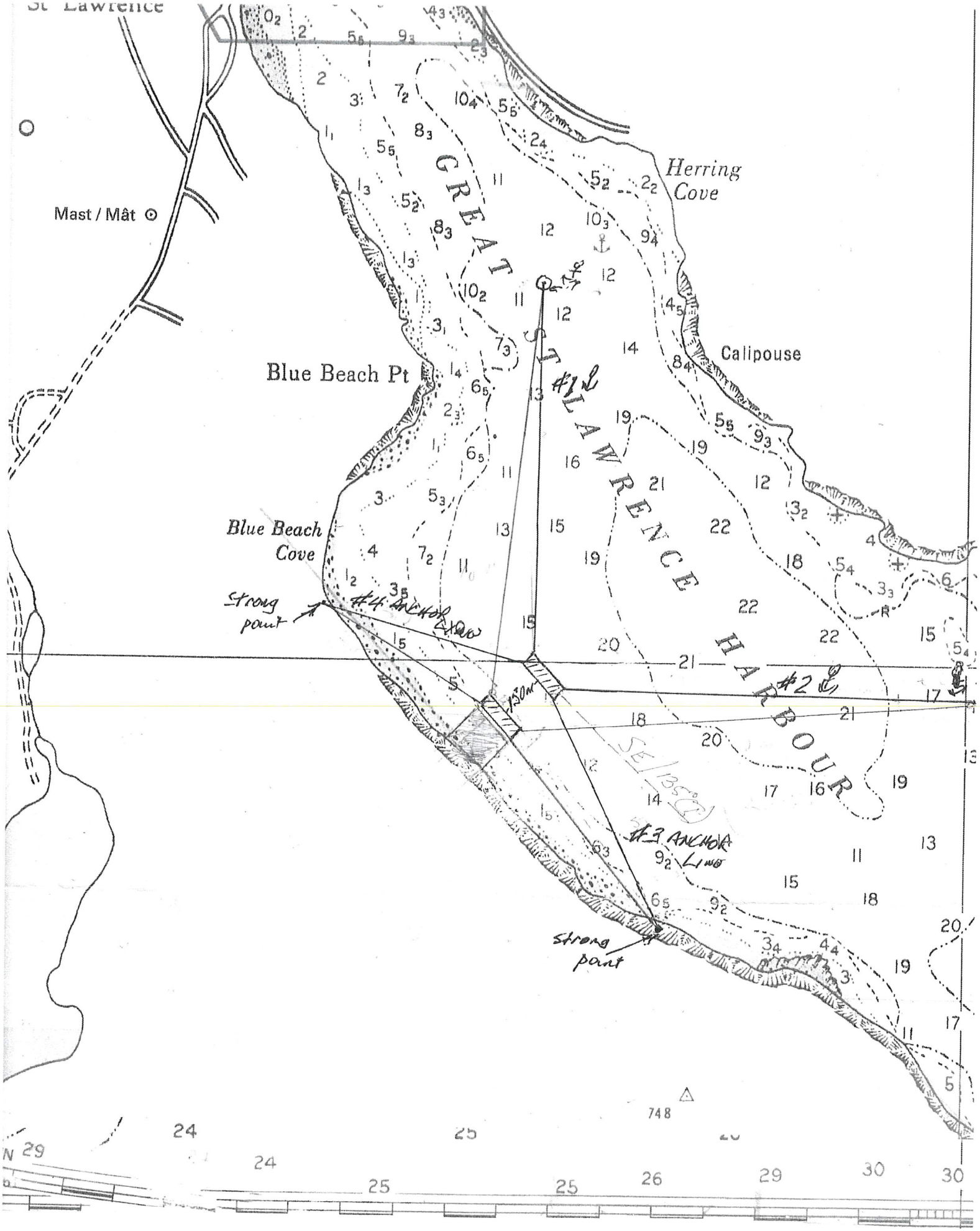
Anchor #3 will be connected to 550m of 76mm studded link chain coupled to two 80m x 45 mm pennants connected to the anchor chain and each other by 55TSWL shackles run initially at a heading of 320° (T) towards the starboard forward corner of the barge and initially connected to an anchor buoy by a 50m long x 30mm riser pennant. Once this anchor is connected and the barge heaved out to its storm location, the riser pennant and the two 80m long 45mm pennants are retrieved, the eye of the anchor will be at the smit bracket and connected with a final length of 580m of chain coupled to the strong point with a direction of 325° (T) from the strong point to the to the starboard forward corner of the barge.

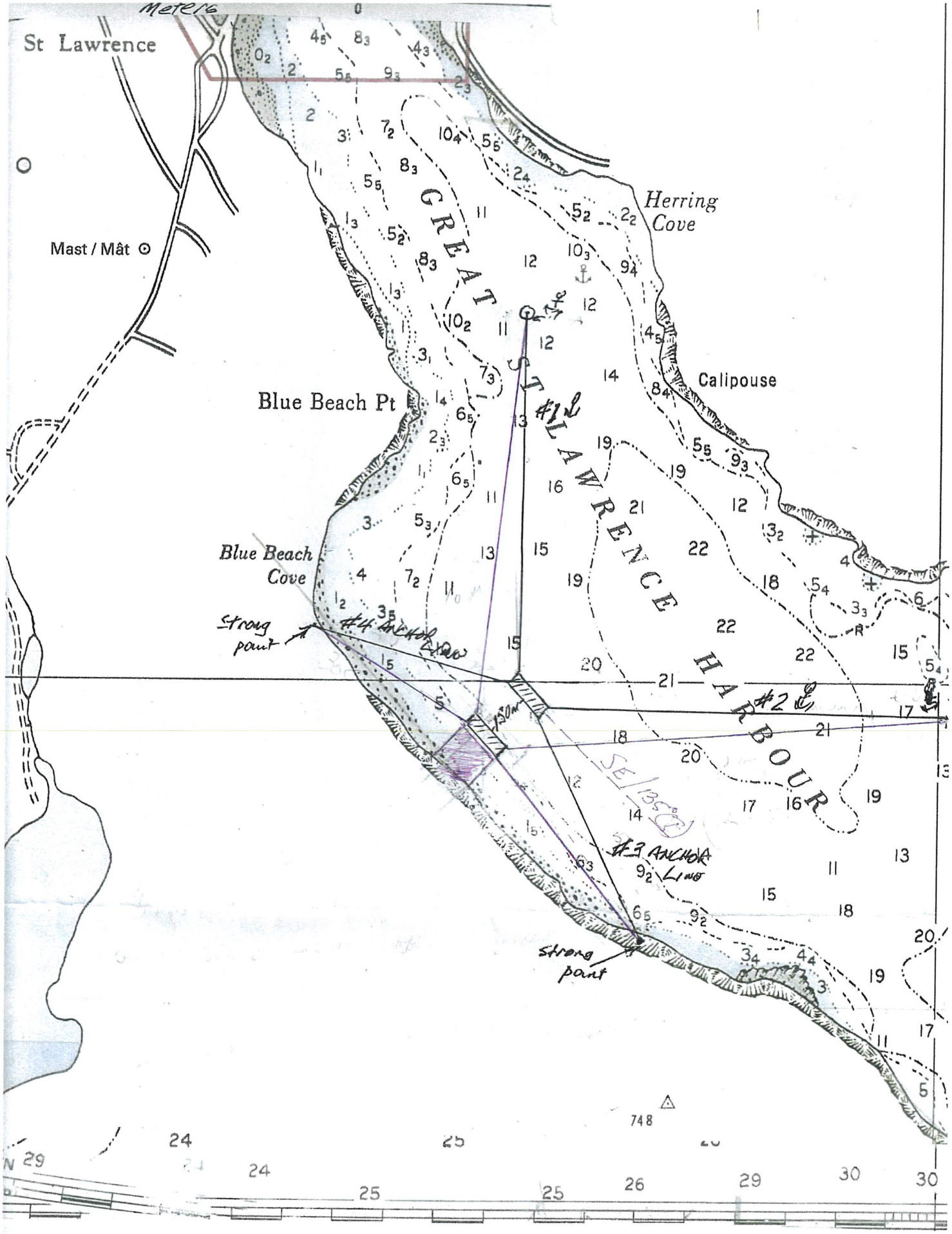
Anchor #4 will be connected to 520m of 76mm studded link chain coupled to two 80m x 45 mm pennants connected to the anchor chain and each other by 55TSWL shackles run initially at a heading of 125° (T) towards the starboard aft corner of the barge and initially connected to an anchor buoy by a

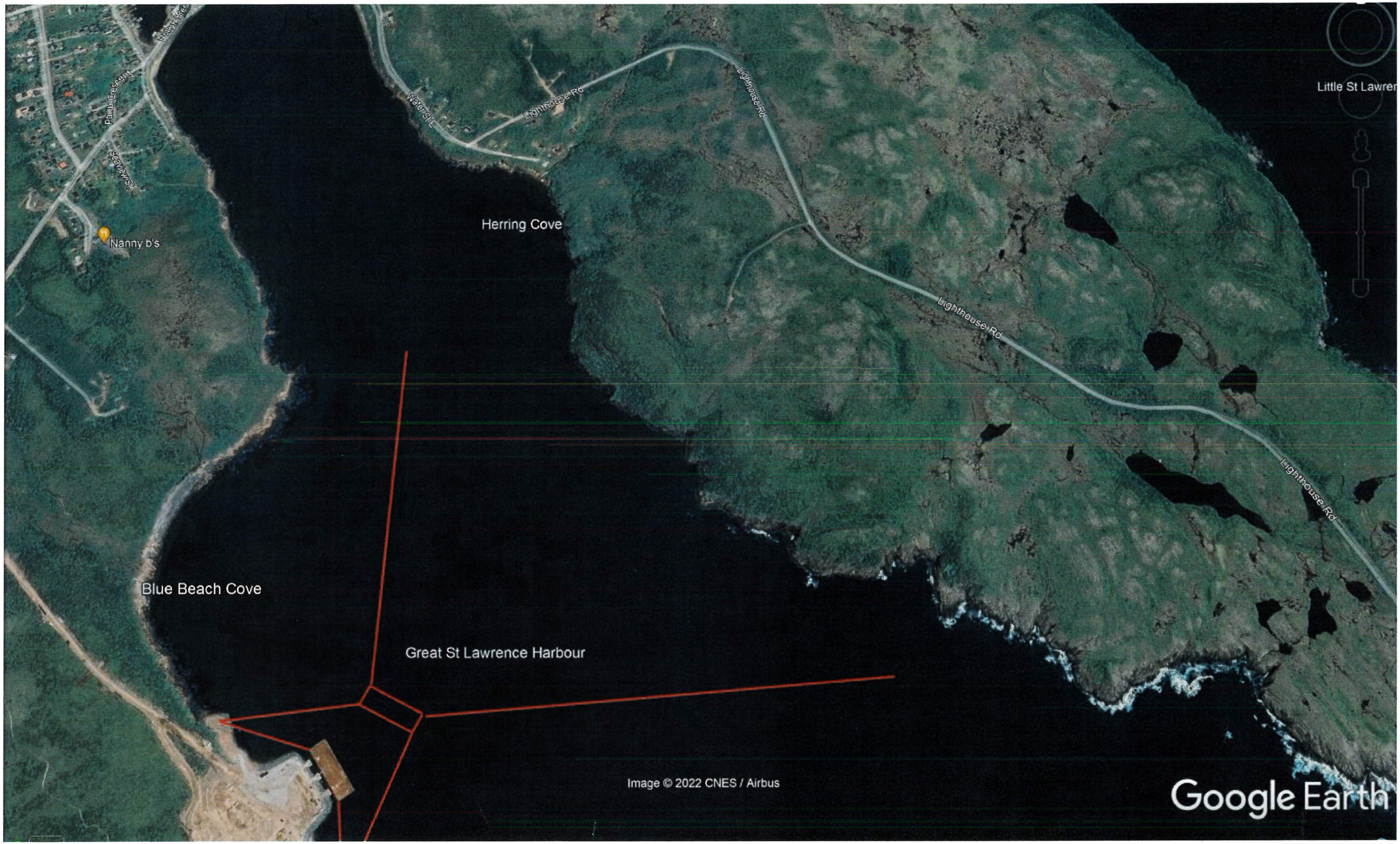
50m long x 30mm riser pennant. Once this anchor is connected and the barge heaved out to its storm location, the riser pennant and the two 80m long 45mm pennants are retrieved, the eye of the anchor will be at the smit bracket and connected with a final length of 580m of chain coupled to the strong point with a direction of 097°(T) from the strong point to the to the starboard aft corner of the barge.

**ANCHOR PATTERN**




St Lawrence
Mast / Mât
Herring Cove
GREAT ST LAWRENCE HARBOUR
Calipouse
Blue Beach Pt
Blue Beach Cove
Strong point
#4 ANCHOR LINE
#1
#2
#3 ANCHOR LINE
Strong point
748


Metres
St Lawrence
Mast / Mât
Herring Cove
GREAT ST LAWRENCE HARBOUR
Calipouse
Blue Beach Pt
Blue Beach Cove
Strong point
#4 ANCHOR LINE
#1
#2
#3 ANCHOR LINES
Strong point
SE 135°
150m
748


Little St Lawrer
Lighthouse Rd
Lighthouse Rd
Lighthouse Rd
Lighthouse Rd
Lighthouse Rd
Water St E
Pauly Crescent
Seaview Dr
Nanny b's
Herring Cove
Blue Beach Cove
Great St Lawrence Harbour
Image © 2022 CNES / Airbus
Google Earth

Meeting agenda for Friday November 12th

Present

Jason Flood, John Norman, Leo Power, Pat Gannon, Dick Spellacy Others from CFI as needed

Chair Jason Flood

1. Opening remarks and welcome – Jason
2. Overall description of project, Dick
3. Initial survey of Bilge/Ballast system, John
4. Project to date, contractors appointed or contacted and progress Dick
5. Wrap up Jason

Maritime &
Coastguard
Agency

# Ballast Water Record Book

INTERNATIONAL CONVENTION FOR THE CONTROL AND MANAGEMENT OF SHIPS' BALLAST WATER AND SEDIMENTS

| | |
|---|---|
| Name of ship: | SFI Pontoon -1 |
| IMO ship identification number: | ~~9732838 OA.~~ N/A ** |
| Gross tonnage of ship: | 6615.61 t |
| Flag: | PANAMA |
| Total ballast water capacity (m³) | * 25658 @ 85% |
| This ship is provided with a ballast water management plan | ✓ |
| Period from: | 16/12/2021 to: |

* See inside
** Two Numbers Given

London: TSO

Maritime &
Coastguard
Agency

# Ballast Water Record Book

INTERNATIONAL CONVENTION FOR THE CONTROL AND MANAGEMENT OF SHIPS' BALLAST WATER AND SEDIMENTS

| | |
|---|---|
| Name of ship: | CFI PONTOON -1 |
| IMO ship identification number: | ~~9732838 OA~~ N/A ** |
| Gross tonnage of ship: | 6615.61 t |
| Flag: | PANAMA |
| Total ballast water capacity (m³) | * 25658 @ 85% |
| This ship is provided with a ballast water management plan | ✓ |
| Period from: | 16/12/2021 to: |

* SEE INSIDE
** TWO NUMBERS CITED

London: TSO

Maritime & Coastguard Agency

# Ballast Water Record Book

INTERNATIONAL CONVENTION FOR THE CONTROL AND MANAGEMENT OF SHIPS' BALLAST WATER AND SEDIMENTS

| | |
|---|---|
| Name of ship: | CFI PONTOON 1 |
| IMO ship identification number: | N/A |
| Gross tonnage of ship: | 6515.61 |
| Flag: | PANAMA |
| Total ballast water capacity (m³) | ~~N/A~~ 26688 @ 85% |
| This ship is provided with a ballast water management plan | ✓ |
| Period from: | 16/12/2021 to: |

~~N/A~~: TWO CAPACITIES GIVEN 26658 & 24359

London: TSO

# RECORD OF BALLAST WATER OPERATIONS

Name of ship: BARGE # CFI PONTOON I

Distinctive number or letters:

| Date | Item (number) | Record of operations/signature of officer in charge |
|---|---|---|
| 16/12/21 | (1) | TRANSFER B/W FROM 6S TO 4P |
| | 1200/1800 | |
| | 1800/2400 | " " " 5S TO 4C |
| | | |
| 17/12/21 | 0000/0730 | TRANSFERING B/W FROM 5S TO 4C |
| | 0800/1100 | " " " 6S TO 4P |
| | 1100/1238 | " " " 7S TO 4S |
| | | |
| 20/12/21 | 0905/2400 | TRANSFER 7S TO 4S |
| | | |
| 21/12/21 | 0000/0730 | TRANSFER 7S TO 4S // ~~#5~~ 5S, 6S, 7S MT |
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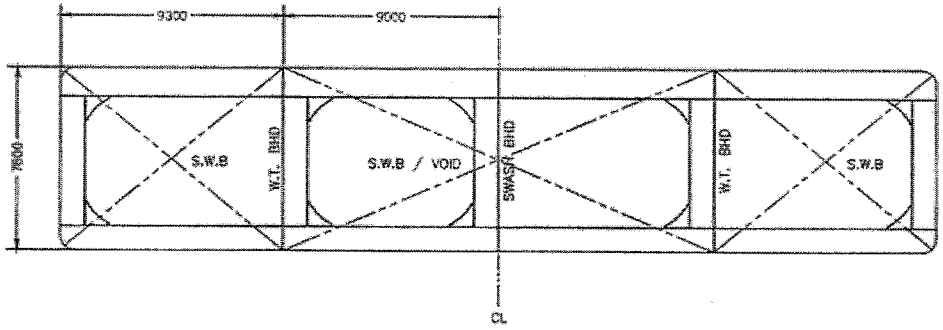
R. Sparacy

Signature of Master




TYP WEB FRAME (IN WAY OF TANKS)
LOOKING FWD

NOTES:

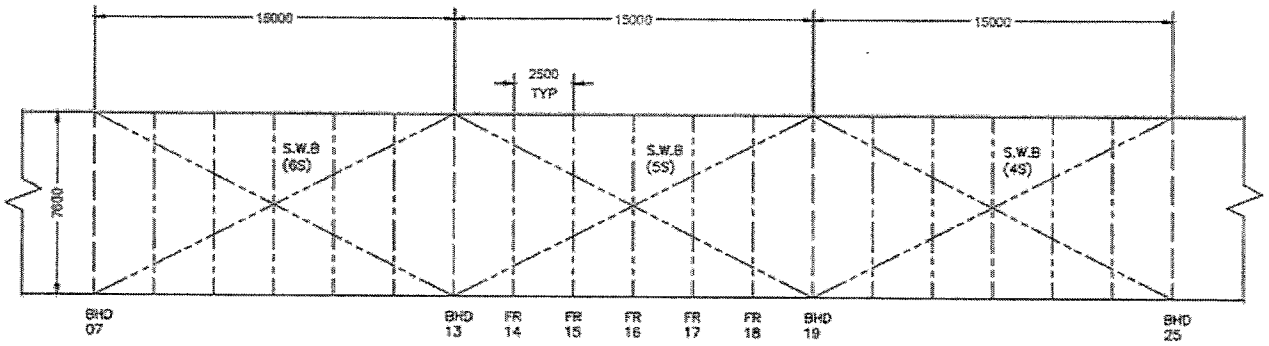
| REV. | DATE | DESCRIPTION | DRAWN | CHECKED | APPROVED CONSULTANT | APPROVED CLIENT |
|---|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
|---|---|---|---|---|---|
| 00 | 0082EP | SKETCH | NTS : NTS | 01 of 03 | A |

A3




ELEVATION VIEW (IN WAY OF TANK 5S)
LOOKING PORT

FORWARD

NOTES:

| REV. | DATE | DESCRIPTION | DRAWN | CHECKED | APPROVED | CONSULTANT | MANUFACTURER XXXXXX |
|---|---|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

DRAWING TITLE:

PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
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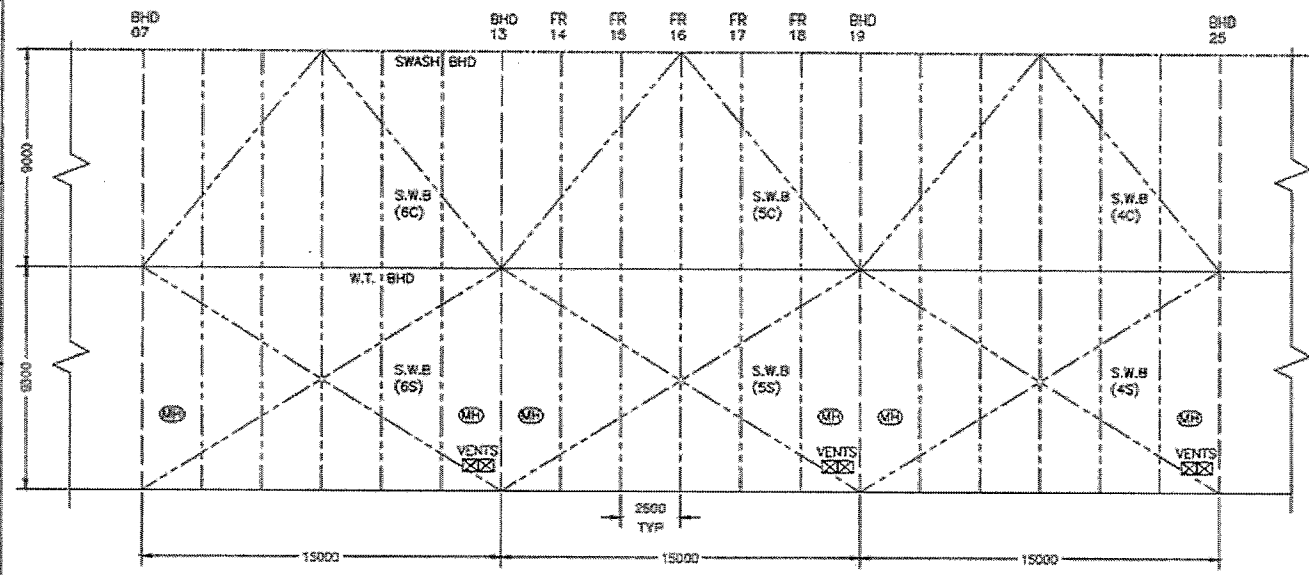


PLAN VIEW (IN WAY OF TANK 5S)
LOOKING DOWN

FORWARD

NOTES:

| REV. | DATE | DESCRIPTION | DRAWN | PROJECT MANAGER CONSULTANT | MANAGER APPROVAL BOOKER |
|---|---|---|---|---|---|
| | | | | | |

AMS Adaptive Marine Solutions Inc.

DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
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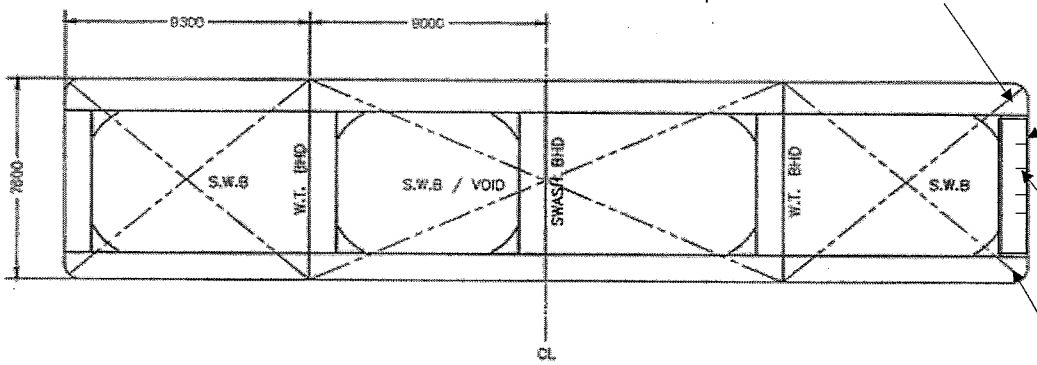
| 00 | 0082EP | SKETCH | NTS : NTS | 03 of 03 | A |

# Fr14 Web Frame Replacement, Shell Stiffener Replacement

*This option acknowledges corrosion on other frames is not significant, does not mandate frame replacement and can be locally repaired with doublers or insert plates




TYP WEB FRAME (IN WAY OF TANKS)
LOOKING FWD

This Portion of Frame looks ok, but will require verification

Main body of frame to be replaced

Side shell stiffeners to be replaced

This Portion of Frame looks ok, but will require verification

NOTES:

| REV. | DATE | DESCRIPTION | DRAWN | CHECKED | APPROVED | CONSULTANT | XXXXXX |
|---|---|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
|---|---|---|---|---|---|
| 00 | 0082EP | SKETCH | NTS : NTS | 01 of 03 | A |

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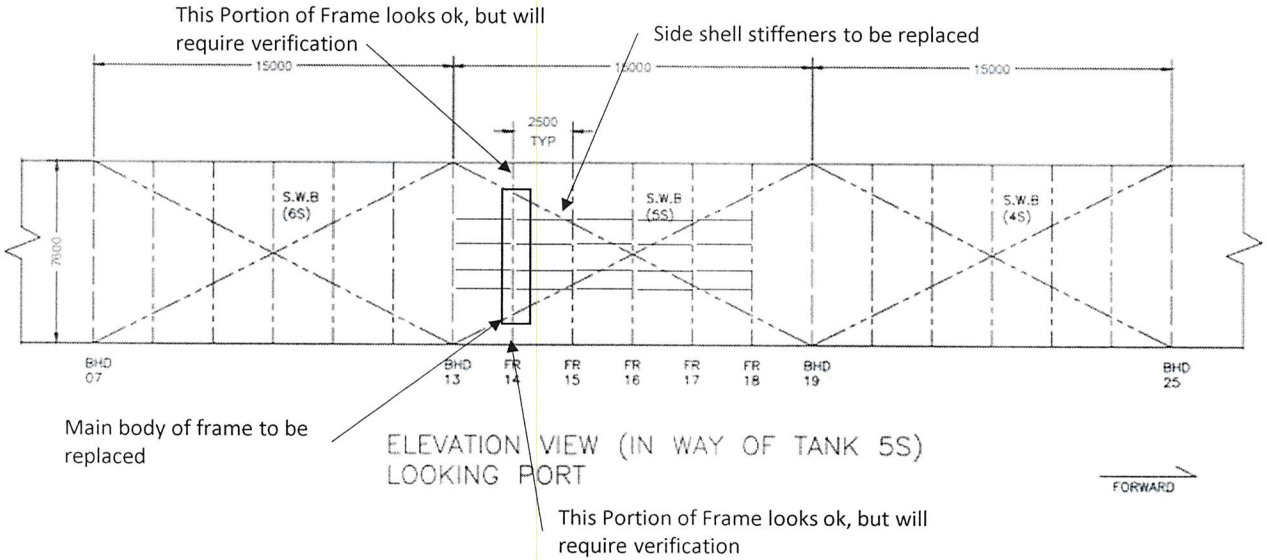


NOTES:

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|---|---|---|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

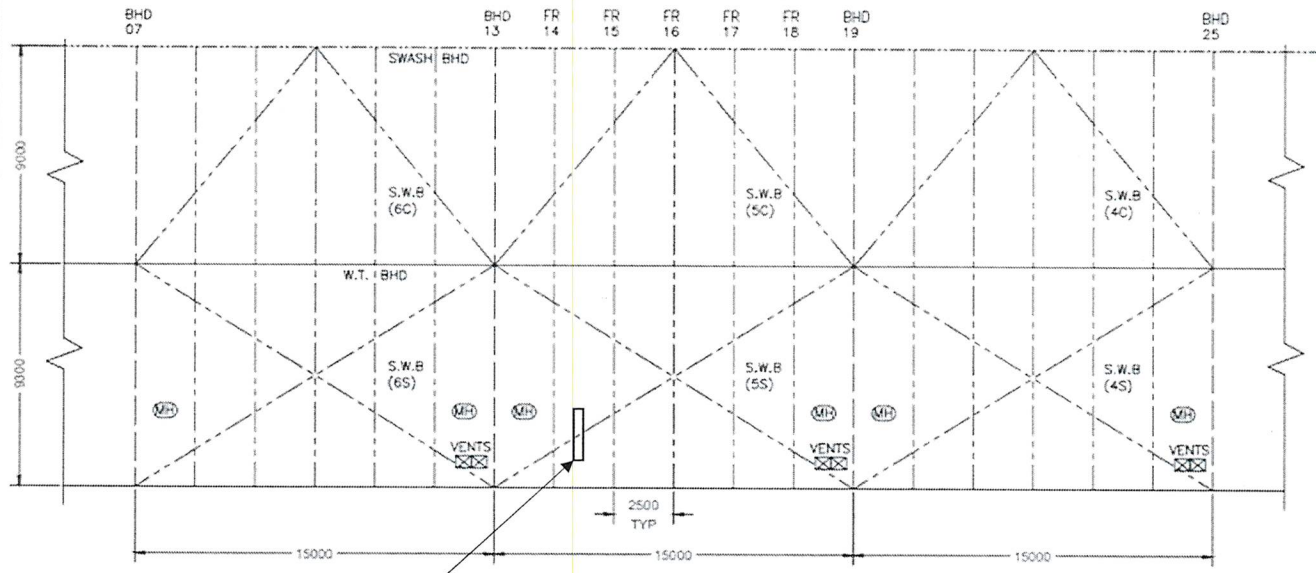
DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
|---|---|---|---|---|---|
| 00 | 0082EP | SKETCH | NTS : NTS | 02 of 03 | A |

A3

# Fr14 Web Frame Replacement, Shell Stiffener Replacement

*This option acknowledges corrosion on other frames is not significant, does not mandate frame replacement and can be locally repaired with doublers or insert plates




Slot in deck to lower new vertical frame in place
This cut to be clear of deck radius

PLAN VIEW (IN WAY OF TANK 5S)
LOOKING DOWN

NOTES:

| REV. | DATE | DESCRIPTION | DRAWN | CHECKED | APPROVED CONSULTANT | APPROVED XXXXXX |
|---|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

DRAWING TITLE: PRELIM. SKETCHES

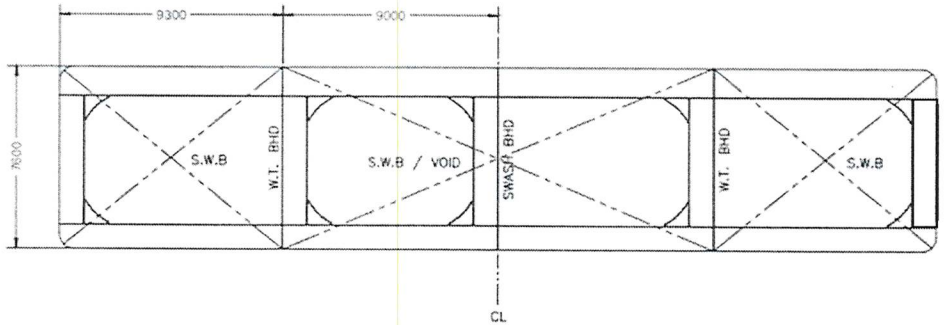
| JOB NO. | PROJECT NO. | DRAWING NO. | SCALE | SHEET | REV. |
|---|---|---|---|---|---|
| 00 | 0082EP | SKETCH | NTS : NTS | 03 of 03 | A |

A3

# Side Shell Panel Replacement

New side shell panel fabricated in a shop shipped to site and installed
Panel will contain all Webs and stiffeners that need replacement

*This option acknowledges corrosion on other frames is significant and mandates frame replacement




TYP WEB FRAME (IN WAY OF TANKS)
LOOKING FWD

NOTES:

| REV. | DATE | DESCRIPTION | DRAWN | CHECKED / APPROVED CONSULTANT | FRAMING APPROVED XXXXXX |
|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
|---|---|---|---|---|---|
| 00 | 0082EP | SKETCH | NTS : NTS | 01 of 03 | A |

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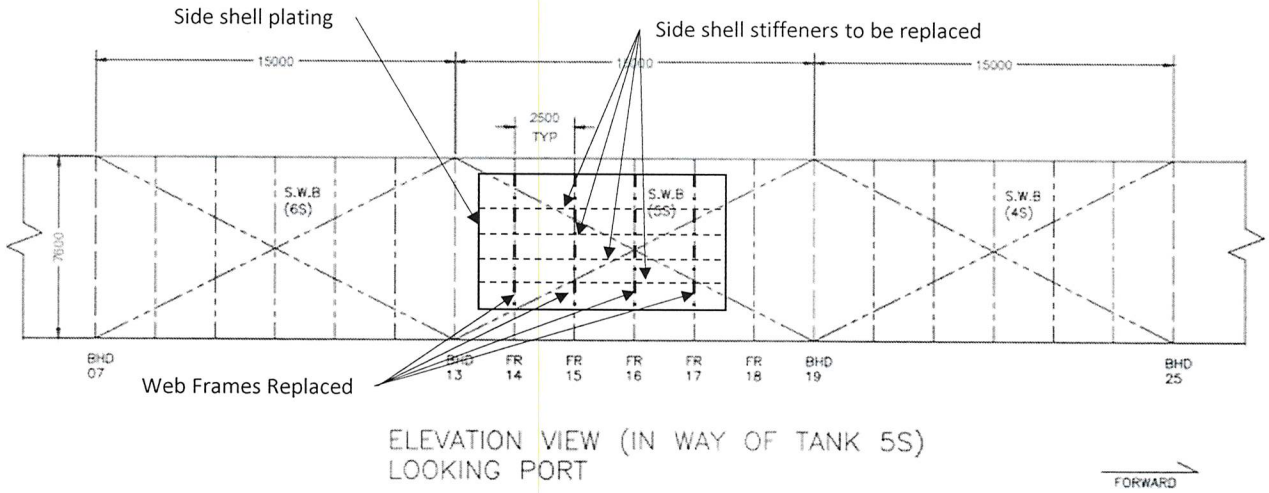


ELEVATION VIEW (IN WAY OF TANK 5S)
LOOKING PORT

FORWARD

NOTES:

| REV. | DATE | DESCRIPTION | DRAWN | CHECKED / APPROVED | CONSULTANT | REVIEWED / APPROVED | XXXXXX |
|---|---|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
|---|---|---|---|---|---|
| 00 | 0082EP | SKETCH | NTS : NTS | 02 of 03 | A |

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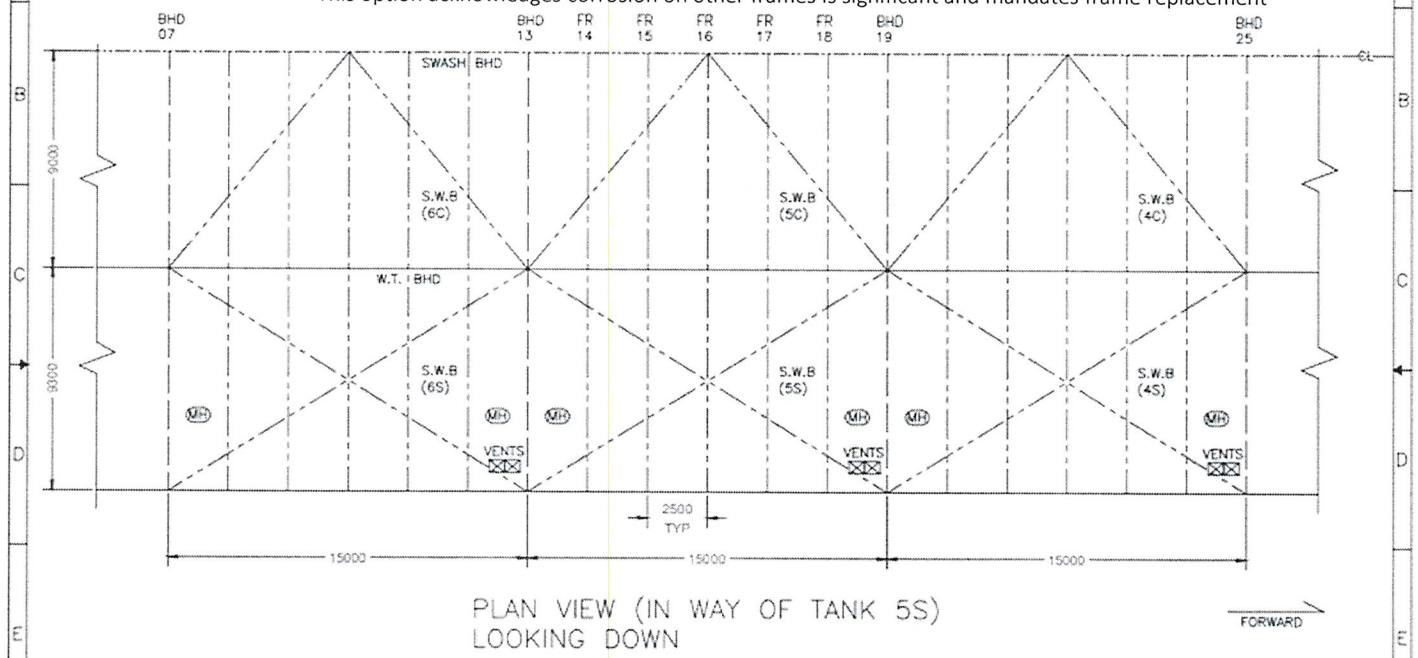


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| REV. | DATE | DESCRIPTION | DRAWN | CHECKED / APPROVED CONSULTANT | CHECKED / APPROVED XXXXXXX |
|---|---|---|---|---|---|

AMS Adaptive Marine Solutions Inc.

DRAWING TITLE: PRELIM. SKETCHES

| JOB NO.: | PROJECT NO.: | DRAWING NO.: | SCALE: | SHEET: | REV. |
|---|---|---|---|---|---|
| 00 | 0082EP | SKETCH | NTS : NTS | 03 of 03 | A |

## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Monday, October 24, 2022 4:27 PM
**To:** Deborah Hutchings
**Subject:** FW: 0082EP-Barge Second Visit Daily Progress Report RevB
**Attachments:** 0082EP-DPR0002_RevB-Daily Progress Report-Nov 26, 2021.pdf

Photos ofside shell damage

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Sunday, December 5, 2021 10:29 AM
**To:** Anthony Barclay <barclayanthony0@gmail.com>
**Subject:** FW: 0082EP-Barge Second Visit Daily Progress Report RevB

**From:** Toby Butler <toby.butler@ams-ink.ca>
**Sent:** December 2, 2021 8:50 AM
**To:** Jason Flood <jflood@canadafluorspar.com>
**Cc:** Dick Spellacy <richardspellacy@hotmail.com>
**Subject:** 0082EP-Barge Second Visit Daily Progress Report RevB

Jason

A minor revision to the report for the second visit to the barge. Photo titles for ballast tank No.5 were incorrectly named ballast tank No.6

This Type-O has been corrected, the revised report is attached

Regards

**Toby Butler**
Vice President / Naval Architect
**Phone** (709) 746-4328
**Email** Toby.Butler@ams-ink.ca
**Web** www.ams-ink.ca

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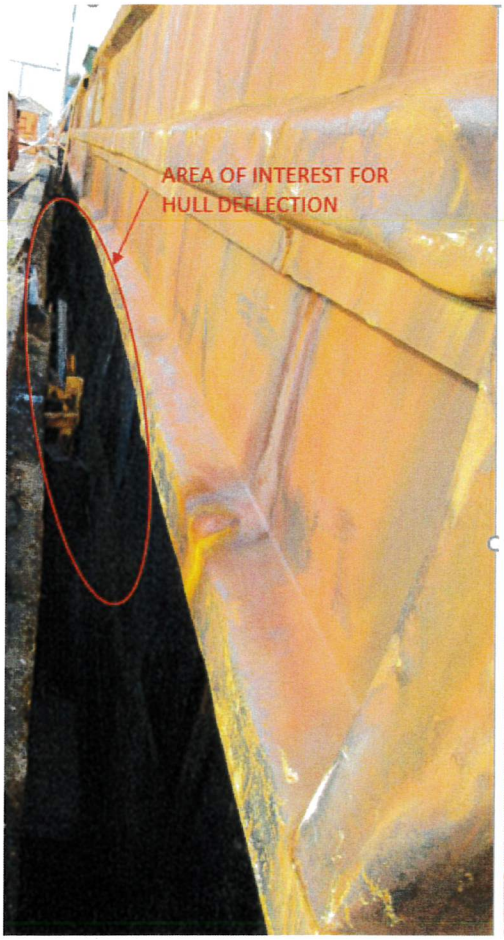
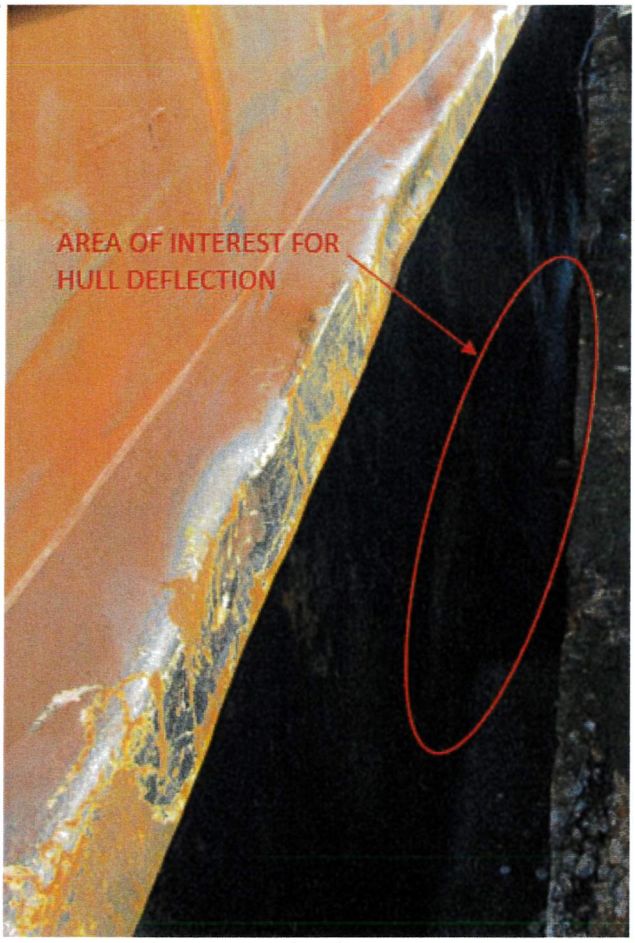
## 1) Location

Barge currently alongside at Marbase, site of the former Marystown Shipyard Location.

## 2) Work Scope

The AMS team is to inspect the barge side shell in way of Ballast Tanks 6S and 5S where there appears to be deflection in the hull. This report is a summary of the **Third** visit to the barge, the Third visit was required due to the inability to enter tanks on the first and second visit as ballast water in the tanks could not be transferred. Non-transfer of ballast water was due to mechanical issues resulting in the inability to start generators and thus the ballast pumps, (see 0082EP-DPR0001RevA-Daily Progress Report-Nov 22, 2021 and 0082EP-DPR0002_RevB-Daily Progress Report-Nov 26, 2021). The survey will attempt to confirm if there is damage to structure adjacent to the areas of deflection and if the hull plating has been compromised. CFI will transfer ballast water from the ballast tanks to other ballast tanks within the barge to facilitate viewing of hull structure that would normally be concealed by the ballast water. Areas of interest are shown in the following images.



## 3) Project Status at End of Day

1. 100% visual inspection completed in way of side shell only for Ballast Tanks 5 Starboard and 6 Starboard
   - Tank entry possible, water was transferred from Tanks 5S and 6S to other tanks on the barge.
   - Approximately 8" of water was remining in Ballast Tank 5 after transfer
   - Approximately 12" of water was remining in Ballast Tank 6 after transfer

## 4) Work Progress

- Walk around and external visual inspection performed.
- Barge tanks opened.
- Safety equipment prepared for tank entry.
- Generator started.
- Pumps engaged.
- Ballast transferred.

## 5) Personnel at site or Onboard

- Jason Flood (Canada Fluorspar (NL), (CFI)).
- Toby Butler (Adaptive Marine Solutions (AMS)).
- Mark Strong (Adaptive Marine Solutions (AMS)).
- Logan Norman (CFI Contractor).
- Derrick Slaney (CFI Contractor).

## 6) Detailed Work Breakdown

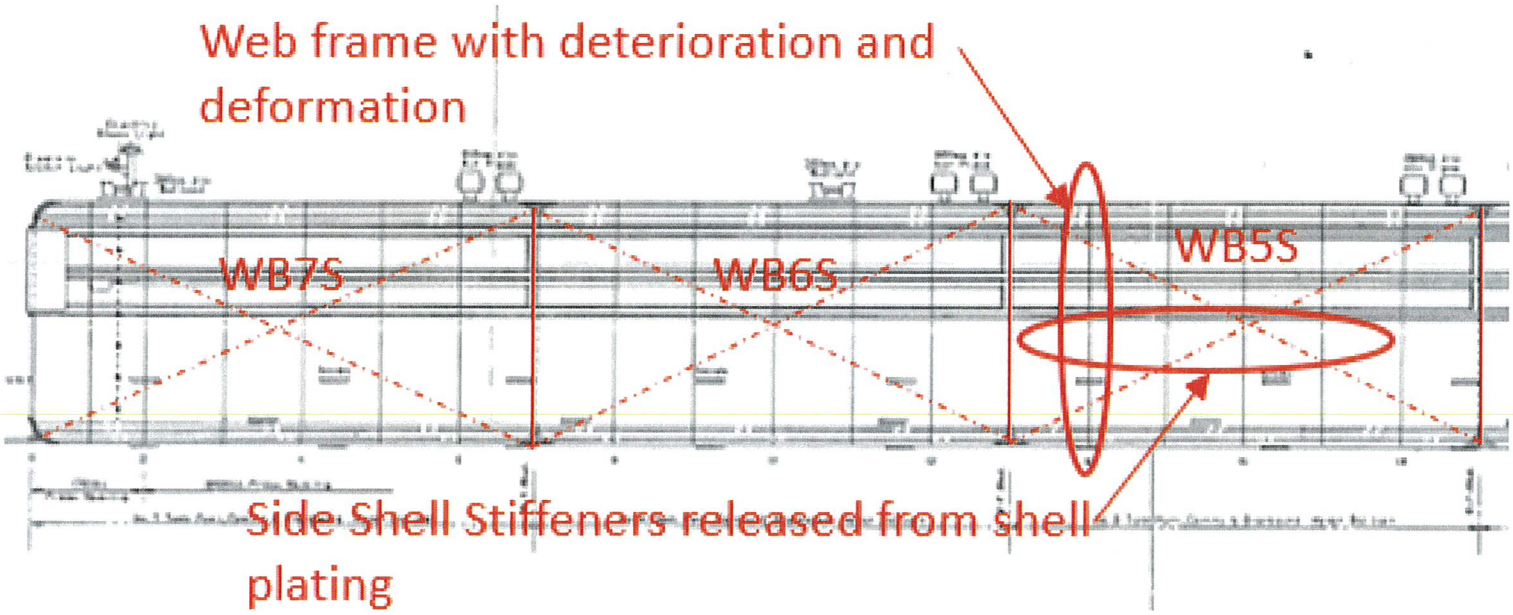
| Time | Work Description |
|---|---|
| 8:00am | AMS Arrived on site performed outside walk around of Starboard side, aft end and forward end of barge (i.e., areas viewable from Wharf). |
| 9:00am | Toby Butler (AMS), Mark Strong (AMS), Jason Flood (CFI), Logan Norman (CFI Contractor), Derrick Slaney (CFI Contractor) meet near barge to discuss work and.<br>1. Prepared hazard assessment<br>2. Prepared tank entry permits<br>3. Prepared equipment for work<br>4. Begin locating/positioning equipment at ballast tank 5S (first tank to be entered) |
| 9:30am | ○ Placed air quality monitor in Ballast Tank 5S to test air quality |

| | |
|---|---|
| | ○ Monitor indicated tank safe to enter.<br>○ Surveyor entered tank and completed visual survey of side shell |
| 10:30am | ○ Placed air quality monitor in Ballast Tank 6S to test air quality<br>○ Monitor indicated tank safe to enter.<br>○ Surveyor entered tank and completed visual survey of side shell |
| 11:30am | ○ Visual inspection of Side shell areas of Tanks 6S,5S completed<br>○ Demobilization of personal and equipment from the barge begun. |
| 12:50am | ○ AMS leave Marbase facility |
| | |

## 7) Inspection Findings – Ballast Tank 5S

Several photos were taken inside the tank of the side shell to capture the current condition of the structure and coatings. It was observed that structural members in this tank are damaged, corroded through or are broken free of the side shell. The following images will show the areas of corrosion and damage. Web Frame #14 had large hole(s) (approx. 12"x12" holes) corroded completely through and was deformed in way of the bottom shell transverse frame, side shell stiffeners were seen to be broken free of the shell plating in multiple locations.

Below is a portion of the Barge GA marked up to indicate areas of interest for damage, deterioration, or deformation.



**Web Frame 14:** shows signs of web deflection at the lower portion of the frame in way of the bracket connection to the bottom shell transverses frame, also areas of the web of the frame have been corroded through, see Photo No.1, and Photo No.2. Deformation of this frame was also noticed at connection with side shell.

Shell stiffeners between Frame 13 (aft bhd) and Frame 14, as well as Between Frame 14 and Frame 15 show significant corrosion and are released from the side shell. Between Frame 13 (aft bhd) and Frame 14 two shell stiffeners have holes corroded through and are released from the side shell plating. Between Frame 14 and Frame 15 one stiffener is completely rusted away with only the bulb remaining, a second stiffener has holes corroded through. See Photo No.2b.

**Photo No.1 – Ballast Tank 5S (Frame 14, web deflection)**

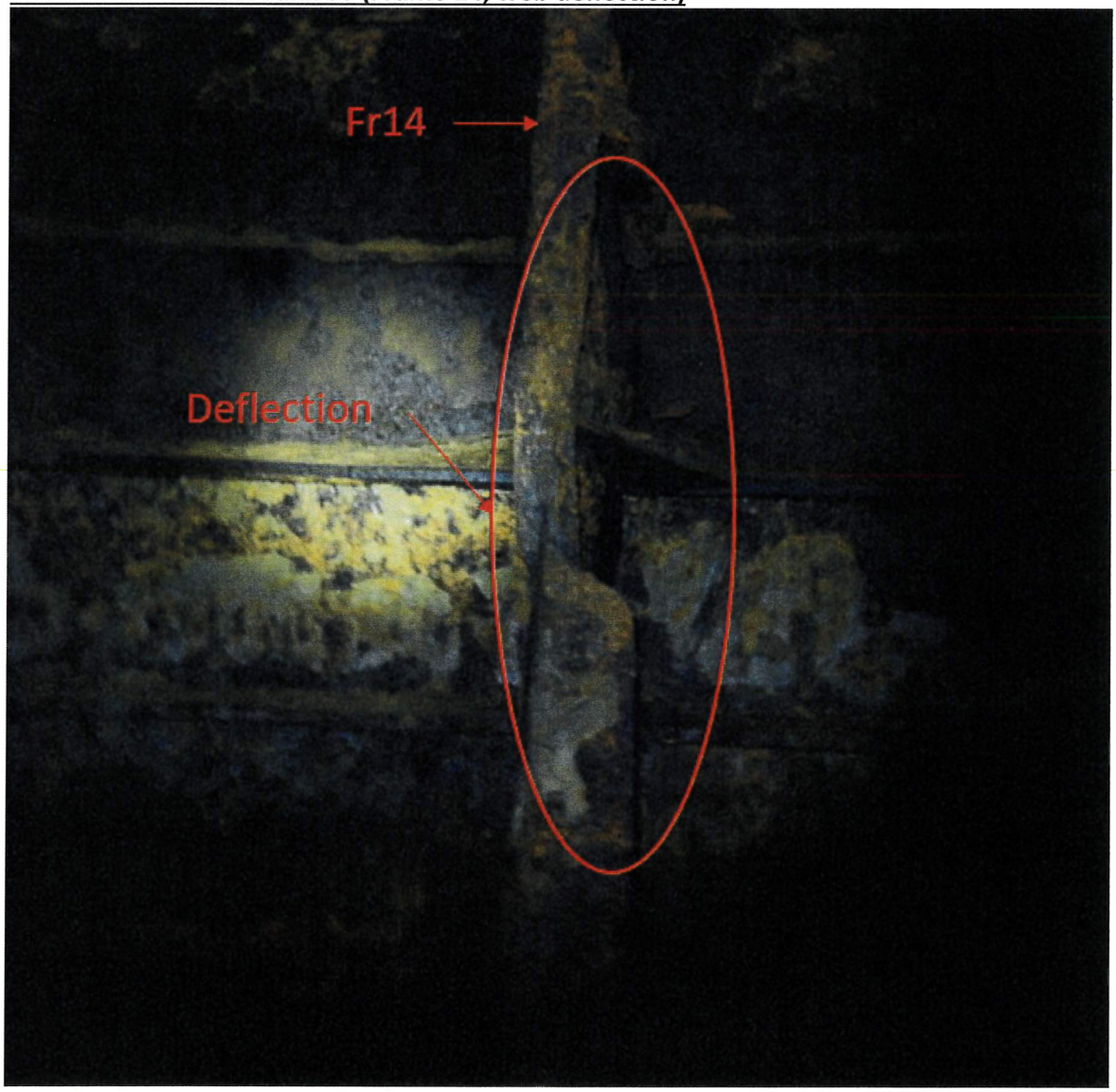


**Photo No.2 – Ballast Tank 5S (Frame 14 web corroded through)**

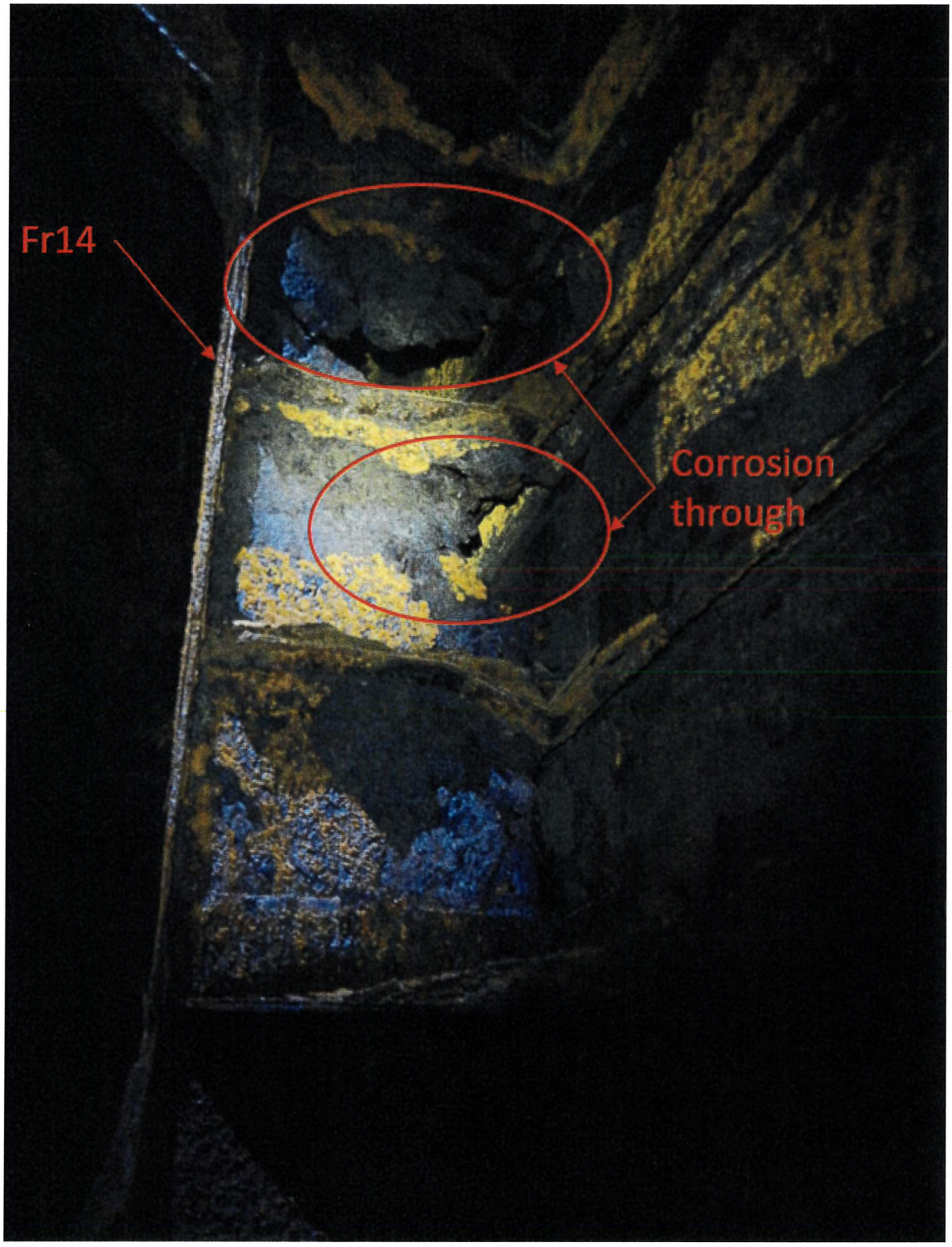
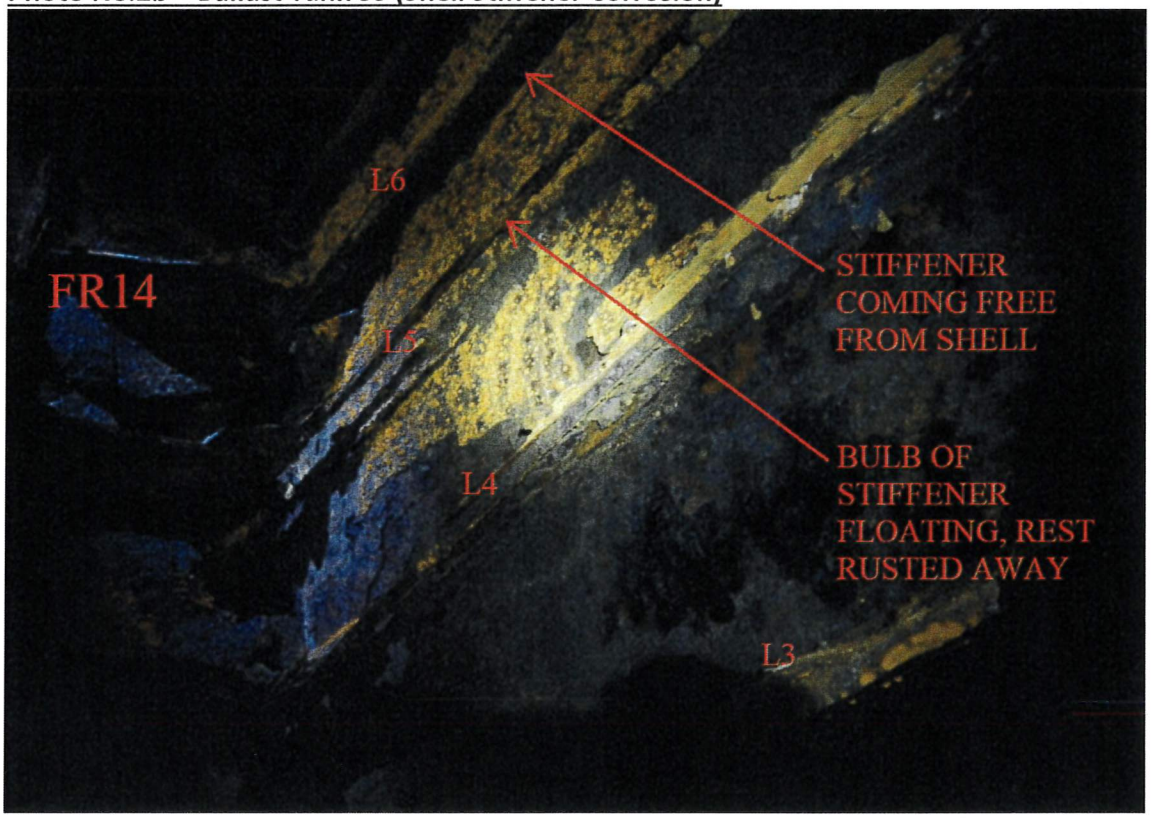


**Photo No.2b – Ballast Tank 5S (Shell Stiffener Corrosion)**



**Web Frame 15:** This frame shows slight deformation in way of the large bottom bracket. The web of the frame has extensive corrosion with small holes through the steel. It was hard to capture in pictures due to the rust/coatings flaking in this area. In the area of side shell (between Frame 16 and Frame 15) a side shell stiffener can be seen to be released from the side shell plating, see Photo No.3, other shell stiffeners in this area showed corrosion with holes and released from the shell.

**Photo No.3 – Ballast Tank 5S (side shell stiffener released)**

**Web Frame 16:** This frame shows no obvious visible damage but small holes were noticed to be corroded through the web. In the area of side shell plate (between Frame 17 and Frame 16) a side shell stiffener can be seen to be released from the plating, see Photo No.4.

**Photo No.4 – Ballast Tank 5S (side shell stiffener released)**

**Web Frame 17:** This frame has slight deformation towards the bottom along the shell, extensive corrosion but with no visible through holes through the web. In the area of the side shell (between Frame 18 and 17) a side shell stiffener is released from the side shell plating, see Photo No.5. Other stiffeners in this area have holes rusted through and are released from the side shell.

**Photo No.5 – Ballast Tank 5S (side shell stiffener released)**

**Web Frame 18:** This web frame shows no obvious visible damage or corrosion through the web or the flange. Although heavy corrosion was noted throughout with no coatings remaining, with flaking and pitting of all steel.

## 8) Inspection Findings – Ballast Tank 6S

Several photos were taken inside the tank to capture the current condition of the side shell structure. After water transfer there was approx. 12" of water still remaining in the tank. Significant corrosion and scaling exist in this tank in numerous areas, coatings have scaled and broken away from the structure and can be seen collecting on the horizontal shell stiffeners and on the bottom. Side shell structure in ballast tank 6 stbd did not contain any obvious signs of damage or deflection, general condition of the tank coatings can be seen in the following photos.

**Web Frame 8:** This frame shows no obvious visible damage or corrosion through the web or flange, in the area of the side shell (between Frame 8 and tank aft bhd) no side shell stiffeners appear to be released from the side shell. see Photo No.6 and Photo No.7

**Photo No.6 – Ballast Tank 6S - Web Frame 8**

**Photo No.7 – Ballast Tank 6S - Between Aft Bhd and Web Frame 8**

**Web Frame 9:** This frame shows no obvious visible damage or corrosion through the web or flange, in the area of the side shell (between Frame 9 and Frame 8) no side shell stiffeners appear to be broken free of the side shell plating. See Photo No.8 and Photo No.9

**Photo No.8 – Ballast Tank 6S - Web Frame 9**

**Photo No.9 – Ballast Tank 6S - Between Web Frame 9 and Web Frame 8**

**Web Frame 10:** This frame shows no obvious visible damage or corrosion through the web or flange, in the area of the side shell (between Frame 10 and Frame 9) no side shell stiffeners appear to be broken free of the side shell plating, see Photo No.9 and Photo No.10

**Photo No.10 – Ballast Tank 6S - Web Frame 10**

**Photo No.11 – Ballast Tank 6S - Between Web Frame 10 and Web Frame 9**

**Web Frame 11:** This frame shows no obvious visible damage or corrosion through the web or flange. In the area of the side shell (between Frame 11 and Frame 10) no side shell stiffeners appear to be broken free of the side shell plating, see Photo No.11 and Photo No.12

**Photo No.12 – Ballast Tank 6S - Web Frame 11**

**Photo No.13 – Ballast Tank 6S - Between Web Frame 11 and Web Frame 10**

**Web Frame 12:** This frame shows no obvious visible damage or corrosion through the web or flange. In the area of the side shell (between Frame 12 and Frame 11) no side shell stiffeners appear to be broken free of the side shell plating. Side shell stiffeners (between Frame 13 (fwd BHD) and Frame 12) did not appear to be broken free of the shell plating, see Photo No.14, Photo No.15 and Photo No.16

**Photo No.14 – Ballast Tank 6S - Web Frame 12**

**Photo No.15 – Ballast Tank 6S - Between Web Frame 12 and Web Frame 11**

**Photo No.16 – Ballast Tank 6S - Between Web Frame 13 (Fwd Bhd) and Web Frame 12**

## 9) Signatures

Toby Butler
Vice President
Adaptive Marine Solutions Inc.

Estimated Costs for Barge Side Shell and Internal Stiffener Repairs

*(Based on information provided by two reputable fabricators)*

Specification Item 1.11

| | |
|---|---|
| Doubling Plate over Full Extent of Stbd Side Shell Damage | $506,000 |

Specification Item 1.12

| | |
|---|---|
| Crop and Renew Internals where corroded and damaged | $121,000 |

Specification Item 1.13

| | |
|---|---|
| Insert Plate over Full Extent of Stbd Side Shell Damage | |
| Crop and Renew Internals where corroded and damaged | $627,800 |

Additional Options:

- Do not carry out any remedial work
- Place large tires, similar to those on port side, in way of quays
- Fill suspected damaged compartments with polyurethane foam

## Attachment 1 Repair Proposals

The attached power point, weight estimates and and previously submitted report from AMS are to be read in conjunction with this document. Further, due to the holiday season, we have not as yet been able to obtain any accurate information regarding costs of the ensuing solutions but have some costs based on information provided by two reputable fabricators. These fabricators operate in the conventional dry dock industry and thus the prices below are what CFI would expect to pay if the barge was in a shipyard.

Given the foregoing, if CFI were to approach local repair facilities, the figures below will be reduced, possibly by as much as 30% or more and all cost estimates are gross figures and include all ancillary costs such as staging, cranes, transport, welding etc..

**Estimated repair weights as provided by AMS**

Estimated Costs for Barge Side Shell and Internal Stiffener Repairs

These are preliminary weight check on the options: and will need verification

**Option 1 – Shell doubler: 11.5 Tonnes**

Doubling Plate over Full Extent of Starboard Side Shell Damage $506,000

**Option 2 – web fr14 and stiffener replacement: 2.1 Tonnes**

Enter through deck, crop and renew Internals where corroded and damaged $121,000

We've presumed to include (frames 15, 16, 17, 18 here as well as they may need some local repairs or full replacement)

-

**Option 3 – side shell panel replacement: 13.6 Tonnes**

frames 14, 15, 16, 17, 18
12.5m x 6.6m of plate
L2, L3, L4,L5 (shell stiffeners from web frame 13 to web frame 18)
Insert Plate over Full Extent of Starboard Side Shell Damage

Crop and Renew Internals where corroded and damaged $627,800

**All options assume one or all of the following:**

- Shell Plate, 5/8" Plate
- Shell Stiffeners, 100x6 BP's
- Web Frames, 500x10x75x12 Web Frames

*** We have not accounted for bracketing of stiffeners to the web frames in the web frame weights**

Of all the above options, #1 is the simplest as it does not involve hull penetrations or welding inside the tanks.

Option #2 is probably the most economical but before any work can commence the tank must be pumped dry and the tank bottom around the repair area will have to be cleaned, proper ventilation to allow the welders access to the work site. Option #3 is the cleanest and structurally most acceptable

solution of the three and if the barge was going to be classed it would be the requirement of the classification society.

The options outlined above all require an expensive repair bill but number 2 is the most economical of the three and the one that I would recommend if CFI were to proceed down that route. There is another option however and that option will depend upon the proposed future usage of the barge.

As far as I am aware, the inspections to date have not revealed any hull breaches or penetrations of any sort and CFI plans to use the barge for no more than a further 2 to 3 years in the current planned configuration and once that usage is complete, then the barge will be disposed of, either to a local owner or as scrap.

If that is the case and there is no plan to use the barge to carry any cargo or to have class reinstated, then there is a fourth choice and that is to simply leave the barge as it is. By way of explanation, if the storm moorings as designed are installed in the manner that I have described, then the barge will be capable of being drawn off the dock at short notice without the assistance of tugs and thus the potential for further heavy loads of any kind on that area should be eliminated. To further assist in this respect, once the barge is brought down from Marbase and before it is installed on the moorings, one of the inflatable pneumatic fenders can be removed from its current location on the port midship of the barge and re-installed alongside the existing damaged area. This action will greatly assist in preventing further damage to this area.

Utilising this last option will allow the preparatory work on the moorings to proceed and would remove the issue of tug assistance from your operations while this temporary arrangement is in place and if the moorings are laid as per the drawings that I have submitted, then the inner moorings attached to the land can be used to warp the export vessel up and down the dock and the offshore moorings can in fact be used to warp an export vessel off the berth in an emergency.

**It should be stressed at this point, that transverse strength of the barge in the area of the damage has been impaired and a further impact in that area will almost certainly result in a hull breach. This event in and of itself would not be catastrophic given that this tank (5S) is only one of some 18+ tanks but the condition of surrounding tank members cannot be taken for granted.**

Suite 202, 130, Lemarchant Road

St. Johns

Newfoundland

A1C 2H2

September 01, 2022

The Owners, Directors and Monitor of CFI

St. Lawrence

Newfoundland

**To invoice you for my services as master of the BARGE H-404**

For the period February 01, 2022, until August 31, 2022 a total 212 days less time working on other projects

| | |
|---|---|
| A total of 141.5 days at $225 per hour | $252,900 |
| HST @15% | $37,935 |
| | $290,835.00 |

Sincerely

Captain R. Spellacy

Suite 202, 130, Lemarchant Road

St. Johns

Newfoundland

A1C 2H2

September 01, 2022

The Owners, Directors and Monitor of CFI

St. Lawrence

Newfoundland

**To invoice you for my services as master of the BARGE H-404**

For the period February 01, 2022, until August 31, 2022 a total 212 days less time working on other projects

| | |
|---|---|
| A total of 141.5 days at $1,500 per day /$225 per hour | $210,750/$252,900 |
| HST @15% | $31,612.50/$37,935.00 |
| | $242,362.50/$290,835.00 |

Sincerely

Captain R. Spellacy

\

Jason

I have attached the revised schedule and after consultation with John I reduced the manning and training budget from $80,000 $32,00 and that may be a bit excessive. The total as it stands now is around C$1,714,200 and if I include the cost for John and I to date we will push that amount to just under $2,000.000.

I have listed the anchors and chains as a purchase as while the rental proposal from Pennecon was really attractive, $160,400 for two years and I expect an option for a third year at the price of $80,200 would be available. At the end of that rental period, CFI must mobilize a vessel to pick up the anchors and chains and return them to the Pennecon base in Bay Bulls and the cost for that exercise more than erases any advantage gained by the initial rental advantage. I did ask about wet storing these items in St. Lawrence Harbour until required by Pennecon but that proposal was unacceptable. I point this out as there is no flexibility, if the market is active which I expect it will be, then CFI is at the mercy of the vessel market or it must pay a further $80,200 for another years use of the product until any options have expire. As is, if the items are purchased, I suspect that they can be left on the bottom to form part of the mooring system for the new dock.

While other vessels are coming over for the summer drilling campaign, the Baird Study has indicated that the system must be able to withstand a 265 tonne pull and the Arctic is the only vessel around here capable of doing that. Further, John is also negotiating a ballast cleaning proposal with Horizon so I would strongly advise that you issue an RFP in accordance with the attached documents and also get the procedures proposal PO completed and issue an RFP to the winch supplier otherwise we might well be shut out due to the work schedule. My understanding is that the vessel will be available in the last two weeks of March.

As far as I am concerned, I see 40 hours reviewing the bids, 48 hours supervising the placement and installing of the barge winches and approximately and 216 hours for the anchoring up (15 days at 12 hours per day) for a total of approximately $67,000 plus expences of around $3,000 for a total of $70,000 plus taxes. I will also one more invoice for January which will be in to you on Tuesday and that will be for approximately $5,000 plus expences of around $200

Cheers

Dick

Blue Beach Barge Alternative Mooring Budget

| | Task | | Person Responsible | PR | PO | Est $ |
|---|---|---|---|---|---|---|
| Barge | Barge inspection ballast tanks S7, S6, & S5 | Pump to supplied and sourced | Jason F | | | $3,000 |
| | | Decision on where/How to Ballast the vessel | Dick S | | | N/A |
| | | Inspectors / And CSE teams for entrants | Peter H | | | $34,000 |
| | | Barge Master to track Movements of fluid | Jason F | | | N/A |
| | | Operators to use pump | Jason F | | | $6,000 |
| | Winch inspection | To Be conducted By Local Company to do on site inspection | Dick S | | | $2,000 |
| | Purchase Winch | Through CFI Purchasing | Ron M winch to include 120m of 18mm wire | | | $132,000 |
| | | Shipping Of winches to site | Ron M | | | $12,000 |
| | Winch base frame design | Engineer to design (Tony Barkley) | Dick & John | | | $3,000 |
| | Purchase Winch bases | Can be Fabricated locally (Cactus Marine)/ or Inhouse using CFI welding team with approved Design | Ron M | | | $7,000 |
| | | Purchase Wire to be installed on winches and respective Jewelry to attach to chain (winch w cable) | Ron M | | | included in 2 |
| | | Crane to place equipment on barge | Jason F | | | $22,000 |
| | Quotes for crane and forklift to install the winches | Equipment to be lifted to Barge | Jason F | | | N/A |
| | | Qualified Welder to install ( Cactus Marine ) (SOW) | Dick S | | | $12,000 |
| | | Winch to be Installed on frame and ran upon tested (Mechanic) | Dick S | | | $12,000 |
| | | NDT of welds | Dick S | | | $2,200 |
| | Install winches and test | Will require Marine engineer/Mechanic to function test | Dick S | | | G17 |
| AHST | Quotes anchor handling vessel | These costs should Fall under the total cost of the vessel | Dick S See 28 below | | | $615,000 |
| | Pick up Anchor Equipment Bay Bulls | | Dick S | | | N/A |
| | Set Anchors chains at Blue Beach | | Dick S | | | N/A |
| | Pick up barge at Marbase deliver to Blue Beach | | Dick S | | | N/A |
| | Connect to the four anchor chains | | Dick S | | | N/A |

| | | | | |
|---|---|---|---|---|
| | Develop list of deck handling materials | Local Suppliers Extreme East/ Oceanside Including Jewelry / Norw Buoys to float chain tails ( Spartan Marine) | John N | $23,000 |
| | Purchase chain and anchors | Pennecon Bay Bulls | Jason F see 22 above Total price $1,200,000 | $615,000 |
| | Purchase Of SALS handling ropes from Exxon | As per spec. for getting the Chain tails to shore mooring | John N | $29,000 |
| | Test the system to move barge to and from the cribs | Use Seasoned Seafarers (Training on the system) | John N | |
| | Setup local seafarers to move the barge | Use Seasoned Seafarers, Create Procedure for task, JSA & Risk Assessment to be developed | John N | $52,000 |
| Site | Set up weather warning system | This can be achieved through a local forecasting company ( Woods Etc.) | Dick S | TBD |
| | Quote drill for land anchor point (s) | Ballards on BB design covers this task | Dick S | N/A |
| | Install land anchor point (s) | Shoreline bollard strong points with chain and pick up lines | Dick S | $15,000 |
| | Ballast water letter of retention | BWM plan is under way with George Anderson | John N | $15,000 |
| | Notify CCG Proposed Anchor pattern | Notify Not Canada for navigational warnings / Contact Placentia Coast Guard to forward Nav warnings | John N | N/A |
| | ROV study Blue Beach | Out for tender | Jason F/John N | $30,000 |
| | | | | $1,673,200 |

Note

This project does not include cleaning the seabay section lines, baskets, and pumps on the barge.

| | |
|---|---|
| Actual $ | |
| | CDN |
| | CDN |
| | CDN |
| | USD |
| | USD |
| | USD |
| | CDN |
| | CDN |
| 8 below | USD |
| | CDN |
| | CDN |
| | CDN |
| TBD | CDN |

TBA
includes 10 kenterlinks 2200 meters 4 anchors

Ops cost

Chain, tri plate and pick line
TBA cost for price John

# VENDOR REGISTRATION APPLICATION

## Canada Fluorspar (NL) Inc.

St Lawrence Newfoundland

Notes to vendors: Vendor registration is essential for procurement and payment purposes.
Please answer all questions fully so that your application may proceed without delay
INFORMATION PROVIDED REMAINS CONFIDENTIAL IN PERPETUITY

| Date of Application | Prepared by | Title |
|---|---|---|
| 28-Oct-21 | Richard Spellacy | President |

Full company name *: Inaminka Marine Services Ltd.

Currency *: Canadian Dollars

Business Address *: Suite 202, 130 Lemarchant Road

| City * | Province/State * | Country * |
|---|---|---|
| St. Johns | Newfoundland and Labrador | Canada |

| Postal/Zip Code | Company registration number * | Payment Terms * |
|---|---|---|
| A1C 2H2 | 38557 | Net 30 days |

**Contacts**

| | Phone Number | Email Address |
|---|---|---|
| Operations Contact Name: Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |
| PO Contact Name: Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |
| A/R Contact Name: Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |

VOLUNTARY: Is your business owned by a member of an underrepresented group (mark X in all that apply)

| | | | |
|---|---|---|---|
| | Women | | Disability |
| | Aboriginal | | Visible Minority |

**Banking information**

Name to appear on cheques or wire transfers *: Inaminka Marine Services Ltd

Name of bank: CIBC

Address of bank: 215 Water Street, St. Johns, NL, A1C6C9

| Institution # (3 digits) * | IBAN/Account Number * | Swift * |
|---|---|---|
| 390 | 00063-010-4811410 | CIBCCATT |

Transit # (5 digits) *: 63

Country: CANADA

**Mailing Address for Cheque (If applicable)**

Full company name *: Inaminka Marine Srvices Ltd.

Business Address *: Suite 202, 130 Lemarchant Road

| City * | Province/State * | Country * |
|---|---|---|
| St. Johns | NL | CANADA |

Postal/Zip Code: A1C 2H2

**Internal use Only (CFI)**

Entered In Sage date: _____ /_____ /_____ Entered By: _____

This is Exhibit C referred to in the Affidavit of Richard A. Spellacy
Sworn or affirmed before me this 24th day of October, 2022.

Canada Fluorspar (NL) Inc.

# Purchase Requisition

| Date | Page |
|---|---|
| 2021-11-05 | 1 |
| Purchase Requisition Number RQN0012966 | |

| Reference | Description | Required Date | | Requested By |
|---|---|---|---|---|
| Blue Beach | Review BB barge mooring away f | | CAP2021-001 | Serena Hickey |

| Ship To | Bill To | Ship Via | FOB Point |
|---|---|---|---|
| | | | |

| Item | Description | Vendor | Expected Arrival | GL Account | Quantity | UOM | Unit Cost | Extended Cost |
|---|---|---|---|---|---|---|---|---|
| CAPDC | Review BB barge mooring away from cribs | | | 18343-505-033 | 60.00 | EA | 1,500.00 CAD | 90,000.00 |

Comment:
Vendor Richard Spellacy

Total Cost: 90,000.00

Approver Name: Approver Position / Title:

# Purchase Order

| Date | Page |
|---|---|
| Dec 14, 2021 | 1 |
| Purchase Order Number | |
| PO00021012 | |

Canada Fluorspar (NL) Inc.
P.O. Box 337
St. Lawrence, NL A0E 2V0

01/19/2022
7:27:52AM

REQUISITION # **RQN0012966**

**Vendor Address:**

Inaminka Marine Services Ltd.
Suite 202
130 Lemarchant Rd
St. John's, NL A1C 2H2
Canada

| Reference | Contact | Vendor Number | PO Date | Terms | Ship Via | Expected Arrival |
|---|---|---|---|---|---|---|
| Blue Beach | | INAMAR | Dec 14, 2021 | NET60 | | |

| Qty. Ordered | Vendor Item Number | Description | CFI Item Number | Unit Cost | UOM | Extended Price |
|---|---|---|---|---|---|---|
| 0.0000 | CAPDC | Review BB barge mooring away from cribs $220.00 PER HOUR<br>**Instructions:** Requisitioner: SHICKEY RQN0012966 | CAPDC | 1.000000 | EA | 0.00 |
| 0.0000 | CAPDC | MILELAGE .60 PER KM<br>**Instructions:** Requisitioner: SHICKEY RQN0012966 | CAPDC | 1.000000 | MT | 0.00 |
| 50,000.0000 | RQN13616 | Review BB Barge Mooring Away from Crib (220.00 per hr) | CAPDC | 1.000000 | EA | 50,000.00 |
| 3,000.0000 | CAPDC | MILELAGE | CAPDC | 1.000000 | EA | 3,000.00 |

**Comments:**
Richard Spellacy to SUBMIT DAILY RECORD OF WORK DONE WITH INVOICE

**Tax Summary:**
HSTGST 7,950.00

| | |
|---|---|
| **Less:** included tax | **0.00** |
| **Subtotal** | **53,000.00** |
| **Total tax** | **7,950.00** |
| **Total purchase order** | **60,950.00** |

CFI
CANADA FLUORSPAR INC.

# Purchase Order

| Date | Page |
|---|---|
| Dec 14, 2021 | 1 |

Purchase Order Number
PO00021012

12/14/2021
8:14:19AM

REQUISITION # RQN0012966

**Vendor Address:**

Inaminka Marine Services Ltd.
Suite 202
130 Lemarchant Rd
St. John's, NL A1C 2H2
Canada

Contact : Richard Spellacy
Phone: 7096851725
Email: richardspellacy@hotmail.com

**Ship To/Billing address**

**Canada Fluorspar (NL) Inc**
**141 Director Drive**
**P.O. Box 337**
**St. Lawrence, NL**
**A0E 2V0**
**Phone: (709) 873-3331**
**Fax: (709) 873-3335**

| Reference | Contact | Vendor Number | PO Date | Terms | Ship Via | Expected Arrival |
|---|---|---|---|---|---|---|
| Blue Beach | | INAMAR | 12/14/2021 | NET60 | | |

| Vendor Item Number | Description | CFI Item Number | Qty. Ordered | Expected Arrival | Unit Cost | UOM | Extended Price |
|---|---|---|---|---|---|---|---|
| GL ACCT: | Review BB barge mooring away from cribs $220.00 PER HOUR 18343-505-033 | CAPDC | 87,000.00 | | 1.000000 | EA | 87,000.00 |
| GL ACCT: | MILELAGE .60 PER KM 18343-505-033 | CAPDC | 3,000.00 | | 1.000000 | MT | 3,000.00 |

**Comments:**
Richard Spellacy to SUBMIT DAILY RECORD OF WORK DONE WITH INVOICE

**Tax Summary:**
HSTGST 13,500.00

| | |
|---|---|
| Subtotal | 90,000.00 |
| Total tax | 13,500.00 |
| Total purchase order | 103,500.00 |

| Approver Name: | Approver Position / Title: |
|---|---|
| Bill Dobbs | |
| Jason Flood | |
| Patrick Gannon | |
| Ron Milmine | |
| Serena Hickey | |
| Terry Fleming | |

# Operational Log of Events

**Page 1 CFI St. Lawrence Barge Moorings**

**Richard Spellacy February legal Time Sheet Feb/Sept**

| Time & Date | Description of Event |
|---|---|
| | |
| | **February 1st** |
| 8 hours | Jason Flood x 2 , Ron Milmine & Toby Butler, |
| | |
| | **February 2nd** |
| 8 hours | Tomas Serafinavicius, Leo Power, Chris Gonsoulin & Anthony Barclay |
| | |
| | **February 3rd** |
| 10 hours | Paul Antle x 2, Stephen Penny x 2 Eric Machum |
| | |
| | **February 4th** |
| 8 hours | Paul Antle x 3, Eric Machum |
| | |
| | **February 6th** |
| 4 hours | Paul Antle, Cliff Gaetz |
| | |
| | **February 8th** |
| 2 hours | Stephen Penny |
| | |
| | **February 9th** |
| 4 hours | Seamus Ryder x 2 |
| | |
| | **February 11th** |
| 6 hours | Paul Antle x 2, Stephen Penny |
| | |
| | **February 13th,** |
| 4 hours | Stephen Penny, Patrick Gannon |
| | |
| | **February 14th.** |
| 6 hours | Deborah Hutchings x 3 |
| | |
| | **February 15th** |
| 12 hours | Deborah Hutchings x 3, John Norman, Accounts Payable, Toby Butler |
| | |
| | **February 16th** |
| 6 hours | Deborah Hutchings x 3 |

| | |
|---|---|
| | |
| | **February 17th** |
| 6 hours | Deborah Hutchings x 3 |
| | |
| | **February 18th** |
| 14 hours | Deborah Hutchings x 7 |
| | |
| | **February 23rd** |
| 8 hours | Deborah Hutchings x 3, Patrick Gannon x 1 |
| | |
| | **February 28** |
| 2 hours | Deborah Hutchings x 1 |
| | |
| | **Total for February, 108 hours** |
| | |
| | |
| | **Hours for March** |
| | **March 10** |
| 2 hours | Deborah Hutchings |
| | |
| | **March 12** |
| 4 hours | Patrick Gannon, Deborah hutchings |
| | |
| | **March 13** |
| 2 hours | Deborah Hutchings |
| | |
| | **March 25** |
| 2 hours | Deborah Hutchings |
| | |
| | **March 30** |
| 2 hours | Patrick Gannon |
| | |
| | **Total for March 12 hours** |
| | |
| | |
| | **Hours for April** |
| | |
| | **April 1** |
| 2 hours | Paul Antle |
| | |
| | **April 03** |
| 2 hours | Patrick Gannon |
| | |
| | **April 8th** |
| 4 hours | Phil Clark x 2 |

| | |
|---|---|
| | |
| | **April 11** |
| 14 hours | Phil Clark x 2 Deborah Hutchings x 2, John Norman x 3 |
| | |
| | **April 13** |
| 2 hours | Deborah Hutchings |
| | |
| | **April 22** |
| 4 hours | Deborah Hutchings, Paul Antle |
| | |
| | **April 23** |
| 2 hours | Paul Antle |
| | |
| | **April 25** |
| 4 hours | Deborah Hutchings, Paul Antle |
| | |
| | **April 29** |
| 2 hours | Deborah Hutchings |
| | |
| | **Total Hours for April 36** |
| | |
| | |
| | **Hours for May** |
| | |
| | **May 12** |
| 2 hours | Phil Clarke |
| | |
| | **Total Hours for May 2** |
| | |
| | |
| | **Hours for June** |
| | **June 05** |
| 2 hours | **Sean Leet** |
| | |
| | **June 07** |
| 6 hours | Phil Clarke x 3 |
| | |
| | **June 08** |
| 4 hours | Phil Clarke, Cliff Gaetz |
| | |
| | |
| | **Total Hours for June 12** |
| | |
| | **Hours for July** |
| | **July 11** |

| | |
|---|---|
| 4 hours | Phil Clarke x 2 |
| | |
| | **July 13** |
| 4 hours | Deborah Hutchings x 2 |
| | |
| | **July 14** |
| 2 hours | Phil Clarke |
| | |
| | **July 19** |
| 4 hours | Deborah Hutchings x 2 |
| | |
| | **July 20** |
| 2 hours | Deborah Hutchings |
| | |
| | **July 29** |
| 2 hours | Deborah Hutchings |
| | |
| | **Total Hours for July 18** |
| | |
| | **Hours for August** |
| | **August 02** |
| 4 hours | Deborah Hutchings x 2 |
| | |
| | **August 03** |
| 2 hours | Deborah Hutchings |
| | |
| | **August 04** |
| 2 hours | Deborah Hutchings |
| | |
| | **August 05** |
| 4 hours | Deborah Hutchings x 2 |
| | |
| | **August 08** |
| 2 hours | Deborah Hutchings, |
| | |
| | **August 10** |
| 2 hours | Toby Butler |
| | |
| | **August 11** |
| 4 hours | Toby Butler, Deborah Hutchings |
| | |
| | **August 18** |
| 6 hours | Deborah Hutchings x 3 |
| ` | **August 19** |
| 2 hours | Tony Barclay |

| | |
|---|---|
| | |
| | **August 22** |
| 2 hours | Deborah Hutchings |
| | |
| | **August 25** |
| 4 hours | Deborah Hutchings x 2 |
| | |
| | **August 26** |
| 4 hours | Deborah Hutchings x 2 |
| | |
| | **August 30** |
| 10 hours | Deborah Hutchings x 5 |
| | |
| | **August 31** |
| 8 hours | Deborah Hutchings x 4 |
| | |
| | **Total hours for August 56** |
| | |
| | **September 01** |
| 4 hours | Deborah Hutchings x 2 |
| | |
| | **September 02** |
| 6 hours | Deborah Hutchings x 3 |
| | |
| | **September 08** |
| 14 hours | Deborah Hutchings x 2 Self x 5 |
| | |
| | **September 13** |
| 14 hours | Deborah Hutchings x 4 Self x 3 |
| | |
| | **September 15** |
| 2 hours | Deborah Hutchings x 1 |
| | |
| | **September 16** |
| 6 hours | Deborah Hutchings x 3 |
| | |
| | **September 22** |
| 2 hours | Deborah Hutchings |
| | |
| | **September 25** |
| 6 hours | Deborah Hutchings x 3 |
| | |
| | **September 26** |
| 6 hours | **Attendance in court** |
| | |

| | |
|---|---|
| | **Total for September 60 hours** |
| | |
| | **Total hours on court filing February through August 304** |
| | **@$220/hour = $66,880.00** |

## MacNab, Fagan & Murphy

**From:** Deborah Hutchings
**Sent:** September 15, 2022 5:12 PM
**To:** MacNab, Fagan & Murphy
**Subject:** FW: CFI Pontoon 1 Ballast Management Plan
**Attachments:** BW titlae page.jpeg; ballast water transfer record.jpeg

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** September 2, 2022 11:22 AM
**To:** Deborah Hutchings <dhutchings@yourlegalteam.ca>
**Subject:** RE: CFI Pontoon 1 Ballast Management Plan

**From:** Deborah Hutchings <dhutchings@yourlegalteam.ca>
**Sent:** Friday, September 2, 2022 11:17 AM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Subject:** RE: CFI Pontoon 1 Ballast Management Plan

Thank you.

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** September 2, 2022 11:06 AM
**To:** Deborah Hutchings <dhutchings@yourlegalteam.ca>
**Subject:** FW: CFI Pontoon 1 Ballast Management Plan

FYI

Dick

**From:** John Norman <john_w_norman@hotmail.com>
**Sent:** Monday, January 24, 2022 9:57 AM
**To:** Anderson, George <George.Anderson@tc.gc.ca>
**Cc:** Jason Flood <jflood@canadafluorspar.com>; Dick Spellacy <richardspellacy@hotmail.com>; Patrick Gannon <pgannon@canadafluorspar.com>; Captain - Horizon Arctic <captain.arctic@horizonvessel.com>; Dustin Boyd Boyd <dustin.boyd@horizonmaritime.com>; Steve Widmeyer <steve.widmeyer@horizonmaritime.com>
**Subject:** Re: CFI Pontoon 1 Ballast Management Plan

Good Morning George,

To answer some of your Questions

1. Total ballast on board the barge. (All ballast onboard is to be managed)
2. Please see attached Ballast Management Plan

3. A table of the amount of ballast in each tank on board presently. (indicating the sounding of the water level, volume contained in each tank, (adjusted for trim), salinity (if taken)
4. Please see attached Ballast Management Plan
5. The condition of the tanks vis a vis the sediments on the barge,
6. Tanks 5 STBD, 6 STBD & 7 STBD were surveyed for sediment and there is very little inside each tank except for what would be expected Rust scale minimal amounts of retained water and this was observed to be clear and compartments show very little signs of sediment.
7. Method used to pump out the ballast. (internal pumping or portable pumps),
8. Portable Pumps will be used to transfer all Ballast, the Plan going forward will be to transfer all Ballast to the center tanks to allow quicker offloading time when the vessel is present, as these tanks are the larger of the tanks on the Barge. The wings for each set of tanks will be transferred to the center with each corresponding tank IE; 1 STBD to 1 Center and 1 Port to 1 Center this will allow us more time for stripping the wing tanks to reduce the amount of fluid retained in the smaller tanks.
9. How will the ballast be transferred to the Horizon Arctic?
10. Again the same portable pumps will be used to transfer to the Horizon Arctic.
    a. Location of the connect point on the HORIZON ARCTIC to transfer the ballast to the BWMS.
11. The BWMS is connected to the full Ballast system throughout the Arctic any ballast tank can be used and accessed from the deck through its venting system, also through the drill water manifold prefered method will be through the vent to lessen the amount of exposure of the piping system to the Ballast water from the CFI Pontoon 1.
12. What system is onboard the Horizon Arctic, etc.
13. The System onboard the Horizon Arctic is Ultra Violet and filter System DNV Certificate attached.
    a. What is the method used for treating ballast by the BWMS
    b. Ultra Violet and filter System
        i. The ballast would be required to enter the sea suction side of the BWMS, (Filtration/treatment on uptake)
        No the Ballast would not enter the sea suction side of the system if it was loaded through the vent and there would be no need to flush the lines of the Arctic. Only the minimal amount of piping to be exposed as required.
        ii. If necessary, any hold time that might be required for compliant management.
        This operation would not require any hold time as any pathogens in the water will be naturalized and or filtered out through this system.
        iii. Treatment or neutralization on discharge.
        Neutralization and Filtration

7. What tank/s will be used to receive the ballast on the HORIZON ARCTIC.
8. This operation will only require 1 BW tank as the vessel treats the ballast water it will be discarded overboard. As the chosen BW tank is being filled the Arctic crew can draw and treat this water for discharge over the side on location.
9. Where will the treated ballast be discharged( alongside or at sea).
10. The treated Ballast will be discharged on site over-board.
11. HORIZON ARCTIC may be required to then manage/clean the piping depending on configuration.
12. The Arctic can flush the tank and line on site, through the same BW tank and line through the BWMS to clean with local water, and discharge overboard, until satisfactory.

As above questions have been answered if these answers have uncovered new questions, please at your convenance reply to this email for discussion.
Also please see Attached Documents for clarification.

Best Regards,
Norman Marine Services
John Norman

Cell : 709-873-6276

# BALLAST WATER MANAGEMENT PLAN

## Vessel name: CFI Pontoon 1

## IMO number:****

Document date: January 21, 2022

Created by: John Norman

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## INTRODUCTION

Ballast water is essential to control trim, list, draught, stability, or stresses of the vessel. However, ballast water may contain aquatic organisms or pathogens which, if introduced into the sea including estuaries, or into fresh water courses, may create hazards to the environment, human health, property or resources, impair biological diversity or interfere with other legitimate uses of such areas.

This plan is written in accordance with the requirements of Regulation B-1 of the International Convention for the Control and Management of Vessels' Ballast Water and Sediments, 2004 (the Convention) and the associated Guidelines.

The purpose of the plan is to meet the requirements for the control and management of vessel's ballast water and sediments in accordance with the Guidelines for Ballast Water Management and the Development of Ballast Water Management Plans (G4) resolution MEPC.127(53). It provides standard operational guidance for the planning and management of vessels' ballast water and sediments and describes safe procedures to be followed.

The selection of appropriate methods of Ballast Water Management should take into account the need to ensure that Ballast Water Management practices used to comply with the Convention do not cause greater harm to the environment, human health, property or resources of any States and the safety of vessels, than they prevent.

This plan has been presented to be approved by Transport Canada and no alteration or revision shall be made to any part of it without the prior approval of CFI.

VESSEL PARTICULARS

Vessel Name: CFI Pontoon 1
IMO Number: xxx
Flag: Panama (To Be Canadian)
Port of registry St. Lawrence NL
Vessel Type: Floating Dock
Dimensions Gross Tonnage: 6515.61t
Length B.P. : 117.12m
Beam: 36.6m
Deepest ballast draughts (normal/heavy weather): 7.5m
Total ballast water capacity @ 85% = 24,359.3 m3
Designated ballast water management officer (rank of officer): John Norman
Main ballast water management method(s): Internal Piping / Mobile Pumps
D-1 (ballast water exchange):
D-2 (ballast water treatment): Treatment through the Horizon Arctic

PURPOSE

The ballast water management plan aims to assist governments, appropriate authorities, vessels' Masters, operators, owners, port authorities as well as other interested parties, in preventing, minimizing and ultimately eliminating the risk of introducing harmful aquatic organisms and pathogens from vessels' ballast water and associated sediments while protecting vessels' safety.

Good record keeping is critical to the success of a sound ballast water management program. The appointed ballast water management officer is responsible for ensuring the maintenance of appropriate records and that the ballast water management and treatment procedures are followed and recorded.

It is the owners/managers or Master's responsibility to regularly review the plan and ensure that the information contained therein is accurate and updated.

1. DESCRIPTION OF THE BALLAST SYSTEM

Ballast water is essential to control trim, list, draught, stability or stresses of the vessel. The vessel's ballast system consists of the following:

1.1 Overview of BWM methods applied

| BW Tank # | BW Treatment | | | BW Treatment |
|---|---|---|---|---|
| | Ultra Violet Method | Flow-Through Method | Filter Method | |

1.2 Barge Layout

| Tank # | Capacity @ 85% m3 |
|---|---|
| 1 Center | 1713.6 |
| 2 Center | 1713.6 |
| 3 Center | 1713.6 |
| 4 Center | 1713.6 |
| 5 Center | 1713.6 |
| 6 Center | 1713.6 |
| 7 Center | 1713.6 |
| 1 StBd | 883.15 |
| 2 Stbd | 883.15 |
| 3 Stbd | 883.15 |
| 4 Stbd | 883.15 |
| 5 Stbd | 883.15 |
| 6 Stbd | 883.15 |
| 7 Stbd | 883.15 |
| 1 Port | 883.15 |
| 2 Port | 883.15 |
| 3 Port | 883.15 |
| 4 Port | 883.15 |
| 5 Port | 883.15 |
| 6 Port | 883.15 |
| 7 Port | 883.15 |
| Total BW | 28658 |

1.2 Pump data

| Pump # | Rated capacity [m3 /hr] | Type | Location |
|---|---|---|---|
| Portable Pumps | 100 m3/hr | | On deck |

## 2 BALLAST WATER MANAGEMENT OPERATIONS

### 2.1 General

Ballast Water Management System (BWMS) means any system which processes ballast water such that it meets or exceeds the ballast water performance standard in regulation D-2. The BWMS includes ballast water treatment equipment, all associated control equipment, monitoring equipment and sampling facilities.

BWMS means equipment which mechanically, physically, chemically, or biologically processes, either singularly or in combination, to remove, render harmless, or avoid the uptake or discharge of harmful aquatic organisms and pathogens within ballast water and sediments. Ballast water treatment equipment may operate at the uptake or discharge of ballast water, during the voyage, or at a combination of these events.

Ballast water exchange can also be used for this vessel, but only to meet the standard described in regulation D-1. The applicable methods are: sequential method, flow through method and dilution method or a combination of those.

Ballast water exchange will be phased out as an acceptable method for complying with the Convention, depending on ballast water capacity and date for renewal survey of the vessel. Therefore ballast water treatment will be the only remaining option for complying with the Convention.

During normal conditions the treatment system is to be used for ballast water operations, however it is possible to bypass this and then ballast exchange can be conducted.

It is the responsibility of the ballast water management officer to decide which method is to be used (e.g. in port states where discharge of treated ballast water is not a requirement.)

It is the Master's responsibility to control the safety of the vessel at all times. This includes evaluation of stability and longitudinal strength throughout the sequential exchange sequence. The sequence included in this document is only one example of an acceptable sequence for one specific loading condition.

It must be ensured that the ballast water treatment system installed is approved in accordance with Regulation D-3 of the Convention. All systems (type) approved by any IACS Class society and physically inspected by Class' surveyor after installation should fulfil this requirement.

The system should only be operated in accordance with the system design criteria and manufacturer's operational and maintenance instructions. When the system encounters malfunctions or failure, these are to be recorded in the ballast water record book.

## 3 BALLAST WATER EXCHANGE

There are three methods of ballast water exchange which have been evaluated and accepted by IMO. The three methods are the sequential method, the flow-through method and the dilution method. The flow-through method and the dilution method are considered as "pump through" methods.

Regulation B-4 of the Convention requires that vessels shall conduct ballast water exchange:

- At least 200 nautical miles from the nearest land and in water at least 200 meters in depth; if this is not possible
- At least 50 nautical miles from the nearest land and in water at least 200 meters in depth; or
- In areas designated by the Port State.

All local and/or national regulations should be taken into consideration as they may specify other depths and distances from land.

It is the Master's responsibility to control the safety of the vessel at all times. This includes evaluation of stability and longitudinal strength throughout the sequential exchange sequence. The sequence included in this document is only one example of an acceptable sequence for one specific loading condition.

A vessel shall not be required to deviate from its intended voyage or delay the voyage in order to comply with any particular requirement as stated above.

The voyage should be planned taking into account when ballast water exchange in accordance with the above criteria can be carried out.

Because of the possibility that partially exchange may encourage re-growth of organisms, ballast water exchange should only be commenced in any tank if there is sufficient time to complete the exchange to comply with the standard in Regulation D-1 and the vessel can comply with the distance from land and minimum water depth criteria in Regulation B-4. As many complete tanks should be

exchanged to the standard in Regulation D-1 as the time allows, if for any tank the standard in Regulation D-1 cannot be fully met the exchange should not be commenced for that tank.

In addition, if the master reasonably decides that an exchange would threaten the safety or stability of the vessel, its crew or passengers because of adverse weather, vessel design or stress, equipment failure, or any other extraordinary condition he is not required to comply with above requirements.

When a vessel is required to conduct ballast water exchange and does not do so in accordance with these requirements, the reasons shall be entered in the ballast water record book.

The applied ballast water exchange methods for this vessel are the following:

## 3.1 Ultra Violet Treatment / Filtration

### 3.1.1 General

The ballast water is prepared for UV disinfection using a variety of filters or cyclonic separators. The systems are usually automated; the UV systems have automatic wiping and the filters automatic backwashing.

UV works by permanently damaging the DNA of all living organisms. The damaged (or dimerized) DNA is no longer able to support normal cell function and the organism is rendered non-viable.

The sizing of the UV system is determined by: (a) flow rate; (b) transmittance of the fluid to ultraviolet light and (c) the dose requirement. The method is non- intrusive and does not alter the chemistry, color or physical property of the ballast water.

Different organisms have demonstrated varied resistance to UV. A growing number of organisms are being found to be highly resistant to chlorine and many of these emerging pathogens are effectively disinfected using UV.

UV dose is expressed in mJ cm-2. Most of the leading UV manufacturers use CFD (computational fluid dynamics) models to predict the performance of the UV systems.

Working in partnership with BWT system providers, they use a variety of validation techniques to determine the actual UV system performance in the BWT process.

Preparation of ballast water is very important, as color, suspended solids and particulates would render the UV ineffective.

3.1.2 Vessel Specific Ballast Condition:

| Tank # | Volume M3 @ 100% | Tested Ullage/Sounding | Sounding M @ 100% | Fluid Calc in Tank | SG of Tank |
|---|---|---|---|---|---|
| 1 Center | 2016 | 0.42 | 7.6 | 106 | 12.4 |
| 2 Center | 2016 | 0.61 | 7.6 | 159 | 8.99 |
| 3 Center | 2016 | 061 | 7.6 | 159 | 15.6 |
| 4 Center | 2016 | 1.16 | 7.6 | 318 | 20.3 |
| 5 Center | 2016 | 1.36 | 7.6 | 371 | 21.5 |
| 6 Center | 2016 | 1.26 | 7.6 | 340 | 21.5 |
| 7 Center | 2016 | 0.53 | 7.6 | 125 | 27 |
| 1 StBd | 1039 | 0.84 | 7.6 | 115 | 20.2 |
| 2 Stbd | 1039 | 0.81 | 7.6 | 110 | 9.81 |
| 3 Stbd | 1039 | 0.96 | 7.6 | 130 | 8.03 |
| 4 Stbd | 1039 | 1.56 | 7.6 | 200 | 22.1 |
| 5 Stbd | 1039 | 0 | 7.6 | 0 | 0 |
| 6 Stbd | 1039 | 0 | 7.6 | 0 | 0 |
| 7 Stbd | 1106 | 0 | 7.6 | 0 | 0 |
| 1 Port | 1039 | 0.43 | 7.6 | 60 | 18 |
| 2 Port | 1039 | 0.51 | 7.6 | 96 | 22 |
| 3 Port | 1039 | 0.46 | 7.6 | 65 | 16.4 |
| 4 Port | 1039 | 1.34 | 7.6 | 175 | 11.0 |
| 5 Port | 1039 | 0.46 | 7.6 | 65 | 15.3 |
| 6 Port | 1039 | 1.26 | 7.6 | 170 | 26.3 |
| 7 Port | 1106 | 125 | 7.6 | 165 | 27.3 |

## 4 BALLAST WATER TREATMENT

### 4.1 Treatment system details

| | |
|---|---|
| Manufacturers Name | Hyde Marine |
| Model Name | Hyde GUARDIAN HG 200S |
| Technology | Filtration + UV |
| Operation required during | Ballast Management |
| TRC (Capacity) in m3 /h) | 200 m3/h |
| Installation Location | Vessel Engine room |
| Type Approval Certificate No. | DNV ID No: 34143 |
| TAC issued by | DNV |
| Number of ballast pumps to be used simultaneously | one/two ballast pumps |

1) Range of flow rate from a minimum acceptable capacity up to the Treatment Rated Capacity acc. to TAC.
2) Only one/two pumps can be used at a time for ballasting/de-ballasting, except in cases of emergencies.
Ballast water treatment system's operation manual, The system should only be operated in accordance with the system design criteria and manufacturer's operational and maintenance instructions given in.

### 4.2 Control and monitoring equipment

The control equipment automatically monitors and adjusts necessary dosages or intensities or other aspects of the ballast water management system.

The control equipment should be able to store data for at least 24 months and should be able to display or print a record for official inspections as required. In the event the control equipment is replaced, means should be provided to ensure the data recorded prior to replacement remains available on board for 24 months.

The control equipment of this treatment system consists of the following:

- Number of control panels with locations
- Integration to vessel automation system
- List of equipment located in hazardous area with reference to EX certificate if applicable

4.3 Operation of the treatment equipment

4.3.1 Normal operating parameters

This section includes simple and important parameters for the operation of the equipment, for example

4.3.2 Limitations of the system this section must include limitation for operating the equipment, for example

• Minimum holding time in the tanks for systems using active substances • minimum UV transmittance the system manages to treat
• Salinity, temperature, pH etc.
• Use of stripping ejector (i.e. treatment of driving water)

4.3.3 Ballasting operations this section must include vessel specific procedure for ballasting operation, such as

• Before ballasting operations start (such as warm up sequence or internal circulation)
• For stopping ballasting operations
• Detailed reference to the Operation Manual can be sufficient
4.3.4 De-ballasting operations this section must include vessel specific procedure for de-ballasting operation, such as:

• Before de-ballasting operations start (such as warm up sequence or internal circulation) • • for stopping de-ballasting operations
• Detailed reference to the Operation Manual can be sufficient
4.3.5 Shutdown of the treatment system this section must include procedure for shutdown. Detailed reference to the Operation Manual can be sufficient

4.3.6 By-pass

The Convention requires the control system of the BWMS to trig an alarm and log any by-pass of the BWMS. This include bypass due to gravity filling or discharge of tanks. Treatment is not required for internal transfer, but such operations will be recorded. The system will always trig the alarm in case of by-pass.

Opening the following valves will give alarm and logging:
< All by-pass valves subject to alarm and logging are to be listed as approved>
- During ballasting
- During de-ballasting

Bypassing the treatment system during operation within one coastal zone is allowed. This will lead to untreated water in the pipeline. Procedure to remove untreated water in pipeline is described in the chapter below.

## 4.4 Handling of untreated ballast water

Untreated water in pipelines

The ballast water pipeline may contain untreated water in case of e.g. bypass of the BWMS, common pipeline for ballast water uptake and discharge or BWMS failure. To avoid discharge of untreated ballast water, the following procedure will be carried out:

Ballast water remaining in tanks

Ballast water remaining in the tanks after de-ballasting which has been treated only upon intake may contain organisms that can reproduce in the ballast tanks potentially serving as a contamination source for subsequent ballasting. To minimize the possibility of contamination it is important to empty the tanks as much as possible.

## 4.5 Cleaning of combined ballast tanks

Tanks used for other purposes (e.g. mud / grey water / treated sewage) should be cleaned prior to using for holding ballast water that shall be treated. Otherwise the BWMS may not work properly.

## 4.6 Safety and emergency procedures for the BWMS

The following Personal Protection Equipment (PPE) is provided in case of emergency:

The Personal Protective Equipment Directive provides for product classification into three categories.

Level A- This is the highest level of protection for extremely harmful situations that require then the highest level of respiratory, skin, eye and mucous membrane protection.

A typical Level A ensemble includes:

Respiratory - Positive pressure (pressure demand), self-contained breathing apparatus (SCBA) (NIOSH approved), or positive-pressure supplied air respirator with escape SCBA

Protective Clothing – Fully encapsulated chemical protective suit (This will protect against splashes and eye protection is not a factor since the person is fully protected within the suit.)

Hand Protection – Gloves- Inner and Outer gloves, both pair being chemical resistant

Foot Protection - Boots, chemical resistant, steel toe and shank; (depending on suit boot construction, worn over or under suit boot.)

Level B – This level of protection is required when there is a significant respiratory risk, but skin and eye protection is not at the highest risk. Level B clothing protects the wearer from chemical splashes.

A typical Level B ensemble includes:

Respiratory - Positive pressure (pressure demand), self-contained breathing apparatus (SCBA), or positive-pressure supplied air respirator with escape SCBA

Protective Clothing – Chemical resistant clothing, including overalls with jacket, coveralls, chemical splash suits with hoods, disposable chemical resistant coveralls

Hand Protection – Gloves- Inner and Outer gloves, both pair being chemical resistant

Foot Protection - Boots, chemical resistant, steel toe and shank

Level C – This level of protection is selected when the respiratory risk is known, the concentration measured, and the correct criteria for using air-purifying respirators are met. Skin and eye exposure is unlikely with this level of protection. Monitoring of the air must be conducted, and if something changes the worker may need to be in a Level B ensemble.

A typical Level C ensemble includes:

Respiratory - Full-face or half-mask, air-purifying respirator (NIOSH approved) with correct cartridges for the respiratory nuisance

Protective Clothing -Chemical resistant clothing, including a one piece coverall, hooded two piece chemical splash suit, chemical resistant hood and apron, disposable chemical resistant coveralls

Hand Protection – Gloves- Inner and Outer gloves, both pair being chemical resistant

Foot Protection - Boots, steel toe and shank, chemical resistant

Level D – This level of protection is the lowest level of protection and primarily consists of a work uniform. PPE is used for nuisance contamination only. Depending on the situation, this level requires only the basic PPE for minimal worker protection. If respiratory or skin hazards exist, then the level should be upgraded accordingly.

4.7 Maintenance of the BWMS

The maintenance schedule for the treatment system is as found in the manufacturers Operation Manual are to be observed.

4.8 CFI Ballast Water Exchange Program

During Canada Fluorspar Regular operations, the company engages vessels from the Global Fleet of Bulk Carriers to carry the main product Fluorspar to markets around the world. With these vessels carrying Ballast Water Treatment Plants onboard there, as a Class requirement for international trade. With Approval the CFI Pontoon 1 will strategically transfer its Ballast Water retained in the Tanks listed in section 3.1.3. over to one of these vessels with an approved system through the ships Ballast System in turn the vessel will transfer through their Ballast Water Treatment Plant and to sea on Location.

## 5 PRECAUTIONARY PRACTICES

### 5.1 Minimizing uptake or transfer of harmful aquatic organisms, pathogens and sediments

Wherever possible, ballast water should be taken outside of port waters and as far from the coast as practicable. Consideration should also be given to the use of dockside water supplies (water not taken directly from the Harbour, such as fresh water, potable water etc.) as source for ballast water.

When loading ballast water, every effort should be made to avoid the uptake of potentially harmful aquatic organisms, pathogens and sediments that may contain such organisms. The uptake of ballast water should be minimized or, where practicable, avoided in areas and situations such as:

1. areas identified by the port state in connection with warnings provided by ports concerning ballast uptake and any other port contingency arrangements in the event of emergency situations
2. in darkness when organisms may rise up in the water column
3. in very shallow water
4. where propellers may stir up sediment
5. areas with current large phytoplankton blooms (algal blooms such as red tides)
6. nearby sewage outfalls
7. where a tidal stream is known to be more turbid
8. where tidal flushing is known to be poor
9. in areas close to aquaculture
10. where dredging is or recently has been carried out.

If it is necessary to take on and discharge ballast water in the same location, care should be taken to avoid unnecessary discharge of ballast water that has been taken up in another location.

### 5.2 Non-release/minimal release of ballast water

The requirements to ballast water management differ from port state to port state. Some have no requirements, some require reporting of ballast water practise and record book and others require ballast water exchange before arrival in their waters. In case ballast water exchange is requested by the port states, this will be applicable to ballast tanks planned to be discharged in their waters. For some loading conditions not all tanks need to be discharged, hence these will not have to be exchanged prior to arrival.

### 5.3 Discharge to reception facilities

If reception facilities for ballast water and/or sediments are provided by a port state, they should, where appropriate, be utilized.

## 6 SEDIMENT MANAGEMENT

Water taken up as vessels' ballast can contain solid alluvial matter that, once the water is becalmed in a vessel's ballast tank, will settle out onto the bottom of the tank and other internal structures.

Aquatic organisms can also settle out of the ballast water and can continue to exist within the sediment. These organisms can survive for long periods after the water they were originally in has been discharged. They may thereby be transported from their natural habitat and discharged in another port or area where they may cause injury or damage to the environment, human health, property and resources.

### 6.1 General requirements

All practical steps should be taken during ballast uptake to avoid sediment accumulation, it is however recognized that sediment will be taken on board and settle on tank surfaces. The volume of the sediment should be monitored on a regular basis. Sediment in ballast tanks should be removed in a timely basis and as found necessary. The frequency and timing of removal will depend on factors such as sediment build up, vessel's trading pattern, availability of reception facilities, work load of the vessel's personnel and safety considerations.

### 6.2 Disposal of sediments to shore

Removal of sediment from ballast tanks should preferably be undertaken under controlled conditions in port, at a repair facility or in dry dock. The removed sediment should preferably be disposed of in a sediment reception facility if available, reasonable and practicable. One should be aware that sediments lying undisturbed for some time may give off toxic gases and appropriate measures must be taken to protect the crew carrying out the job.

### 6.3 Disposal of sediments at sea

When sediment is removed from the vessel's ballast tanks and is to be disposed of by that vessel at sea, such disposal should only take place in areas outside 200nm from land and in water depths of over 200m. Part of the mud may be removed by water movement within a tank to bring sediments to suspension. In double bottom tanks this is achieved by filling clean water 0.5-1 meter sounding in mild weather conditions and keeping it for about 6 hours before pumping it out. In addition the Master may decide to store the sediments onboard the vessel when this will not hamper the security and operational maintenance of the vessel, her cargo and the crew. The sediments must then be disposed of as described in 6.2 and above in this paragraph. Special care is to be taken if ballast water has been carried in spaces designated for other purposes, such as fuel, oil, fresh water

tanks etc. Disposal of the sediments then depends upon the final mixture, e.g. if ballast water is carried in the fuel tanks, more stringent requirements than described above are to be considered.

## 7 BALLAST WATER SAMPLING

Sampling of ballast water is primarily a matter for the authorized inspection officers during port state control. For crew members there is unlikely any need to take samples except at the express request and under the supervision of authorized inspection officers.

### 7.1 General

The table below indicates sampling and accessed on the CFI Pontoon 1 from the deck hatches and tanks, to enable crew members to quickly assist the authorized officers of a party that have reasons to obtain samples.

| Soundings and Samples January 5, 2022 CFI Pontoon | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | | | | | |
| Tank Number | Stbd In M | Weight/T | Center In M | Weight/T | Port In M | Weight/T | |
| #1 | 0.84 | 115 | 0.42 | 106 | 0.43 | 60 | |
| #2 | 0.81 | 110 | 0.61 | 159 | 0.51 | 96 | |
| #3 | 0.96 | 130 | 0.61 | 159 | 0.46 | 65 | |
| #4 | 1.56 | 200 | 1.16 | 318 | 1.34 | 175 | |
| #5 | 0 | 0 | 1.36 | 371 | 0.46 | 65 | 555 |
| #6 | 0 | 0 | 1.26 | 340 | 1.26 | 170 | 1578 |
| #7 | 0 | 0 | 0.53 | 125 | 1.21 | 165 | 796 |
| Total | 4.17 | 555 | 5.95 | 1578 | 5.67 | 796 | |

- Sampling from the ballast water discharge line
- Sampling from ballast water tanks
- Sampling and analysis protocols
- Sample data forms
- Health and safety aspects
- Recommendation for a port state control ballast water sampling kit
- Maintenance, storage, labelling and transportation
- Chain of custody record

7.2 Sampling for compliance with the exchange standard (Regulation D-1)

In-tank sampling may be appropriate for assessing compliance with ballast water exchange standard (D1).

Sampling the ballast water on arriving vessels may provide information on compliance with the ballast water exchange standard by analyzing their physical and/or chemical parameters. However, it is difficult to use indicator (physical/chemical) parameters in isolation to conclusively prove that ballast water exchange either has or has not occurred to the D-1 standard. As with any analytical procedures or techniques used to test for compliance with the ballast water exchange standard, methods used to test for compliance with ballast water exchange requirements should be rigorously validated and widely distributed through the IMO.

For this vessel, sampling for compliance with the ballast water exchange standard is provided through the following:

7.2.1 Sampling from the ballast water discharge line

The location of the sampling lines is given

7.2.2 Sampling from ballast water tanks

Sampling from ballast water tanks for this vessel is done through:

- Manholes for ballast tanks.

- Sounding pipes for ballast tanks

- Air pipes for ballast tanks.

The location of the sampling openings is given in the drawing in Appendix 1.

7.3 Sampling for compliance with the performance standard (Regulation D-2)

Compliance with ballast water performance standard (D-2) should be assessed at ballast water discharge, as near to the point of discharge as practicable, during ballast water discharge whenever this is possible.

In-tank sampling to provide an indication of compliance with standard D-2 should only be used if ballast water treatment process occurs on uptake, prior to or whilst ballast water is in the tank. If any part of

the treatment or neutralization process is applied during the ballast water discharge, then in-tank sampling is inappropriate.

For this vessel, sampling for compliance with the ballast water discharge standard is provided through the following:

## 8 METHODS OF COMMUNICATION

This section contains procedures to assist the Master in coordinating the discharge of ballast in waters of a coastal state, local government or other involved parties.
The quick and effective communication between the vessel and coastal state or other involved party becomes vital in mitigating the effects of an unnecessary delay.
The requirements and roles of the various national and local authorities involved vary widely between states and even from port to port. Approaches to the responsibility for ballast water exchange also vary. In the majority of coastal states, responsibility for compliance with port state requirements is placed on the vessel owner and the vessel.
The port state authorities should be contacted for specific ballast water discharge requirements and reporting, prior to the vessel's arrival in port state's territorial waters.
Therefore, the Master with the responsible officer should timely obtain all necessary information and prepare the vessel accordingly, taking into consideration the safety and operational restrictions as described in this plan and relevant sections. Information on specific port state procedures can be obtained by consulting the company and local agent for latest information and requirements.

### 8.1 Action to be taken by the vessel where coastal state has specific procedures for discharge of ballast water

- Follow agreed reporting procedures
- Contact vessel's agent and/or company to ascertain latest information on ballast discharge requirements in the water of respective state
- Ensure to timely plan for above actions and that safety and operational restrictions are met
- Keep proper records and have them readily available for possible inspection 8.2 Action to be taken by the vessel where coastal state has no specific procedures for discharge of ballast water
- Contact vessel's agent and/or company to obtain latest information on ballast discharge requirements in the water of respective state
- Carry out discharge of ballast water as per the ballast exchange sequence
- Take into consideration safety and operational procedures related to respective discharge
- Keep proper records and have them readily available for possible inspection

## 9 DUTIES OF THE BALLAST WATER MANAGEMENT OFFICER

The ballast water management officer is responsible for implementing the procedures of the ballast water management plan.

Duties of the ballast water management officer:

- Ensure the safety of the vessel and crew
- Ensure that ballast water management and/or treatment procedures are followed and recorded
- Where ballast exchange is required, ensure that the steps of the ballast exchange sequence are followed in the prepared order
- Ensure adequate personnel and equipment are available for the execution of the planned ballast water management operations
- Ensure all required ballast water management records are maintained and up to date, including the ballast water record book
- Where required, prepare the appropriate national or port ballast water declaration forms prior to arrival
- Assist the port state control or quarantine officers for any sampling that may need to be taken
- Undertake familiarization and training of crew in ballast water management requirements and applicable shipboard systems and procedures
- Other duties, as specified by the company.

The Master must ensure that the ballast water management plan is clearly understood by the appointed officer and by any other vessel staff that may need to be involved.

The ballast water management officer must keep the Master advised on the progress of the ballast water management operations and any envisaged deviations from the agreed plan.

Should there be any doubt or if the management plan is not in line with the schedule, the Master shall be advised accordingly.

## 10 CREW TRAINING AND FAMILIARIZATION

It is essential that the Master, vessel's officer and crew have an understanding of the need for ballast water management.

If crew members understand the reasons for the treatment or exchange of ballast water and associated sediments, they are more likely to ensure that it is carried out effectively and efficiently.

Owners, managers, operators and others involved in officer and crew training for ballast water management should consider the following:

• training for vessels' Masters and crews as appropriate should include instructions on the requirements of the Convention, the ballast water and sediment management procedures and the ballast water record book, drawing particular attention to matters of vessel safety, maintenance of records and reporting requirements in accordance with the Convention.

Vessels' officers and ratings engaged in ballast water exchange at sea must be aware of what is expected of them and should be familiarized and trained in the following:

• Vessel's pumping arrangements including ballast arrangements;
• Location of air and sounding pipes of all ballast tanks;
• Positions of all ballast tank suctions and pipelines;
• Overboard discharge arrangements and openings for release of water on deck;
• Inspection and maintenance for ensuring that sounding pipes are clear and that air pipes and non-return devices are in good order;
• Times and circumstances required to undertake the various ballast water exchange operations;
• Methods used for ballast water exchange at sea, the related safety precautions and associated hazards; and
• Location and suitable access points for sampling purposes. The Master and ballast water management officer should ensure that the personnel assigned key responsibilities in any ballast exchange procedures are suitable and well trained according to the above. Special attention should be given to the safety aspects related with the subject procedures. Provisions for crew training and familiarization include the following:
• General requirements for ballast water management;
• Training and information on ballast water management practices;
• Ballast water treatment systems installed on board;
• Ballast water exchange methods;
• General safety considerations;
• The ballast water record book and maintenance of records;

• Safety aspects associated with the particular systems and procedures used on board the vessel which affect the safety or human health of crew and passengers and/or the safety of the vessel;
• Precautions for entering tanks for sediment removal;
• Procedures for the safe handling and packaging of sediment; and
• Storage of sediment

## 11 RECORDING REQUIREMENTS

The ballast water management officer is to ensure that the Ballast Water Record Book and any other necessary documentation and forms are kept up-to-date.

The Ballast Water Record Book may be an electronic record system or may be integrated into another record book or system.

The Ballast Water Record Book entries shall be maintained on board the vessel for a minimum period of two years after the last entry has been made.

The control equipment of the ballast water treatment system is able to store data for at least 24 months. The requirements for type approval are that the control equipment should be able to display or print a record for official inspections as required. In the event the control equipment is replaced, means should be provided to ensure the data recorded prior to replacement remains available on board for 24 months.

## APPENDICES

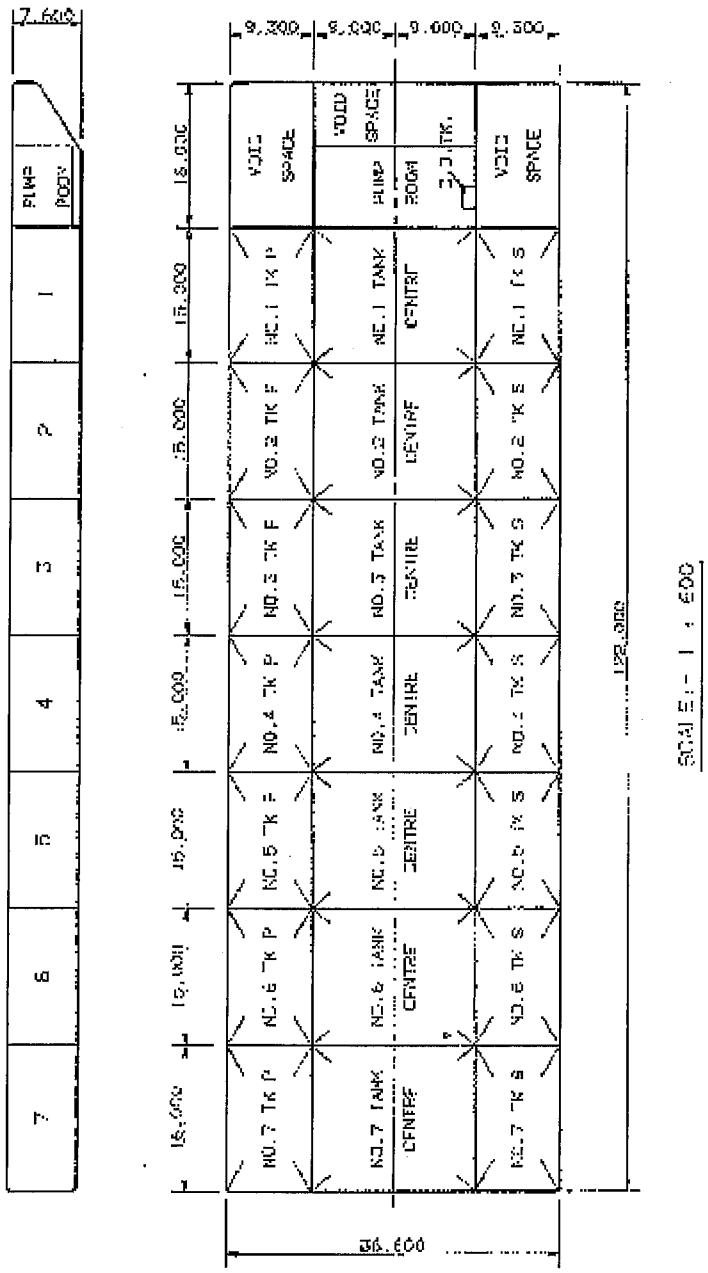
Plans and Drawings
Appendix 1. General Arrangement
Appendix 2. Tank Capacities
Appendix 3. Load Line
Appendix 4. Framing Layout
Appendix 5. Water Sample Results
Appendix 6. Tank Status

Note: If Appendix Attachments are not clear Double Click to PDF attachment to clear view.

GENERAL ARRANGEMENT

PAGE NO. 2

## Appendix 1 : General Arrangment



## Appendix 2 : Tank Capacities

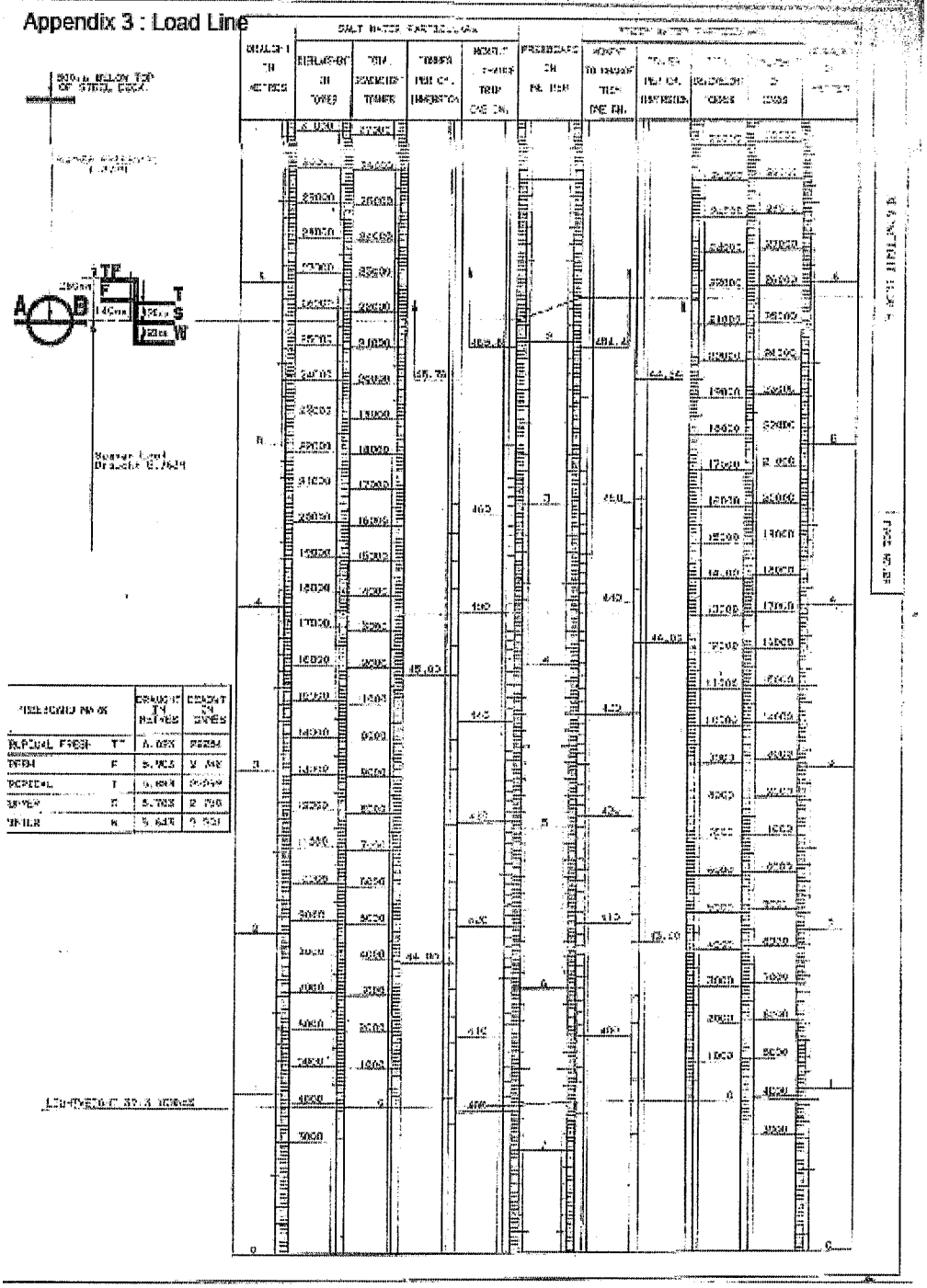
CHANGE OF DRAFT - BODILY SINKAGE + TRIM * L.C.F. FROM FWD OR AFT END / L.B.P.

BODILY SINKAGE IN M.M. = WEIGHT * 10 / T.P.CM

CHANGE OF TRIM - WEIGHT * L.C.G. OF COMPARTMENT FROM L.C.F. * 10 / MOMENT TO CHANGE TRIM ONE CM.

| EFFECT ON TRIM WHEN FILLING TANKS AT A MEAN DRAFT OF [illegible] METRES | | | | | |
|---|---|---|---|---|---|
| COMPARTMENT | ADDED WEIGHT TONNES | CHANGE OF TRIM M.M. | SINKAGE M.M. | CHANGE OF DRAFT AT MARKS | |
| | | | | AFT | FWD |
| NO.1 TANK CENTRE | 2066 | 1754 | 457 | -379 | 1229 |
| NO.1 TANK PORT | 1065 | 904 | 235 | - 85 | 633 |
| NO.1 TANK STBD | 1065 | 904 | 235 | -190 | 633 |
| NO.2 TANK CENTRE | 2066 | 1065 | 457 | -51 | 925 |
| NO.2 TANK PORT | 1065 | 549 | 235 | -26 | 477 |
| NO.2 TANK STBD | 1065 | 549 | 235 | 25 | 477 |
| NO.3 TANK CENTRE | 2066 | 378 | 457 | 276 | 603 |
| NO.3 TANK PORT | 1065 | 195 | 235 | 142 | 321 |
| NO.3 TANK STBD | 1065 | 195 | 235 | 142 | 321 |
| NO.4 TANK CENTRE | 2066 | -369 | 457 | 605 | 320 |
| NO.4 TANK PORT | 1065 | -189 | 235 | [illegible] | 165 |
| NO.4 TANK STBD | 1065 | -189 | 235 | [illegible] | 165 |
| NO.5 TANK CENTRE | 2066 | 996 | 457 | 933 | 7 |
| NO.5 TANK PORT | 1065 | -513 | 235 | [illegible] | 9 |
| NO.5 TANK STBD | 1065 | -513 | 235 | 181 | 9 |
| NO.6 TANK CENTRE | 2066 | -1664 | 457 | [illegible] | 285 |
| NO.6 TANK PORT | 1065 | -858 | 235 | 530 | -146 |
| NO.6 TANK STBD | 1065 | -858 | 235 | 530 | -146 |
| NO.7 TANK CENTRE | 2200 | -2549 | 486 | [illegible] | -636 |
| NO.7 TANK PORT | 1124 | -1313 | 251 | [illegible] | -327 |
| NO.7 TANK STBD | 1124 | -1313 | 251 | [illegible] | -327 |
| DIESEL OIL TANK STBD | 15 | 16 | 2 | 3 | 1 |
| | | | | | |
| EFFECT ON TRIM DUE TO ADDING 100 TONNES AS FOLLOWS | | | | | |
| 20 MTRES FWD OF A.P. | 100 | 88 | 22 | 66 | -16 |
| 30 MTRES FWD OF A.P. | 100 | -66 | 22 | 54 | -6 |
| 40 MTRES FWD OF A.P. | 100 | -44 | 22 | 44 | 2 |
| 50 MTRES FWD OF A.P. | 100 | -22 | 22 | 33 | 12 |
| 60 MTRES FWD OF A.P. | 100 | 0 | 22 | 22 | 22 |
| 70 MTRES FWD OF A.P. | 100 | 22 | 22 | 12 | 32 |
| 80 MTRES FWD OF A.P. | 100 | 44 | 22 | [illegible] | 41 |
| 90 MTRES FWD OF A.P. | 100 | 66 | 22 | -8 | 51 |
| 100 MTRES FWD OF A.P. | 100 | 88 | 22 | -19 | 61 |

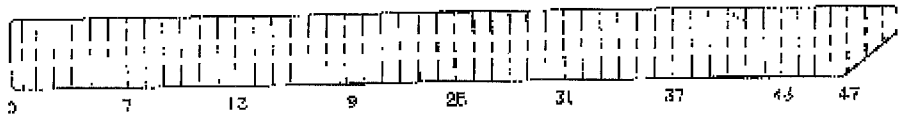
## Appendix 3 : Load Line

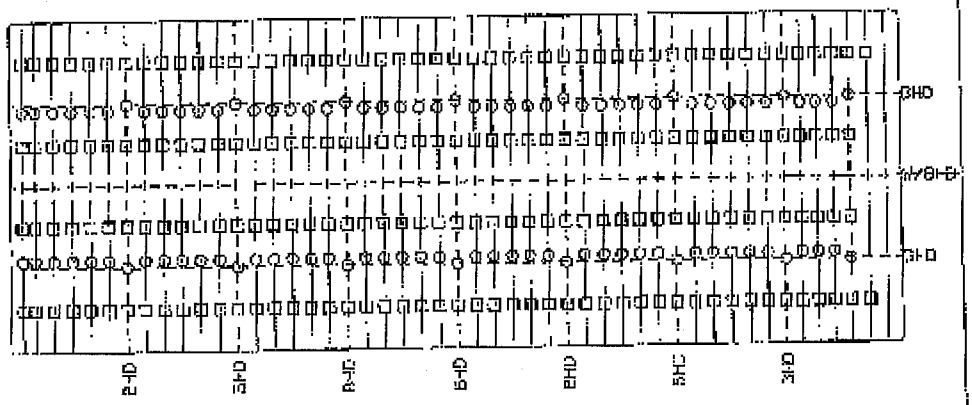


## Appendix 4 : Framing Layout

LOADING SCHEDULE

PART NO.8




MAXIMUM SURFACE LOADING.....15 TONNES PER SQUARE METRE

□ - CONCENTRATED LOADING ON DECK BEAMS/BULKHEADS.....250 TONNES/OVER M²

○ - CONCENTRATED LOADING AT CRUCIFORM OF OUTBOARD LONGITUDINAL BULKHEAD WITH DECK TRANSVERSE OR TRANSVERSE BULKHEAD :-
(a) AT ALTERNATE CRUCIFORMS SIMULTANEOUSLY .....750 TONNES
(b) AT EACH CRUCIFORM SIMULTANEOUSLY.....500 TONNES
LOADS TO BEAR UNIFORMLY IN A TRANSVERSE DIRECTION 2M EACH SIDE OF NO.11 DECK LONGITUDINAL (ON THE TRANSVERSE) AND IN A FORE AND AFT DIRECTION 1.25M EACH SIDE OF THE TRANSVERSE/TRANS. BULKHEAD (ON THE LONGITUDINAL BULKHEAD)

NOTE: FOR FURTHER GUIDANCE REFER TO LOADING DIAGRAM.

AMERICAN BUREAU NOTE:-

ON DECK SEATINGS (OR EQUIVALENT) TO BE ARRANGED IN WAY OF SUCH SPECIFIED LOADS AT JUNCTIONS OF DECK TRANSVERSES AND BULKHEADS TO ENSURE PROPER DISTRIBUTION OF LOADS TO UNDERDECK SUPPORT STRUCTURE. CONCLUDE DETAILS WILL BE SUBMITTED BY OPERATORS FOR EACH "LOAD OUT" CONDITION UNDERTAKEN IN SERVICE.

Appendix 5: Water Sample Results

AGAT Laboratories

# Certificate of Analysis

AGAT WORK ORDER: 22K8 61346

PROJECT: Blue Beach

57 Old Petty Harbour Road, Unit 1
St. John's, NL
CANADA A1E 0A7
Tel: (709) 747 3551
Fax: (709) 747 2123
E-Mail: www.agatlab.com

CLIENT NAME: CANADA FLUORSPAR (NL) INC.

SAMPLING SITE:

ATTENTION TO: Jason Flood

SAMPLED BY:

## Salinity

DATE RECEIVED: 2022-01-18

DATE REPORTED: 2022-01-24

| | | SAMPLE DESCRIPTION: | | INF 5 TBD | INF 1 CENT | INF 1 PORT | INF 2 PORT | INF 2 CENT | INF 2 STBD | INF 3 STBD | INF 3 CENT |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | SAMPLE TYPE: | | Water | Water | Water | Water | Water | Water | Water | Water |
| | | DATE SAMPLED: | | 2022-01-05 | 2022-01-05 | 2022-01-05 | 2022-01-05 | 2022-01-05 | 2022-01-05 | 2022-01-05 | 2022-01-05 |
| Parameter | Unit | G/S | RDL | 3409903 | 3409914 | 3409905 | 3409906 | 3409907 | 3409908 | 3409909 | 3409910 |
| Electrical Conductivity | µS/cm | | 1 | 29300 | 17900 | 29000 | 30500 | 16000 | 5490 | 6300 | 22600 |
| Temperature | Deg C | | | 21 | 21 | 21 | 21 | 21 | 21 | 21 | 21 |
| Salinity | ppt | | | 21.2 | 12.0 | 19.1 | 22.0 | 10.9 | 3.01 | 4.03 | 15.6 |

| | | SAMPLE DESCRIPTION: | | INF 3 PORT | INF 4 PORT | INF 4 CENT | INF 4 STBD | INF 5 CENT | INF 5 PORT | INF 6 CENT | INF 6 PORT |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | SAMPLE TYPE: | | Water | Water | Water | Water | Water | Water | Water | Water |
| | | DATE SAMPLED: | | 2022-01-05 | 2022-01-05 | 2022-01-05 | 2022-01-05 | 2022-01-05 | 2022-01-05 | 2022-01-05 | 2022-01-05 |
| Parameter | Unit | G/S | RDL | 3409911 | 3409912 | 3409913 | 3409914 | 3409915 | 3409916 | 3409917 | 3409918 |
| Electrical Conductivity | µS/cm | | 1 | 24000 | 17900 | 28000 | 32400 | 29000 | 23000 | 31000 | 31000 |
| Temperature | Deg C | | | 21 | 21 | 21 | 21 | 21 | 21 | 21 | 21 |
| Salinity | ppt | | | 15.4 | 11.0 | 20.3 | 22.1 | 21.0 | 15.8 | 21.9 | 20.3 |

| | | SAMPLE DESCRIPTION: | | INF 7 CENT | INF 7 PORT |
|---|---|---|---|---|---|
| | | SAMPLE TYPE: | | Water | Water |
| | | DATE SAMPLED: | | 2022-01-05 | 2022-01-05 |
| Parameter | Unit | G/S | RDL | 3409919 | 3409920 |
| Electrical Conductivity | µS/cm | | 1 | 38900 | 31300 |
| Temperature | Deg C | | | 21 | 21 |
| Salinity | ppt | | | 27.0 | 21.9 |

Comments: RDL = Reported Detection Limit G/S = Guideline/Standard

3409903 3409905 Salinity is a calculated parameter. The calculated parameters are accredited. The component parameters of the calculation are accredited.

Analysis performed at AGAT Halifax (unless marked by *)

Certified By:



Results relate only to the items tested. Results apply to samples as received.

Appendix 5: Water Sample Results

AGAT Laboratories

# Certificate of Analysis

AGAT WORK ORDER: 22K064345

PROJECT: Blue Beach

CLIENT NAME: CANADA FLUORSPAR (NL) INC.

SAMPLING SITE:

ATTENTION TO: Jason Flood

SAMPLED BY:

## TSS

DATE RECEIVED: 2022-01-06

DATE REPORTED: 2022-01-14

| Parameter | Unit | SAMPLE DESCRIPTION: SAMPLE TYPE: DATE SAMPLED: | G / S | RDL | TP1 STRD Water 2022-01-05 | TP1 CENT Water 2022-01-05 | TP1 PORT Water 2022-01-05 | TP2 PORT Water 2022-01-05 | TP2 CENT Water 2022-01-05 | TP2 STBD Water 2022-01-05 | TP3 STBD Water 2022-01-05 | TP3 CENT Water 2022-01-05 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Total Suspended Solids | mg/L | | | 5 | 10 | 6 | 12 | 9 | 7 | <5 | <5 | 8 |

| Parameter | Unit | SAMPLE DESCRIPTION: SAMPLE TYPE: DATE SAMPLED: | G / S | RDL | TP3 PORT Water 2022-01-05 | TP4 PORT Water 2022-01-05 | TP4 CENT Water 2022-01-05 | TP4 STBD Water 2022-01-05 | TP5 CENT Water 2022-01-05 | TP5 PORT Water 2022-01-05 | TP5 CENT Water 2022-01-05 | TP6 PORT Water 2022-01-05 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Total Suspended Solids | mg/L | | | 5 | <5 | 7 | 6 | 7 | 8 | <5 | 6 | <5 |

| Parameter | Unit | SAMPLE DESCRIPTION: SAMPLE TYPE: DATE SAMPLED: | G / S | RDL | TP7 CENT Water 2022-01-05 | TP7 PORT Water 2022-01-05 |
|---|---|---|---|---|---|---|
| Total Suspended Solids | mg/L | | | 5 | 10 | <5 |

Comments: RDL - Reported Detection Limit G / S - Gross / Solids

(Analysis performed at AGAT Mississauga unless marked by *)

Certified By:



Results relate only to the items tested. Results apply to samples as received.

Appendix 6: Tank Status

| | Soundings and Samples January 5, 2022 CFI Pontoon | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | | | | | |
| Tank Number | Stbd In M | Weight/T | Center In M | Weight/T | Port In M | Weight/T | [illegible] |
| #1 | 0.84 | 115 | 0.42 | 106 | 0.43 | 60 | |
| #2 | 0.81 | 110 | 0.61 | 159 | 0.51 | 96 | |
| #3 | 0.96 | 130 | 0.61 | 159 | 0.46 | 65 | |
| #4 | 1.56 | 200 | 1.16 | 318 | 1.34 | 175 | |
| #5 | 0 | 0 | 1.36 | 371 | 0.46 | 65 | 555 |
| #6 | 0 | 0 | 1.26 | 340 | 1.26 | 170 | 1578 |
| #7 | 0 | 0 | 0.53 | 125 | 1.21 | 165 | 796 |
| Total | 4.17 | 555 | 5.95 | 1578 | 5.67 | 796 | [illegible] |

### Short title

**1** This Act may be cited as the *Canada Shipping Act, 2001*.

# Interpretation

### Definitions

**2** The definitions in this section apply in this Act.

**vessel** means a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to method or lack of propulsion, and includes such a vessel that is under construction. It does not include a floating object of a prescribed class. (*bâtiment*)

### Liens

**86 (1)** The master, and each crew member, of a Canadian vessel has a maritime lien against the vessel for claims that arise in respect of their employment on the vessel, including in respect of wages and costs of repatriation that are payable to the master or crew member under any law or custom.

**Foreign liens**

**(2)** The master and each crew member of a vessel on whom a maritime lien against the vessel is conferred by a jurisdiction other than Canada in respect of employment on the vessel has a maritime lien against the vessel.

**Liens for necessaries**

**(2.1)** The master of a Canadian vessel has a maritime lien against the vessel for claims that arise in respect of disbursements made or liabilities incurred by the master for necessaries on account of the vessel.

**Claims**

**(3)** The master, and each crew member, of a vessel may maintain an action against the vessel in the Federal Court, or any court of competent jurisdiction whose rules provide for *in rem* procedure in respect of vessels, for claims in respect of which a lien is conferred by subsection (1), (2) or (2.1).

**Priority**

**(4)** Liens conferred by subsection (1) or (2) rank in priority to all other claims, secured or unsecured, against the vessel, other than

**(a)** claims for costs relating to the arrest and the judicial sale of the vessel; or

**(b)** any lien arising from a claim for salvage in respect of the vessel.

**Priority — liens for necessaries**

**(5)** Liens conferred by subsection (2.1) rank in priority to all other claims, secured or unsecured, against the vessel, other than

**(a)** liens conferred by subsection (1) or (2);

**(b)** claims for costs relating to the arrest and the judicial sale of the vessel; or

**(c)** any lien arising from a claim for salvage in respect of the vessel.

**Carrier's lien**

**248 (1)** A carrier has, on goods carried under a contract of carriage, a lien for any amount that is due to the carrier under the contract for freight or costs of storing, disposing of or preserving the goods.

**Notice of lien to owner of goods**

**(2)** Before exercising a lien, a carrier must give notice of it to the owner of the goods, specifying the amount claimed and the particulars of the claim.

**Notice of lien to third parties**

**(3)** If the carrier places the goods in the custody of a third party and gives the third party notice of the lien and the third party does not retain them until notified by the carrier that the lien is discharged or does not return them to the carrier, the third party is liable to the carrier. The third party may charge the carrier for storing the goods or for any reasonable action taken to preserve them or to protect property or human life from damage they may cause.

**Third party's protection**

**(4)** A third party who retains goods until notified by the carrier that the lien is discharged or who returns them to the carrier is not liable to the owner of the goods, regardless of whether the lien claimed by the carrier is valid.

**Sale or other disposition of goods**

**249 (1)** If an owner of goods does not take delivery of the goods after notice of delivery has been given or fails to discharge a lien after it is exercised, the carrier may

**(a)** sell them by public auction at any time that is 90 days after the notice of delivery is given and 10 days after giving notice of the time and place of the auction in a newspaper that is circulated in the vicinity of the auction; or

**(b)** if the goods are perishable or pose a threat to public health or safety, sell or otherwise dispose of them in the manner and for the

price that is reasonable in the circumstances after giving notice of the sale or other disposition to the owner of the goods.

**Application of proceeds of disposition**

**(2)** The proceeds of the disposition must be credited toward payment of the amounts due or payable under the contract of carriage or any other amounts reasonably incurred for storing, disposing of or preserving the goods. Any surplus must be paid to the owner of the goods.

**Navigation and shipping**

**22 (1)** The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

**Maritime jurisdiction**

**(2)** Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:

**(e)** any claim for damage sustained by, or for loss of, a ship including, without restricting the generality of the foregoing, damage to or loss of the cargo or equipment of, or any property in or on or being loaded on or off, a ship;

**(f)** any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;

**(g)** any claim for loss of life or personal injury occurring in connection with the operation of a ship including, without restricting the generality of the foregoing, any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of the ship are responsible, being an act, neglect or default in the management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;

**(h)** any claim for loss of or damage to goods carried in or on a ship including, without restricting the generality of the foregoing, loss of or damage to passengers' baggage or personal effects;

**(i)** any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;

**(j)** any claim for salvage including, without restricting the generality of the foregoing, claims for salvage of life, cargo, equipment or other property of, from or by an aircraft to the same extent and in the same manner as if the aircraft were a ship;

**(k)** any claim for towage in respect of a ship or of an aircraft while the aircraft is water-borne;

**(m)** any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;

**(n)** any claim arising out of a contract relating to the construction, repair or equipping of a ship;

**(p)** any claim by a master, charterer or agent of a ship or shipowner in respect of disbursements, or by a shipper in respect of advances, made on account of a ship;

**(r)** any claim arising out of or in connection with a contract of marine insurance….

**Jurisdiction applicable**

**(3)** For greater certainty, the jurisdiction conferred on the Federal Court by this section applies

**(a)** in relation to all ships, whether Canadian or not and wherever the residence or domicile of the owners may be;

**(b)** in relation to all aircraft where the cause of action arises out of paragraphs (2)(j) to (l), whether those aircraft are Canadian or not and wherever the residence or domicile of the owners may be;

**(c)** in relation to all claims, whether arising on the high seas, in Canadian waters or elsewhere and whether those waters are naturally navigable or artificially made so, including, without restricting the generality of the foregoing, in the case of salvage, claims in respect of cargo or wreck found on the shores of those waters; and

**(d)** in relation to all mortgages or hypothecations of, or charges by way of security on, a ship, whether registered or not, or whether legal or equitable, and whether created under foreign law or not.

**Jurisdiction *in personam***

**43 (1)** Subject to subsection (4), the jurisdiction conferred on the Federal Court by section 22 may in all cases be exercised *in personam*.

**Jurisdiction *in rem***

**(2)** Subject to subsection (3), the jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against the ship, aircraft or other property that is the subject of the action, or against any proceeds from its sale that have been paid into court.

**Exception**

**(3)** Despite subsection (2), the jurisdiction conferred on the Federal Court by section 22 shall not be exercised *in rem* with respect to a claim mentioned in paragraph 22(2)(e), (f), (g), (h), (i), (k), (m), (n), (p) or (r) unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.

A-215-95

**Feoso Oil Limited** (*Plaintiff*) (*Appellant*)

*v.*

**The Owners and All Others Interested in the Ship "*Sarla*"** (*Defendants*) (*Respondents*)

*INDEXED AS: FEOSO OIL LTD. v. SARLA (THE) (C.A.)*

Court of Appeal, Marceau, Stone and Linden JJ.A.—Vancouver, May 23; Ottawa, June 5, 1995.

*Practice — Judgments and orders — Summary judgment — Appeal from Motions Judge's decision allowing to proceed application for summary judgment dismissing claim in admiralty action in rem on ground no genuine issue of fact — RR. 432.1 to 432.7, governing procedure for obtaining summary judgment, intended to save time, expense of trial where claims or defences without foundation — Moving party required to satisfy Court no genuine issue for trial — Responding party to file evidence setting out facts showing genuine issue — Both sides to file evidence reasonably available on issues raised by pleadings and from which Court can determine whether genuine issue for trial — Respondents' evidence not disproving appellant's assertion fuel for ship's operation ordered by owners, agents — Genuine issue of fact.*

*Maritime law — Contracts — Whether contractual relationship — Appeal from decision to allow to proceed application for summary judgment dismissing claim in admiralty action in rem — Action in rem sustainable only where goods or services provided to defendant ship at request of owners or someone acting on their behalf — Respondents providing marine gas oil, bunkers to ship for its operation — As unclear whether ordered by owners or agent, or out of necessity by master acting with actual or apparent authority, motion for summary judgment should not proceed as genuine issue of fact to be resolved at trial.*

This was an appeal from the Motions Judge's decision to allow the respondents' motion for summary judgment dismissing the plaintiff's claim in this admiralty action *in rem* to proceed on the ground that there were no genuine issues of fact. The defendant ship was arrested on the strength of an affidavit deposing that marine gas oil and fuel oil (bunkers) had been delivered to the defendant ship for its operation. The

A-215-95

**Feoso Oil Limited** (*demanderesse*) (*appelante*)

*c.*

**Les propriétaires du navire «*Sarla*» et toutes autres personnes ayant un droit sur ce navire** (*défendeurs*) (*intimés*)

*RÉPERTORIÉ: FEOSO OIL LTD. c. SARLA (LE) (C.A.)*

Cour d'appel, juges Marceau, Stone et Linden, J.C.A.—Vancouver, 23 mai; Ottawa, 5 juin 1995.

*Pratique — Jugements et ordonnances — Jugement sommaire — Appel de la décision par laquelle un juge des requêtes a permis que la procédure de jugement sommaire visant le rejet de la demande dans une action in rem en matière d'amirauté suive son cours au motif qu'il n'existait aucune question de fait sérieuse à instruire — Les Règles 432.1 à 432.7, régissant la procédure à suivre pour obtenir un jugement sommaire, visent à éviter les délais et les frais liés à un procès dans les cas où les demandes ou les moyens de défense ne sont pas fondés — La partie requérante doit convaincre la Cour qu'il n'existe pas de question sérieuse à instruire — La partie intimée doit produire une preuve qui énonce des faits démontrant l'existence d'une question sérieuse à instruire — Les deux parties doivent produire les éléments de preuve auxquels elles ont raisonnablement accès relativement aux questions soulevées par les actes de procédure et à partir desquels la Cour peut déterminer s'il existe une question sérieuse à instruire — La preuve des intimés ne réfutait pas l'allégation de l'appelante selon laquelle le carburant pour le fonctionnement du navire avait été commandé par ses propriétaires ou leurs agents — Il existait une question de fait sérieuse à instruire.*

*Droit maritime — Contrats — Existence ou non d'un lien contractuel — Appel de la décision de permettre que la procédure de jugement sommaire visant le rejet de la demande dans une action in rem en matière d'amirauté suive son cours — Une action in rem est possible uniquement lorsque les marchandises ou services ont été fournis au navire défendeur à la demande de ses propriétaires ou d'une personne agissant en leur nom — Les intimées ont fourni du mazout lourd au navire pour son fonctionnement — Comme il n'était pas clair si le mazout lourd avait été commandé par les propriétaires ou leurs agents, ou par le capitaine par nécessité avec l'autorisation réelle ou apparente des propriétaires, la demande de jugement sommaire ne devait pas suivre son cours car une question de fait sérieuse devait être tranchée à l'issue d'une instruction.*

Il s'agissait d'un appel de la décision par laquelle le juge des requêtes a permis que la procédure de jugement sommaire, visant le rejet de la demande des demanderesses dans l'action *in rem* en matière d'amirauté, suive son cours au motif qu'il n'existait pas de question de fait sérieuse à instruire. Le navire défendeur a été saisi sur la foi d'un affidavit portant que du gazoil marin et du mazout (le «mazout lourd») avaient été

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bunkers had been ordered by a broker. The plaintiff/appellant alleged, and the defendants/respondents denied, that the bunkers were ordered by or on behalf of the owners.

Rules 432.1 to 432.7 govern the procedure for obtaining summary judgment. Rule 432.3(1) provides that where a judge is satisfied that there is no genuine issue for trial, the judge shall grant summary judgment. Rule 432.3(4) provides that the judge may grant summary judgment where there is a genuine issue unless the judge is unable to find the facts necessary to decide the questions of fact or law or the judge considers that it would be unjust to decide the issues on the motion for summary judgment. Rule 432.2(1) provides that a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out in affidavit material or other evidence, specific facts showing there is a genuine issue for trial.

According to *Federal Court Act*, paragraph 22(2)(*m*) and subsections 43(2) and (3), the right to proceed *in rem* for a claim falling within paragraph 22(2)(*m*) exists only if at the time the action is commenced the ship is beneficially owned by the person who was the beneficial owner at the time the cause of action arose. Only where the owners of a ship have incurred a debt for necessaries supplied does the creditor acquire a right to proceed *in rem* against the ship. The appellant cannot sustain an action *in rem* in the absence of proof that the bunkers were supplied to the defendant ship at the request of the owners or someone acting on their behalf and in a position to bind them.

*Held*, the appeal should be allowed.

Rules 432.1 to 432.7 were intended to save the time and expense of a trial where the claims or defences are clearly without foundation. Both sides are required to file such evidence as is reasonably available to them on the issues raised by the pleadings and from which the Court can determine whether there is a genuine issue for trial. Subsection 432.2(1) of the Rules places upon the responding party an obligation not to rest on the pleadings, but to file evidence setting out "specific facts showing that there is a genuine issue for trial". The moving party is required to satisfy the Court that no such issue existed. Thus the appellant was obligated to bring forth evidence, if so available, showing that there was a genuine issue for trial.

It was not clear whether the owners ordered the bunkers through their agents or whether they were ordered out of some necessity by the master who remained in charge of the ship, with actual or apparent authority of owners. The respondents' evidence did not disprove the assertion in the appellant's evidence that the bunkers were ordered "in accordance with instructions received from purchaser M/V SARLA and

livrés au navire pour son fonctionnement. Le mazout lourd avait été commandé par un courtier. La demanderesse/appelante soutenait, et les défendeurs/intimés niaient, que le mazout lourd avait été commandé par les propriétaires du navire ou en leur nom.

Les Règles 432.1 à 432.7 régissent la procédure à suivre pour obtenir un jugement sommaire. Le paragraphe 432.3(1) oblige le juge à rendre un jugement sommaire lorsqu'il est convaincu qu'il n'existe aucune question sérieuse à instruire. En vertu du paragraphe 432.3(4), le juge peut rendre un jugement sommaire lorsqu'il existe une question sérieuse à instruire, sauf s'il ne peut obtenir les faits nécessaires pour trancher les questions de fait ou de droit ou s'il estime injuste de trancher les questions dans le cadre de la requête en vue d'obtenir un jugement sommaire. Le paragraphe 432.2(1) prévoit que la partie intimée ne peut s'appuyer sur les seules allégations ou dénégations contenues dans ses plaidoiries écrites, mais qu'elle doit énoncer, dans un affidavit ou à l'aide d'un autre élément de preuve, des faits précis démontrant l'existence d'une question sérieuse à instruire.

Par application de l'alinéa 22(2)*m*) et des paragraphes 43(2) et (3) de la *Loi sur la Cour fédérale*, le droit de connaître d'une demande visée à l'alinéa 22(2)*m*) par voie d'action *in rem* existe uniquement si, au moment où l'action est intentée, le navire appartient véritablement à la personne qui en était le véritable propriétaire au moment où la cause d'action a pris naissance. Le créancier acquiert le droit d'intenter une action *in rem* contre le navire uniquement si ses propriétaires ont contracté une dette pour la fourniture de choses de première nécessité. L'appelante ne peut faire valoir une action *in rem* en l'absence de preuve établissant que le mazout lourd a été fourni au navire défendeur à la demande des propriétaires ou d'une personne agissant en leur nom et capable de les lier.

*Arrêt*: l'appel doit être accueilli.

Les Règles 432.1 à 432.7 visent à éviter les délais et les frais liés à un procès dans les cas où les demandes ou les moyens de défense ne sont manifestement pas fondés. Les deux parties doivent produire les éléments de preuve auxquels elles ont raisonnablement accès relativement aux questions soulevées par les actes de procédure et à partir desquels la Cour peut déterminer s'il existe une question sérieuse à instruire. Le paragraphe 432.2(1) des Règles impose à la partie intimée l'obligation de ne pas s'appuyer sur les seules plaidoiries écrites, mais de produire une preuve qui énonce «des faits précis démontrant l'existence d'une question sérieuse à instruire». La partie requérante est tenue de convaincre la Cour qu'il n'en existe pas. L'appelante était donc tenue de présenter une preuve, s'il en était, démontrant qu'il existait une question sérieuse à instruire.

Il n'était pas clair si les propriétaires avaient commandé le mazout lourd par l'intermédiaire de leurs agents, ou si c'est le capitaine, qui demeurait responsable du navire, qui les avait commandées par nécessité avec l'autorisation réelle ou apparente de ses propriétaires. La preuve des intimés ne réfutait pas l'allégation contenue dans la preuve de l'appelante selon laquelle le mazout avait été commandé «en conformité avec les

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owners". This was a genuine issue of fact which could only be resolved at trial.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

*An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England* (U.K.), 1840, 3 & 4 Vict. c. 65, s. 6.

*Federal Court Act*, R.S.C., 1985, c. F-7, ss. 22(2)(*m*), 43(2),(3).

*Federal Court Rules*, C.R.C., c. 663, RR. 2(2), 6 (as enacted by SOR/90-846, s. 2), 302, 332(1), 344 (as am. by SOR/87-221, s. 2), 432.1 (as enacted by SOR/94-41, s. 5), 432.2 (as enacted *idem*), 432.3 (as enacted *idem*), 432.4 (as enacted *idem*), 432.5 (as enacted *idem*), 432.6 (as enacted *idem*), 432.7 (as enacted *idem*).

*Rules of Civil Procedure*, O. Reg. 560/84, RR. 1.04(1), 20.

*Rules of the Supreme Court*, SI 1965/1776 (U.K.), Ord. 14, r. 1.

*The Admiralty Court Act, 1861* (U.K.), 24 Vict., c. 10, s. 5.

CASES JUDICIALLY CONSIDERED

APPLIED:

*The Tolla*, [1921] P. 22 (Adm.); *The Mogileff*, [1921] P. 236 (Adm.); *Mount Royal/Walsh Inc. v. Jensen Star (The)*, [1990] 1 F.C. 199; (1989), 99 N.R. 42 (C.A.); *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225; 45 C.P.C. (2d) 168; 33 C.P.R. (3d) 515 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545; 83 D.L.R. (4th) 734; 1 C.P.C. (3d) 248; 50 O.A.C. 176 (C.A.).

DISTINGUISHED:

*Marine Atlantic Inc. v. Blyth* (1994), 77 F.T.R. 97 (F.C.T.D.); *Nova Scotia Barristers' Liability Claims Fund v. Ship Ashley Lynn* (1994), 80 F.T.R. 141 (F.C.T.D.); *Penthouse International Ltd. v. 163564 Canada Inc.* (1994), 86 F.T.R. 95 (F.C.T.D.).

REFERRED TO:

*Westcan Stevedoring Ltd. v. The Armar*, [1973] F.C. 1232 (T.D.).

APPEAL from Motion Judge's decision allowing to proceed a motion for summary judgment dismissing the claim in an admiralty action *in rem*. Appeal allowed.

COUNSEL:

*John W. Bromley* for plaintiff (appellant).

instructions reçues de l'acheteur M/V SARLA et de ses propriétaires». Il s'agissait là d'une question de fait sérieuse qui ne pouvait être tranchée qu'à l'issue d'une instruction.

LOIS ET RÈGLEMENTS

*An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England* (R.-U.), 1840, 3 & 4 Vict. ch. 65, art. 6.

*Loi sur la Cour fédérale*, L.R.C. (1985), ch. F-7, art. 22(2)*m*), 43(2),(3).

*Règles de la Cour fédérale*, C.R.C., ch. 663, Règles 2(2), 6 (édictée par DORS/90-846, art. 2), 302, 332(1), 344 (mod. par DORS/87-221, art. 2), 432.1 (édictée par DORS/94-41, art. 5), 432.2 (édictée, *idem*), 432.3 (édictée, *idem*), 432.4 (édictée, *idem*), 432.5 (édictée, *idem*), 432.6 (édictée, *idem*), 432.7 (édictée, *idem*).

*Règles de Procédure Civile*, Règl. de l'Ont. 560/84, règles 1.04(1), 20.

*Rules of the Supreme Court*, SI 1965/1776 (R.-U.), Ord. 14, r. 1.

*The Admiralty Court Act, 1861* (R.-U.), 24 Vict., ch. 10, art. 5.

JURISPRUDENCE

DÉCISIONS APPLIQUÉES:

*The Tolla*, [1921] P. 22 (Adm.); *The Mogileff*, [1921] P. 236 (Adm.); *Mount Royal/Walsh Inc. c. Jensen Star (Le)*, [1990] 1 C.F. 199; (1989), 99 N.R. 42 (C.A.); *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225; 45 C.P.C. (2d) 168; 33 C.P.R. (3d) 515 (Div. gén.); *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545; 83 D.L.R. (4th) 734; 1 C.P.C. (3d) 248; 50 O.A.C. 176 (C.A.).

DISTINCTION FAITE AVEC:

*Marine Atlantic Inc. c. Blyth* (1994), 77 F.T.R. 97 (C.F. 1re inst.); *Nova Scotia Barristers' Liability Claims Fund c. Navire Ashley Lynn* (1994), 80 F.T.R. 141 (C.F. 1re inst.); *Penthouse International Ltd. c. 163564 Canada Inc.* (1994), 86 F.T.R. 95 (C.F. 1re inst.).

DÉCISION CITÉE:

*Westcan Stevedoring Ltd. c. Le Armar*, [1973] C.F. 1232 (1re inst.).

APPEL de la décision par laquelle un juge des requêtes a permis que la procédure de jugement sommaire visant le rejet de la demande dans une action *in rem* en matière d'amirauté suive son cours. Appel accueilli.

AVOCATS:

*John W. Bromley* pour la demanderesse (appelante).

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*H. Peter Swanson* for defendants (respondents).

SOLICITORS:

*Connell Lightbody*, Vancouver, for plaintiff (appellant).
*Campney & Murphy*, Vancouver, for defendants (respondents).

*The following are the reasons for judgment rendered in English by*

STONE, J.A.: The only issue in this appeal is whether the learned Motions Judge erred in allowing the respondents' motion for summary judgment to proceed in this admiralty action *in rem*.

The motion in the Trial Division is "for Summary Judgment dismissing the Plaintiff's claim in whole and for an order that the Defendant be awarded costs" on the ground "that there is no privity of contract between the Plaintiff and Defendant, or any obligation at law, by the Defendant to the Plaintiff". Rules [*Federal Court Rules*, C.R.C., c. 663] 344 [as am. by SOR/87-221, s. 2] and 432.1 [as enacted by SOR/94-41, s. 5] are invoked. It is to be noted that the order under attack does not grant relief in terms of that specifically requested, but simply allowed the motion for summary judgment to proceed on the ground that "there are no genuine issues of fact" and adjourned the motion to be argued on a fixed date or on such other date as the Motions Judge fixed. In so proceeding, it appears the Motions Judge acted upon the express agreement of the parties. At the opening of oral argument, this Court suggested that this way of proceeding might well be irregular in that subsections 432.1(2) and 432.3(1) [as enacted *idem*] of the Rules appear to contemplate the disposition of the entire motion for summary judgment by a motions judge, rather than of a ruling or rulings on a preliminary point or points and the subsequent disposition of the motion as such. Otherwise, the possibility could arise of a series of appeals instead of a single appeal from the order or judgment disposing of the entire matter. Nevertheless, the Court heard full argument on both sides on the issue raised for determination but made it clear that it did not necessarily approve of the procedure followed in this case.

*H. Peter Swanson* pour les défendeurs (intimés).

PROCUREURS:

*Connell Lightbody*, Vancouver, pour la demanderesse (appelante).
*Campney & Murphy*, Vancouver, pour les défendeurs (intimés).

*Ce qui suit est la version française des motifs du jugement rendus par*

LE JUGE STONE, J.C.A.: La seule question soulevée par l'appel est celle de savoir si le juge chargé des requêtes a commis une erreur en accueillant la requête des intimés afin que la procédure de jugement sommaire suive son cours dans la présente action *in rem* en matière d'amirauté.

La requête présentée devant la Section de première instance sollicitait [TRADUCTION] «un jugement sommaire rejetant en totalité la demande de la demanderesse et une ordonnance portant que les dépens sont adjugés en faveur de la partie défenderesse» au motif qu'il «n'existe aucun lien contractuel entre la demanderesse et la partie défenderesse, et que celle-ci n'a aucune obligation juridique envers la demanderesse». Les intimés invoquent les Règles [*Règles de la Cour fédérale*, C.R.C., ch. 663] 344 [mod. par DORS/87-221, art. 2] et 432.1 [édictée par DORS/94-41, art. 5]. Il faut souligner que l'ordonnance contestée n'accorde pas le redressement expressément demandé, mais permet uniquement que la procédure en jugement sommaire suive son cours au motif qu'il «n'existe aucune question de fait sérieuse à instruire» et qu'elle a ajourné la requête afin qu'elle soit plaidée à une date déterminée ou à toute autre date fixée par le juge chargé des requêtes. Il semble que celui-ci ait procédé ainsi avec l'accord exprès des parties. Au début de la plaidoirie orale, la Cour a laissé entendre que cette façon de procéder pourrait bien être irrégulière parce que les paragraphes 432.1(2) et 432.3(1) [édictée, *idem*] des Règles semblent prévoir que le juge chargé des requêtes doit trancher complètement la requête sollicitant un jugement sommaire, et non rendre une ou plusieurs décisions sur une ou plusieurs questions préliminaires et trancher ultérieurement la requête proprement dite. Autrement, il pourrait s'ensuivre une série d'appels plutôt qu'un appel unique de l'ordonnance ou du jugement réglant la

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totalité de l'instance. La Cour a néanmoins entendu en entier la plaidoirie des deux parties sur la question qui lui était soumise, tout en indiquant clairement qu'elle n'approuvait pas nécessairement la procédure suivie en l'espèce.

The defendant/respondent ship (hereinafter the "defendant ship") was arrested under a warrant which was issued on the strength of an affidavit to lead warrant sworn September 20, 1994, in which it was deposed:

2. That I am informed by Brandon Tieh Ching Liu of 9-11th Floors Chia Chi Building, 877 Laichi Kok Rd., Kowloon, Hong Kong, Managing Director of Feoso Oil Limited, (Feoso) that marine gas oil and fuel oil ("bunkers") were supplied to the motor vessel "SARLA" for the vessel's operation on or about July 6, 1994 in Hong Kong.

3. The bunkers were ordered from Feoso by Marine Oil Brokering Co. (S) Pte. Ltd., as broker on behalf of the purchaser M/V "SARLA" and the owners, in accordance with the supplier's normal terms and conditions. Attached hereto and marked as Exhibit "A" to this my Affidavit is a true copy of a telex sent by Marine Oil Brokering Co. (S) Pte. Ltd. to K. M. Chan at Feoso in that regard.

4. Attached hereto and marked as Exhibit "B" to this my Affidavit is a true copy of a telex from Feoso to Marine Oil Brokering Co. (S) Pte. Ltd. confirming the order and stating that the order is subject to the Feoso Standard Terms March 91.

5. Attached hereto and marked as Exhibit "C" to this my Affidavit is a true copy of a fax from Praxis Maritime Services Ltd. ("Praxis") to the charterer of the vessel stating that Praxis, acting in accordance with instructions received from the purchaser M/V "SARLA" and the owners, nominated the bunker supply from Feoso in accordance with the bunker supplier's general terms, conditions and specifications.

6. I am informed by Brandon Tieh Ching Liu that Feoso has been supplying fuels through Marine Oil Brokering Co. (S) Pte. Ltd. for about the past five years and that Marine Oil Brokering Co. (S) Pte. Ltd. would have been familiar with Feoso Standard Terms March 91.

7. Attached hereto and marked as Exhibit "D" to this my Affidavit is a true copy of Feoso Standard Terms March 91 which in paragraph 1.2 defines "BUYER" as meaning jointly and severally the party arranging the deliver of the fuel and the owner and/or bareboat charterer of the vessel.

8. Attached hereto and marked as Exhibit "E" to this my Affidavit is a true copy of the invoices that were stamped by the master of the vessel to be to the "Charterer's Account".

Le navire défendeur/intimé (ci-après le «navire défendeur») a été saisi en vertu d'un mandat décerné sur la foi d'un affidavit portant demande de mandat, signé le 20 septembre 1994, qui contenait les allégations suivantes:

[TRADUCTION] 2. Brandon Tieh Ching Liu, 9e-11e étages de l'édifice Chia Chi, 877, route Laichi Kok, Kowloon, Hong Kong, directeur exécutif de la société Feoso Oil Limited («la société Feoso») m'a informé que du gazoil marin et du mazout («le mazout lourd carburant») ont été fournis au bâtiment motorisé «SARLA» pour le fonctionnement du bâtiment, vers le 6 juillet 1994, à Hong Kong.

3. Le mazout lourd a été commandé à la société Feoso par la société Marine Oil Brokering Co. (S) Pte. Ltd., en sa qualité de courtier au nom de l'acheteur M/V «SARLA» et de ses propriétaires, conformément aux conditions et modalités habituellement stipulées par le fournisseur. Une copie conforme d'un télex envoyé par la société Marine Oil Brokering Co. (S) Pte. Ltd. à K. M. Chan de la société Feoso sur ce sujet constitue la pièce «A» jointe au présent affidavit.

4. Une copie conforme d'un télex envoyé par la société Feoso à la société Marine Oil Brokering Co. (S) Pte. Ltd. confirmant la commande et la déclarant assujettie aux clauses types de mars 1991 de la société Feoso constitue la pièce «B» jointe au présent affidavit.

5. La pièce «C» jointe au présent affidavit est une copie conforme d'une télécopie envoyée par la société Praxis Maritime Services Ltd. («la société Praxis») à l'affréteur du bâtiment qui précise que la société Praxis, en conformité avec les instructions reçues de l'acheteur M/V «SARLA» et de ses propriétaires, a désigné la société Feoso pour la fourniture de mazout lourd conformément aux spécifications, modalités et conditions générales du fournisseur.

6. Brandon Tieh Ching Liu m'a informé que la société Feoso fournissait du carburant par l'intermédiaire de la société Marine Oil Brokering Co. (S) Pte. Ltd. depuis environ cinq ans, et que la société Marine Oil Brokering Co. (S) Pte. Ltd. devait connaître les clauses types de mars 1991 de la société Feoso.

7. La pièce «D» jointe au présent affidavit est une copie conforme des clauses types de mars 1991 de la société Feoso, dont le paragraphe 1.2 définit le terme «ACHETEUR» comme s'entendant solidairement de la partie qui organise la livraison du carburant et du propriétaire et/ou de l'affréteur coque nue du bâtiment.

8. La pièce «E» jointe au présent affidavit est une copie conforme des factures sur lesquelles le capitaine du bâtiment a apposé le tampon [TRADUCTION] «Compte de l'affréteur».

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9. That the claim of the plaintiff for payment for the bunkers delivered has not been satisfied and US $68,797.39 remains owing.

9. Il n'a pas été satisfait à la demande de paiement du mazout lourd livré, faite par la demanderesse, et une somme de 68 797,39 $ US demeure impayée.

Attached to the affidavit is a copy of a fax dated June 29, 1994, from Praxis Maritime Service Ltd. of Pireus, Greece to the charterers referred to below, advising that they had "stemmed" the bunkers in question in the following terms:

Une copie d'une télécopie datée du 29 juin 1994 est jointe à l'affidavit. Cette télécopie a été envoyée par la société Praxis Maritime Service Ltd. de Pirée, en Grèce, aux affréteurs mentionnés ci-dessous, pour les aviser que la société avait passé un contrat pour la fourniture du mazout lourd en cause aux conditions suivantes:

Acting as brokers only and in accordance with instructions received from purchaser M/V "SARLA" and owners we have nominated the following bunker stem in accordance with suppliers normal terms and conditions . . .

[TRADUCTION] En qualité de courtier uniquement et en conformité avec les instructions reçues de l'acheteur M/V «SARLA» et de ses propriétaires, nous avons désigné le contrat suivant de fourniture de carburant conformément aux modalités et conditions habituellement stipulées par les fournisseurs . . .

The following day, Marine Oil Brokering Co. (S) Pte. Ltd., of Singapore, sent a telex to the appellant (a copy of which is attached to the affidavit), placing the order for the bunkers "as brokers only and in accordance with instructions received from purchaser M/V SARLA and owners". The appellant responded by telex the same day, confirming its acceptance "subject to the Feoso Standard Terms March 91". Also attached to the affidavit as Exhibit "E" are copies of two bunker delivery receipts dated July 6, 1994 which are stamped "M/V SARLA—Pireus Greece", both of which are receipted by the Chief Engineer of the defendant ship and are stamped with the words "Charterer's Account". The true significance of these latter words is not apparent on the face of the two documents or in the other evidence filed.

Le lendemain, la société Marine Oil Brokering Co. (S) Pte. Ltd., de Singapour, a envoyé un télex à l'appelante (dont une copie est jointe au présent affidavit), pour commander le mazout lourd [TRADUCTION] «en qualité de courtier uniquement et en conformité avec les instructions reçues de l'acheteur M/V SARLA et de ses propriétaires». L'appelante a répondu par télex le même jour, pour confirmer son acceptation [TRADUCTION] «sous réserve des clauses types de mars 1991 de la société Feoso». La pièce «E» est également jointe à l'affidavit. Il s'agit de copies de deux reçus de livraison de carburant datés du 6 juillet 1994 qui portent le tampon [TRADUCTION] «M/V SARLA—Pirée Grèce», émis tous les deux par le chef mécanicien du navire défendeur et portant le tampon [TRADUCTION] «Compte de l'affréteur». La simple lecture de ces documents et des autres éléments de preuve déposés ne révèle pas la véritable signification de ces derniers mots.

The statement of claim contains the following allegations:

La déclaration contient les allégations suivantes:

3. Marine gas oil and fuel oil ("bunkers") were supplied to the motor vessel "SARLA" by the plaintiff Feoso Oil Limited ("Feoso") for the vessel's operation on or about July 6, 1994 in Hong Kong.

[TRADUCTION] 3. Du gazoil marin et du mazout («le mazout lourd») ont été fournis au navire motorisé «SARLA» par la société demanderesse Feoso Oil Limited («la société Feoso») pour le fonctionnement du bâtiment vers le 6 juillet 1994, à Hong Kong.

4. The bunkers were ordered from Feoso by the owners of the M.V. "SARLA" and in accordance with the supplier's normal terms and conditions which are known as the Feoso Standard Terms March 91.

4. Le mazout lourd a été commandé à la société Feoso par les propriétaires du M.V. «SARLA» et en conformité avec les modalités et conditions habituellement stipulées par le fournisseur qui sont connues comme les clauses types de mars 1991 de la société Feoso.

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5. The claim of the Plaintiff for payment for the bunkers delivered to the vessel has not been satisfied despite demand on the owner and US $68,797.39 remains owing.

The statement of defence, which was filed December 1, 1994, pleads as follows:

3. The Defendant denies each and every allegation of fact contained in paragraph 3 of the Statement of Claim and, without limiting the generality of the foregoing, specifically denies that marine gas, oil and fuel oil ("bunkers") were supplied to the Ship "SARLA" by the Plaintiff for the vessel's operation on or about July 6, 1994 in Hong Kong as alleged or at all.

4. The Defendant denies each and every allegation of fact contained in paragraph 4 of the Statement of Claim and, without limiting the generality of the foregoing, specifically denies that the bunkers were ordered by the owners of the M.V. "SARLA" and in accordance with the supplier's normal terms and conditions as alleged or at all.

5. The Defendant denies each and every allegation of fact contained in Paragraph 5 of the Statement of Claim and, without limiting the generality of the foregoing, specifically denies that the sum of US $69,797.39 or any amount is owing by the Defendant to the Plaintiff.

6. In answer to the whole of the Statement of Claim and in the alternative the Defendant says that if bunkers were supplied to the vessel "SARLA" as alleged, which is denied, then such bunkers were supplied on the specific order and credit of the charterers of the vessel and not on the credit of the vessel or her owners or their servants or agents and the Defendant says that there is no contractual relationship whatsoever between the Plaintiff and the Defendant.

According to the record, the defendant/respondent ship was owned at material times by Manley Corporation of the British Virgin Islands which in turn was wholly owned by Norfolk Shipholding Ltd. of the same place.

The record contains additional affidavit evidence which was filed by the respondents in support of their motion for summary judgment. This includes a "Time Charter" (government form, approved by the New York Produce Exchange) dated April 21, 1994 between Manley Corporation and Hanchart Worldwide Shipping B.V. as charterers (the "charter party"); a "shipman" standard ship management agreement of April 4, 1989 between Norfolk Shipholding Ltd. (described as "owners") and Natalca Shipping Co. S.A. of Pireus, Greece (described as "managers") with respect to a number

5. Il n'a pas encore été satisfait à la demande de paiement du mazout lourd livré faite par la demanderesse, en dépit d'une mise en demeure adressée aux propriétaires et la somme de 68 797,39 $ US demeure impayée.

La défense, qui a été déposée le 1er décembre 1994, fait valoir les éléments suivants:

[TRADUCTION] 3. La partie défenderesse nie chacune des allégations de fait contenues au paragraphe 3 de la déclaration et, sans limiter la généralité de ce qui précède, nie expressément que du gazoil marin, du pétrole et du mazout («le mazout lourd») ont été fournis au navire «SARLA» par la demanderesse pour le fonctionnement du bâtiment, vers le 6 juillet 1994, à Hong Kong, tel qu'il l'est allégué ou de quelque façon que ce soit.

4. La partie défenderesse nie chacune des allégations de fait contenues au paragraphe 4 de la déclaration et, sans limiter la généralité de ce qui précède, nie expressément que le mazout lourd a été commandé par les propriétaires du M.V. «SARLA» et en conformité avec les conditions et modalités habituellement stipulées par le fournisseur, tel qu'il l'est allégué ou de quelque façon que ce soit.

5. La partie défenderesse nie chacune des allégations de fait contenues au paragraphe 5 de la déclaration et, sans limiter la généralité de ce qui précède, nie expressément devoir à la demanderesse la somme de 69 797,39 $ US ou quelque montant que ce soit.

6. En réponse à l'ensemble de la déclaration et à titre subsidiaire, la partie défenderesse affirme que si le mazout lourd a été fourni au bâtiment «SARLA» tel qu'il l'est allégué, ce qu'elle nie, il l'a été sur commande expresse des affréteurs du bâtiment et sur leur crédit, et non sur le crédit du bâtiment ou de ses propriétaires ou de leurs préposés ou mandataires, et la partie défenderesse fait valoir qu'il n'existe aucun lien contractuel quel qu'il soit entre elle et la demanderesse.

Si l'on s'en remet au dossier, le navire défendeur appartenait à toutes les époques en cause à la société Manley Corporation, des îles Vierges britanniques, qui appartenait entièrement à la Norfolk Shipholding Ltd. du même endroit.

Le dossier comprend une preuve additionnelle, par affidavit, qui a été déposée par les intimés à l'appui de leur requête sollicitant un jugement sommaire. Il s'agit notamment d'un contrat d'affrètement à temps (formule du gouvernement approuvée par la New York Produce Exchange) daté du 21 avril 1994, signé par la société Manley Corporation et Hanchart Worldwide Shipping B.V. en qualité d'affréteurs (la «charte-partie»); une convention type de gestion de navires datée du 4 avril 1989, passée par la société Norfolk Shipholding Ltd. (décrite comme «les propriétaires») et la société Natalca Shipping Co. S.A. de

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of vessels including the defendant ship; and a sub-agency agreement of April 1, 1987 between Natalca Shipping Co. S.A. as "general agent" and Trans-Ocean Steamship Agency, Inc., of New York, as "sub-agent". By line 39 of the charter party, the charterers agreed to "provide and pay for all the fuel except as otherwise agreed"; and by clause 31 the charterers agreed to supply the ship with about the same quantities of bunkers on redelivery as the owners had supplied on delivery of the ship to the charterers, the bunkers on redelivery "to be deducted from last sufficient hire payment". Clause 11 of the ship management agreement required the managers to "arrange for the provision of bunker fuel of the quality specified by the Owners as required for the Vessel's trade." Under Clause 3(a) of the sub-agency agreement, Trans-Ocean Steamship Agency Inc., agreed to "cause to be furnished to the Vessels . . . fuel . . . required for the operation of the Vessels" but that "any contracts for fuel . . . will be subject to the approval of the General Agent." The respondents' affidavits are all to uniform effect, that the bunkers in question were neither ordered by the owners of the defendant ship nor by anyone acting by or with authority of the owners. Indeed one of the affidavits, that of Gregory Seremetis of Trans-Tec Services Inc., a New York corporation, suggests that Praxis Maritime Services Ltd. in sending the fax of June 29, 1994 acted under instructions from the charterers only.[1] It appears from this affidavit that Trans-Tec Services Inc. acted as the exclusive bunker broker for Trans-Ocean Steamship Agency Inc. and Natalca Shipping Co., S.A. According to the final hire statement included in the respondents' evidence, the ship was redelivered to owners "5 July [1994] at 2342 GMT", a circumstance which may be of significance in the sequel.

[1] It is to be noted that while this evidence originated with an officer of Praxis Maritime Services Ltd., it was not stated by the affiant to be on information and belief, as required by ss. 432.2(1) [as enacted *idem*] of the Rules and 332(1).

Pirée, en Grèce (décrite comme «les gestionnaires») relativement à un certain nombre de bâtiments, dont le navire défendeur; enfin, une convention de sous-agence conclue le 1er avril 1987, entre la société Natalca Shipping Co. S.A. en qualité d'«agent général» et la Trans-Ocean Steamship Agency Inc., de New York, en qualité de «sous-agent». À la ligne 39 de la charte-partie, les affréteurs ont convenu de [TRADUCTION] «fournir et payer tout le carburant, à moins de convention contraire»; de plus, par la clause 31, les affréteurs ont convenu de fournir au navire, lors de sa remise à ses propriétaires, approximativement la même quantité de carburant que celle fournie par ceux-ci au moment de la livraison du navire aux affréteurs, le carburant fourni lors de la remise [TRADUCTION] «devant être déduit du dernier paiement suffisant de loyer». La clause 11 de la convention de gestion du navire oblige les gestionnaires à [TRADUCTION] «prendre des arrangements pour la fourniture du carburant, de la qualité précisée par les propriétaires, nécessaire aux activités du bâtiment». Au paragraphe 3(a) de la convention de sous-agence, la société Trans-Ocean Steamship Agency Inc. a convenu de [TRADUCTION] «voir à ce que les bâtiments soient approvisionnés . . . en carburant . . . nécessaire à l'exploitation des navires», mais que [TRADUCTION] «tout contrat relatif au carburant . . . sera assujetti à l'approbation de l'agent général.» Les affidavits des intimés sont tous au même effet, c'est-à-dire qu'ils portent que le mazout lourd en cause n'a été commandé ni par les propriétaires du navire défendeur, ni par qui que ce soit qui aurait été autorisé à agir en leur nom. En fait, l'un des affidavits, celui de Gregory Seremetis de Trans-Tec Services Inc., une société de New York, laisse entendre que la société Praxis Maritime Services Ltd. a agi conformément aux instructions des affréteurs uniquement, lorsqu'elle a envoyé la télécopie du 29 juin 1994[1]. Il ressort de cet affidavit que Trans-Tec Services Inc. a agi en qualité de courtier exclusif en carburant de la société Trans-Ocean Steamship Agency Inc. et de la société Natalca Shipping Co., S.A. L'état définitif de location inclus dans la preuve des intimés établit que le navire a été remis à ses propriétaires [TRADUCTION]

[1] Il faut souligner que, bien que cette preuve émane d'un représentant de la société Praxis Maritime Services Ltd., le déposant ne précise pas qu'il se fonde sur des renseignements ou une croyance, comme l'exigent les art. 432.2(1) et 332(1) des Règles.

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«le 5 juillet [1994] à 2342 UT», fait qui peut avoir une incidence sur l'issue de l'instance.

While the Motions Judge did not give separate reasons for the order under appeal, the recitals contained therein cast light on the reasons why she decided as she did. These recitals indicate that the motion was opposed on grounds that according to the evidence neither the shipowners nor any of the managers or employees connected with the defendant ship had ordered the bunkers in issue, that the standard terms of the appellant's supply contract did not impose liability upon the respondents and, finally, that nothing in the case suggests that the master or chief engineer of the defendant ship had ordered the bunkers. Her order contains the following recitals which no doubt represents her view of the evidence:

Bien que le juge chargé des requêtes n'ait pas énoncé séparément les motifs de l'ordonnance dont appel, ses déclarations introductives nous renseignent sur les motifs de sa décision. Elles indiquent que la requête était contestée sur les points suivants: d'après la preuve, ni les propriétaires du navire, ni aucun gestionnaire ou employé lié au navire défendeur n'a commandé le mazout lourd en cause, les clauses types du contrat de fournisseur de l'appelante n'imposaient aucune obligation aux intimés et, enfin, aucun élément de la preuve ne laisse entendre que le capitaine ou le chef mécanicien du navire défendeur a commandé le mazout lourd. L'ordonnance contient les déclarations introductives suivantes, qui font certainement état de l'opinion du juge concernant la preuve:

AND UPON reviewing the materials and being satisfied that in this case nothing suggests that the master or chief engineer of the "SARLA" in fact placed the bunkers order;

[TRADUCTION] ET APRÈS avoir examiné les documents et avoir acquis la conviction que rien ne laisse entendre en l'espèce que le capitaine ou le chef mécanicien du «Sarla» ont effectivement commandé le mazout lourd;

AND UPON concluding that, pursuant to Rule 432.2(1), it is the obligation of the Plaintiff as the party responding to a motion for summary judgment to take the steps necessary to raise genuine issues of fact for trial;

ET APRÈS avoir conclu que, par application du paragraphe 432.2(1) des Règles, la partie demanderesse a, en qualité de partie intimée dans une requête sollicitant un jugement sommaire, l'obligation de prendre les mesures nécessaires pour soulever des questions de fait sérieuses à instruire;

AND UPON concluding that the Plaintiff has not raised genuine issues of fact either in its own affidavit material or by way of cross-examination;

ET APRÈS avoir conclu que la partie demanderesse n'a pas soulevé de questions de fait sérieuses, que ce soit dans sa propre preuve par affidavit ou par voie de contre-interrogatoire;

The procedure for obtaining summary judgment is governed by Rules 432.1 to 432.7 [as enacted *idem*] of the *Federal Court Rules*, which came into force January 13, 1994. The respondents' motion is provided for in subsection 432.1(2), which reads:

La procédure à suivre pour obtenir un jugement sommaire est régie par les Règles 432.1 à 432.7 [édictées, *idem*] des *Règles de la Cour fédérale*, qui sont entrées en vigueur le 13 janvier 1994. La requête des intimés est prévue par le paragraphe 432.1(2) des Règles, qui se lit comme suit:

*Rule 432.1* . . .

(2) A defendant may, after filing and serving a defence and at any time prior to the fixing of the time and date for trial, make a motion to a judge, with supporting affidavit material or other evidence, for summary judgment dismissing all or part of the claim in the statement of claim.

*Règle 432.1* . . .

(2) Le défendeur peut, après avoir déposé et signifié une défense, et à tout moment avant que l'heure et la date de l'instruction soient fixées, présenter au juge une requête, appuyée d'un affidavit ou d'un autre élément de preuve, en vue d'obtenir un jugement sommaire rejetant tout ou partie de la réclamation contenue dans la déclaration comportant allégués.

The disposition of such a motion is, for present purposes, governed by subsection 432.3(1) which reads:

Aux fins de la présente instance, une requête de cette nature doit être tranchée conformément au paragraphe 432.3(1) des Règles, dont le libellé est le suivant:

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*Rule 432.3* (1) Where a judge is satisfied that there is no genuine issue for trial with respect to a claim or defence, the judge shall grant summary judgment accordingly.

Subsection 432.3(4) is applicable in the circumstances therein described. It reads:

*Rule 432.3* . . .

(4) Where a judge decides that there is a genuine issue with respect to a claim or defence, the judge may nevertheless grant summary judgment in favour of any party, either upon an issue or generally, unless

(*a*) the judge is unable on the whole of the evidence to find the facts necessary to decide the questions of fact or law; or

(*b*) the judge considers that it would be unjust to decide the issues on the motion for summary judgment.

Rule 432.2 deals with the evidence to be presented by the parties upon a motion for summary judgment. It reads:

*Rule 432.2* (1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subsection 332(1), but on the hearing of the motion, an adverse inference may be drawn, if appropriate, from the failure of a party to provide the evidence of persons having personal knowledge of material facts.[2]

Although the issue in this appeal goes to the correctness of the order, it is important to understand the principles of admiralty law upon which the case and its merits must ultimately turn. According to the appellant, the bunkers in question were supplied to the defendant ship upon a request made by or on behalf of owners and therefore that the appellant is entitled to proceed by way of this action *in rem*. The Court's jurisdiction over such a claim is conferred by

[2] The reference to "subsection 332(1)" is obviously intended to be to Rule 332(1), which reads:

*Rule 332.* (1) Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which statements as to his belief with the grounds thereof may be admitted.

*Règle 432.3*(1) Lorsque le juge est convaincu qu'il n'existe aucune question sérieuse à instruire à l'égard d'une réclamation ou d'une défense, il rend un jugement sommaire en conséquence.

Le paragraphe 432.3(4) s'applique dans les situations qui y sont décrites:

*Règle 432.3* . . .

(4) Lorsque le juge décide qu'il existe une question sérieuse à l'égard de la réclamation ou de la défense, il peut néanmoins rendre un jugement sommaire en faveur d'une partie, soit sur une question ou en général, sauf dans l'un ou l'autre des cas suivants:

*a*) l'ensemble de la preuve ne comporte pas les faits nécessaires pour qu'il puisse trancher les questions de fait ou de droit;

*b*) il estime injuste de trancher les questions dans le cadre de la requête en vue d'obtenir un jugement sommaire.

La Règle 432.2 traite de la preuve qui doit être produite par les parties dans le cadre d'une requête sollicitant un jugement sommaire. Le voici:

*Règle 432.2* (1) En réponse à un affidavit ou à un autre élément de preuve présenté à l'appui d'une requête en vue d'obtenir un jugement sommaire, la partie intimée ne peut s'appuyer sur les seules allégations ou dénégations contenues dans ses plaidoiries écrites; elle doit énoncer, dans un affidavit ou à l'aide d'un autre élément de preuve, des faits précis démontrant l'existence d'une question sérieuse à instruire.

(2) La partie qui entend utiliser un affidavit dans le cadre d'une requête en vue d'obtenir un jugement sommaire peut se fonder sur des renseignements ou une croyance, tel qu'il est prévu au paragraphe 332(1), mais, à l'audition de la requête, son omission d'offrir le témoignage de personnes ayant une connaissance personnelle des faits pertinents peut, s'il y a lieu, entraîner une conclusion défavorable[2].

Bien que la question à trancher en appel touche la validité de l'ordonnance, il est important de comprendre les principes du droit de l'amirauté à appliquer pour trancher l'instance en définitive et en apprécier le bien-fondé. Selon l'appelante, le mazout lourd en cause a été fourni au navire défendeur à la suite d'une demande faite par les propriétaires ou en leur nom et, par conséquent, l'appelante a le droit de procéder par voie d'action *in rem*. La Cour tire sa compétence

[2] La mention du «paragraphe 332(1)» renvoie de toute évidence aux Règles; ce paragraphe se lit ainsi:

*Règle 332.* (1) Les affidavits doivent se restreindre aux faits que le témoin est en mesure de prouver par la connaissance qu'il en a, sauf en ce qui concerne les requêtes interlocutoires pour lesquelles peuvent être admises des déclarations fondées sur ce qu'il croit et indiquant pourquoi il le croit.

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paragraph 22(2)(*m*) of the *Federal Court Act* [R.S.C., 1985, c. F-7], which reads:

> **22.** (2) . . .
>
> (*m*) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;

The goods and services of the kind referred to in this paragraph are sometimes described as "necessaries", a term which appeared in former enactments of the United Kingdom.[3] By virtue of subsections 43(2) and (3) of the Act, the jurisdiction conferred by paragraph 22(2)(*m*) shall not be exercised *in rem*:

> **43.** . . .
>
> (3) . . . unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.

What is clear from these provisions is that the right to proceed *in rem* for a claim falling within paragraph 22(2)(*m*) exists only if at the time the action is commenced the ship is beneficially owned by the person who was the beneficial owner at the time the cause of action arose. (See *Mount Royal/Walsh Inc. v. Jensen Star (The)*, [1990] 1 F.C. 199 (C.A.).) There is a further refinement. It is well established that the fact that beneficial ownership has not changed since the necessaries were supplied is not in itself sufficient to support a statutory right *in rem*. The cases are all to the same effect, that it is only where the owners of a ship have incurred a debt for necessaries supplied that the creditor acquires a right to proceed *in rem* against their ship. Thus, in *The Tolla*, [1921] P. 22 (Adm.), a claim for necessaries was asserted in an action *in rem* for expenses incurred at the request of the master while the ship was under a time charter. At page 24, Hill J. stated the applicable principle as follows:

[3] *An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England* (U.K.), 1840, 3 & 4 Vict., c. 65, s. 6; *The Admiralty Court Act, 1861* (U.K.), 24 Vict., c. 10, s. 5.

relative à une demande de cette nature de l'alinéa 22(2)*m*) de la *Loi sur la Cour fédérale* [L.R.C. (1985), ch. F-7] dont le libellé est le suivant:

> **22.** (2) . . .
>
> *m*) une demande relative à des marchandises, matériels ou services fournis à un navire pour son fonctionnement ou son entretien, notamment en ce qui concerne l'acconage et le gabarrage;

Les marchandises et services visés dans cet alinéa sont parfois décrits comme des choses de «première nécessité», ou «*necessaries*», en anglais, terme qui figurait dans les anciennes lois du Royaume-Uni[3]. Par application des paragraphes 43(2) et (3) de la Loi, la compétence conférée à la Cour par l'alinéa 22(2)*m*) ne doit être exercée, en matière réelle,:

> **43.** . . .
>
> (3) . . . que si, au moment où l'action est intentée, le véritable propriétaire du navire, de l'aéronef ou des autres biens en cause est le même qu'au moment du fait générateur.

Il ressort clairement de ces dispositions que le droit de connaître d'une demande visée à l'alinéa 22(2)*m*) par voie d'action *in rem* existe uniquement si, au moment où l'action est intentée, le navire appartient véritablement à la personne qui en était le véritable propriétaire au moment où la cause d'action a pris naissance. (Voir *Mount Royal/Walsh Inc. c. Jensen Star (Le)*, [1990] 1 C.F. 199 (C.A.).) Une autre subtilité doit être prise en compte. Il est bien établi que le fait que le véritable propriétaire n'ait pas changé depuis la fourniture des choses de première nécessité ne suffit pas en soi pour que le créancier bénéficie d'un droit réel en vertu de la loi. La jurisprudence est unanime quant au fait que le créancier acquiert le droit d'intenter une action *in rem* contre le navire uniquement si ses propriétaires ont contracté une dette pour la fourniture de choses de première nécessité. Ainsi, dans l'affaire *The Tolla*, [1921] P. 22 (Adm.), la partie demanderesse a fait valoir une réclamation relative à des choses de première nécessité par voie d'action *in rem* pour les dépenses engagées à la demande du capitaine au moment où le navire faisait

[3] *An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England* (R.-U.), 1840, 3 & 4 Vict., ch. 65, art. 6; *The Admiralty Court Act, 1861* (R.-U.), 24 Vict., ch. 10, art. 5.

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Unless there is a liability on the part of the owners there cannot be a remedy in rem against the ship.

See also e.g. *Westcan Stevedoring Ltd. v. The Armar*, [1973] F.C. 1232 (T.D.) and the *Jensen Star, supra*.[4] In the case at bar, unless it be exceptional, application of the above principle will mean that the appellant could not sustain an action *in rem* in the absence of proof that the bunkers were supplied to the defendant ship at the request of owners or by someone acting on their behalf and in a position to bind them.

It is not surprising that very little jurisprudence has yet been generated in the Court under the summary judgment rules since their adoption less than two years ago. None of the reported cases in the Trial Division (*Marine Atlantic Inc. v. Blyth* (1994), 77 F.T.R. 97; *Nova Scotia Barristers' Liability Claims Fund v. Ship Ashley Lynn* (1994), 80 F.T.R. 141; *Penthouse International Ltd. v. 163564 Canada Inc.* (1994), 86 F.T.R. 95 enunciate any general principle governing the granting or denial of a motion for summary judgment. Those cases appear to have turned on their own facts which is understandable given the novelty of the new process. I respectfully agree with Reed J. in *Blyth, supra*, [at page 103] that the new Rules "should be interpreted by reference to their own textual framework". At the same time, I do not think the Court should disregard decisions of a provincial superior court bearing on the interpretation of

[4] In *The Mogileff*, [1921] P. 236 (Adm.), for example, Hill J. stated, at p. 243:

> These are only illustrations of the principle that you cannot sue *in rem* for necessaries unless at the date of the suit you could maintain an action of debt in respect of the very subject matter of your claim.

If it could be shown that the master ordered the bunkers, the owners would normally be bound and the ship's credit pledged unless the master lacked actual or apparent authority (*The Mogileff, supra*, at p. 243.) The record contains no affidavit of either the master or chief engineer of the defendant ship. Indeed, nowhere in the evidence do the respondents assert that neither of these officers ordered the bunkers.

l'objet d'un affrètement à temps. À la page 24, le juge Hill a énoncé le principe applicable:

[TRADUCTION] Le navire ne peut faire l'objet d'un recours *in rem*, à moins que ses propriétaires ne soient tenus d'exécuter une obligation.

Voir également, par exemple, *Westcan Stevedoring Ltd. c. Le Armar*, [1973] C.F. 1232 (1re inst.) et la décision *Jensen Star*, précitée[4]. En l'espèce, à moins de circonstances exceptionnelles, le principe énoncé ci-dessus s'applique de sorte que l'appelante ne pouvait faire valoir une action *in rem* en l'absence de preuve établissant que le mazout lourd a été fourni au navire défendeur à la demande des propriétaires ou d'une personne agissant en leur nom et capables de les lier.

Il n'est pas surprenant que très peu de décisions aient été rendues par la Cour jusqu'à maintenant sous le régime des règles régissant l'obtention d'un jugement sommaire depuis leur adoption il y a moins de deux ans. Aucune des décisions publiées rendues par la Section de première instance (*Marine Atlantic Inc. c. Blyth* (1994), 77 F.T.R. 97; *Nova Scotia Barristers' Liability Claims Fund c. Navire Ashley Lynn* (1994), 80 F.T.R. 141; *Penthouse International Ltd. c. 163564 Canada Inc.* (1994), 86 F.T.R. 95 ne pose de principe général à appliquer pour accueillir ou rejeter une requête sollicitant un jugement sommaire. Il semble qu'il s'agisse de cas d'espèce, ce qui s'explique compte tenu du caractère inédit du nouveau processus. Je souscris à l'opinion émise par le juge Reed dans l'affaire *Blyth*, précitée [à la page 103], selon laquelle les nouvelles règles «doivent être interprétées dans le contexte qui est le leur». Par ailleurs,

[4] Dans le jugement *The Mogileff*, [1921] P. 236 (Adm.), par exemple, le juge Hill a déclaré, à la p. 243:

> [TRADUCTION] Il s'agit uniquement d'exemples du principe selon lequel vous ne pouvez intenter une action *in rem* pour des choses de première nécessité, à moins qu'à la date de la poursuite, vous ne puissiez intenter une action en paiement d'une dette relativement à l'objet précis visé par votre réclamation.

S'il était possible de démontrer que le capitaine a commandé le mazout lourd, les propriétaires seraient normalement liés et le crédit du navire engagé, à moins que le capitaine n'ait agi sans pouvoir réel ou apparent (décision *The Mogileff*, précitée, à la p. 243.) Le dossier ne contient aucun affidavit du capitaine ou du chef mécanicien du navire défendeur. En fait, les intimés n'affirment nulle part dans la preuve que ni l'un ni l'autre de ces officiers n'ont commandé le mazout lourd.

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any similar rules, particularly where those rules are expressed in language which in all material respects is identical with the rules now under consideration.

A number of decisions have arisen under Rule 20 of the Ontario *Rules of Civil Procedure* [O. Reg. 560/84] from which Rules 432.1 to 432.7 derive. Subrule 20.04(2) of those Rules, like our Rule 432.3(1), provides that where the Court "is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly." In *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.), Henry J. after reviewing several earlier decisions of Ontario courts, had this to say at pages 237-238:

In my opinion, there is a lower threshold that is contemplated by the new Rule 20 and the case law developing. It is that the court, in taking a hard look at the merits, must decide whether the case merits reference to a judge at trial. It will, no doubt, have to go to trial if there are real issues of credibility, the resolution of which is essential to determination of the facts. That aside, however, the rule now contemplates that the motions judge will have before him sworn testimony in the affidavits and other material required by the rule in which the parties put their best foot forward. The motions judge, therefore, is expected to be able to assess the nature and quality of the evidence supporting "a genuine issue for trial"; the test is not whether the plaintiff cannot possibly succeed at trial; the test is whether the court reaches the conclusion that the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial; if so then the parties "should be spared the agony and expense of a long and expensive trial after some indeterminate wait" (*per* Farley J. in *Avery*).

In *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), Morden A.C.J.O. commented on the Ontario rule at pages 550-551 as follows:

A litigant's "day in court", in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can,

je ne pense pas que la Cour doive s'abstenir de tenir compte des décisions rendues par un juge d'une cour supérieure d'une province relativement à l'interprétation de règles similaires, plus particulièrement dans le cas où leur libellé est identique, pour l'essentiel, à celui des règles dont la Cour est saisie.

Un certain nombre de décisions ont été rendues sous le régime de la règle 20 des *Règles de Procédure Civile* [Règl. de l'Ont. 560/84] de l'Ontario, dont les règles 432.1 à 432.7 s'inspirent. Le paragraphe 20.04(2) de ces règles prévoit, tout comme le paragraphe 432.3(1) des *Règles de la Cour fédérale*, que le tribunal, «s'il est convaincu qu'une demande ou une défense ne soulève pas de question litigieuse, rend un jugement sommaire en conséquence.» Dans l'affaire *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Div. gén.), le juge Henry a passé en revue plusieurs décisions antérieures des tribunaux ontariens avant de déclarer, aux pages 237 et 238:

[TRADUCTION] À mon avis, il existe une norme minimale moins exigeante établie par la nouvelle règle 20 et la jurisprudence qui se développe. Selon cette norme, la Cour doit, en examinant minutieusement le bien-fondé d'une instance, décider si l'affaire mérite d'être renvoyée à un juge qui l'instruira. Il ne fait aucun doute que l'affaire sera instruite s'il existe de véritables questions de crédibilité qui doivent absolument être tranchées pour qu'une décision sur les faits soit rendue. Hormis ces éléments, la règle prévoit maintenant que le juge chargé des requêtes aura accès à des témoignages rendus sous serment au moyen des affidavits et à d'autres documents exigés par la règle dans lesquels les parties présentent leur cause sous son meilleur jour. On s'attend donc que le juge chargé des requêtes soit en mesure d'évaluer la nature et la qualité de la preuve à l'appui d'une «question litigieuse»; le critère à appliquer ne consiste pas à savoir si la partie demanderesse n'a aucune chance d'avoir gain de cause à la suite de l'instruction; il s'agit plutôt de savoir si la Cour parvient à la conclusion que l'affaire est douteuse au point de ne pas mériter d'être examinée par le juge des faits lors d'une instruction ultérieure; le cas échéant, il faut épargner aux parties «les souffrances et les dépenses liées à une instruction longue et coûteuse après une attente indéterminée» (le juge Farley, dans *Avery*).

Dans *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), le juge en chef adjoint Morden de la Cour d'appel de l'Ontario a formulé les remarques suivantes sur la règle ontarienne aux pages 550 et 551:

[TRADUCTION] Le droit d'une partie à un litige de se faire entendre, au sens de la tenue d'une instruction, peut avoir été considéré traditionnellement comme l'élément essentiel de la

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however, be proceedings in which, because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings the successful party has been both unnecessarily delayed in the obtaining of substantive justice and been obliged to incur added expense. Rule 20 exists as a mechanism for avoiding these failures of procedural justice.

It would be convenient if the term "genuine issue" could be expressed in a precise formula for the ease of its application. Having regard, however, to the varied and unpredictable ways in which issues under Rule 20 may arise, it cannot—and the experience with Rule 56(*c*) in the United States has shown that it can be harmful to gloss the wording of the rule with expressions that fail to capture its meaning. (See Wright, Miller and Kane, *supra*, at vol. 10A, pp. 97-107 and 176-77.)

It is safe to say that "genuine" means not spurious and, more specifically, that the words "for trial" assist in showing the meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to *satisfy* the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists. (See 6 *Moore's Federal Practice*, 2nd ed. (1987 release), p. 56-391; Wright, Miller and Kane, *supra*, at vol. 10A, pp. 574-75.)[5]

In my view, the new process available under Rules 432.1 to 432.7 should not be construed as to prevent a motions judge from doing that which it surely envisages—allowing a summary judgment to be rendered in a proper case with consequent savings in time and expense that a trial would otherwise entail. The intention appears to be that claims or defences clearly without foundation should not take up the time and incur the costs of a trial. To this end, as

[5] These observations were made in light of the "policy" expressed in subrule 1.04(1) of the Ontario *Rules* which require that the rules "be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits". Subsection 2(2) of the *Federal Court Rules*, although differently worded, appears to have the same objective in mind. It requires, among other things, that the rules "be so interpreted and applied as to facilitate rather than to delay or to end prematurely the normal advancement of cases". See also Rules 6 [as enacted by SOR/90-846, s. 2] and 302.

justice procédurale, et le fait d'en priver une partie, comme la marque d'une injustice procédurale. Il se peut toutefois que dans des procédures ne comportant pas de véritables questions litigieuses qui commandent une instruction, la tenue d'un procès soit inutile, et représente donc un manquement à la justice procédurale. Dans ce type de procédure, la partie qui a gain de cause a, à la fois, subi un retard inutile avant d'obtenir justice sur le fond et dû engager des frais additionnels. La règle 20 est un mécanisme qui permet d'éviter pareil manquement à la justice procédurale.

Il serait pratique que l'expression «question litigieuse» puisse être exprimée sous forme d'une formule précise facile d'application. Toutefois, compte tenu des façons très variées et imprévisibles dont des questions peuvent surgir sous le régime de la règle 20, il n'est pas possible—et l'expérience relative à l'alinéa 56*c*) aux États-Unis a démontré qu'il peut être nuisible — de donner de l'éclat au libellé de la règle à l'aide d'expressions qui n'en rendent pas bien le sens. (Voir Wright, Miller et Kane, *supra*, vol. 10A, pp. 97 à 107 et 176 et 177.)

On peut sans risque affirmer que la question ne doit pas être fallacieuse et, plus précisément, que les termes «à instruire» aident à l'interprétation de cette expression. Si la preuve produite dans le cadre d'une requête sollicitant un jugement sommaire convainc la Cour qu'il n'existe pas de questions de fait dont la résolution exige une instruction, les conditions posées par la règle sont remplies. Il doit être clair qu'une instruction est inutile. C'est à la partie requérante qu'il incombe de *convaincre* le tribunal que sa requête satisfait aux exigences de la règle. De plus, il est important de se rappeler que le rôle du tribunal n'est pas de résoudre une question de fait, mais de déterminer s'il en existe une. (Voir 6 *Moore's Federal Practice*, 2e éd. (publication de 1987), p. 56-391; Wright, Miller et Kane, *supra*, vol. 10A, pp. 574 et 575.[5])

Selon moi, le nouveau processus autorisé par les Règles 432.1 à 432.7 ne doit pas être interprété de façon à empêcher le juge chargé des requêtes de faire ce qu'il prévoit de façon certaine— soit de permettre le prononcé d'un jugement sommaire dans les circonstances appropriées et, partant, des économies par rapport au temps et à l'argent qu'il faudrait autrement consacrer à l'instruction. L'intention qui en ressort est celle d'éviter les délais et les frais liés à un procès

[5] Ces observations ont été faites à la lumière de la politique formulée dans le paragraphe 1.04(1) des Règles de l'Ontario selon lesquelles les règles «doivent recevoir une interprétation large afin d'assurer la résolution équitable sur le fond de chaque instance civile, de la façon la plus expéditive et la moins onéreuse». Le paragraphe 2(2) des *Règles de la Cour fédérale*, bien que libellé différemment, semble viser le même objectif. Il dispose, notamment, que les règles «doivent s'interpréter les unes par les autres et autant que possible faciliter la marche normale des procès plutôt que la retarder ou y mettre fin prématurément». Voir aussi les Règles 6 [édictée par DORS/90-846, art. 2] et 302.

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Henry J. stated in *Pizza Pizza*, *supra*, both sides are required to "put their best foot forward". The responding party cannot hold back in the hope that the motion will fall of its own weight because the evidence in support is insufficient. Subsection 432.2(1) of the Rules places upon that party an obligation not to "rest on the . . . pleadings" but to file evidence setting out "specific facts showing that there is a genuine issue for trial". The new Rules should be approached with all of this in mind.

I cannot agree with the Motions Judge that subsection 432.2(1) of the Rules placed any obligation on the appellant to raise a genuine issue for trial. Rather, as the moving parties the respondents were required to satisfy the Court that no such issue existed (see *Irving Ungerman Ltd.*, *supra*, at page 551). What the new Rules appear to require is that both sides file such evidence as is reasonably available to them on the issues raised by the pleadings and from which the Court can determine whether there is a genuine issue for trial. The appellant was thus obligated by subsection 432.2(1) of the Rules to bring forth evidence, if so available, showing that there is a genuine issue for trial. This Rule, as I see it, imposes an evidentiary burden only.

The appellant contends that the Motions Judge erred in allowing the motion for summary judgment to proceed on the ground that "there are no genuine issues of fact". This, of course, is a claim in an admiralty action *in rem* but that is not of itself a reason for refusing the relief sought. The applicable Rules are not restricted to actions other than actions of this kind.[6]

[6] Compare Order 14, rule 1 of the English *Rules of the Supreme Court* [SI 1965/1776], which allows for the granting of judgment on the ground that "the defendant has no defence", but renders the rule inapplicable to "an Admiralty action *in rem*".

dans les cas où les demandes ou les moyens de défense sont manifestement non fondés. Le juge Henry a déclaré, dans l'arrêt *Pizza Pizza*, précité, que les deux parties doivent [TRADUCTION] «présenter leur cause sous son meilleur jour». L'intimée ne peut demeurer inactive dans l'espoir que la requête échoue d'elle-même en raison de l'insuffisance de la preuve. Le paragraphe 432.2(1) des Règles lui impose l'obligation de ne pas «s'appuyer sur les seules . . . plaidoiries écrites», mais de produire une preuve qui énonce «des faits précis démontrant l'existence d'une question sérieuse à instruire». Pour appliquer les nouvelles règles, il faut tenir compte de tous ces éléments.

Je ne peux souscrire à l'opinion du juge chargé des requêtes, selon laquelle le paragraphe 432.2(1) des Règles impose à l'appelante l'obligation de soulever une question sérieuse à instruire. Au contraire, en qualité de parties requérantes, les intimés devaient convaincre la Cour qu'il n'existait aucune question de cette nature (voir la décision *Irving Ungerman Ltd.*, précitée, à la page 551). Les nouvelles Règles semblent exiger que les deux parties produisent les éléments de preuve auxquels elles ont raisonnablement accès relativement aux questions soulevées par les actes de procédure et à partir desquels la Cour peut déterminer s'il existe une question sérieuse à instruire. L'appelante était donc tenue en vertu du paragraphe 432.2(1) des Règles de présenter une preuve, s'il en était, démontrant qu'il existe une question sérieuse à instruire. Selon moi, cette règle n'impose qu'un fardeau relatif à la preuve.

L'appelante soutient que le juge chargé des requêtes a commis une erreur en permettant que la procédure en jugement sommaire suive son cours au motif [TRADUCTION] «qu'il n'existe aucune question de fait sérieuse». L'instance vise, bien sûr, une demande formulée par voie d'action *in rem* en matière d'amirauté, mais cet élément ne suffit pas en soi pour justifier le refus du redressement demandé. Les règles applicables ne se limitent pas aux actions d'une autre nature[6].

[6] Comparer aux *Rules of the Supreme Court* [SI 1965/1776], Order 14, rule 1, de l'Angleterre, qui permettent le prononcé d'un jugement au motif que [TRADUCTION] «la partie défenderesse ne fait valoir aucun moyen de défense», mais déclarent cette règle inapplicable à [TRADUCTION] «une action *in rem* en matière d'amirauté».

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It is indisputable that the appellant had ample time to cross-examine on the respondents' affidavit evidence if it had cared to do so. On the other hand, the right to so cross-examine, while fundamental, lacks the advantages available on full examination for discovery after production of documents. In the case at bar neither side elected to cross-examine on the other's affidavit evidence. I do not read the new Rules as placing an absolute obligation on either side to cross-examine, although the failure of a party to do so might perhaps militate against that party's position on the issues because of lack of evidence. It would not mean any non-compliance with the Rules, nor in itself justify the drawing of any adverse inference.

The appellant, who was expected by the Rules to file its own evidence in response to that of the respondents, filed only the affidavit of an officer of the appellant, but it does not go much beyond that which was already set forth in the affidavit to lead warrant. I acknowledge that the appellant probably had no control over possible sources of evidence to buttress its assertion that the bunkers were ordered by or on the authority of owners and on the credit of the ship. These sources are located in various countries around the world—a not uncommon situation in admiralty cases in the Court whose jurisdiction *in rem* is world wide provided the *res* is within its territorial jurisdiction at the time an action is commenced. I am unable to see from the record that the appellant held back evidence which should have been filed in response to the motion or, indeed, that the appellant was in a position to say more than that which is set forth in the affidavits filed—that the bunkers were supplied on the strength of the representation contained in the Marine Oil Brokering Co. telex of June 30, 1994.

The question remains whether there was any "genuine issue for trial". The respondents are undoubtedly correct in asserting that their evidence is to the effect that the bunkers were not ordered by the shipowners

Il est incontestable que l'appelante aurait eu amplement le temps, si elle l'avait voulu, de procéder à un contre-interrogatoire relativement à la preuve par affidavit produite par les intimés. Par contre, le droit à un contre-interrogatoire, bien que fondamental, ne comporte pas les mêmes avantages qu'un interrogatoire au préalable complet mené après la divulgation des documents. En l'espèce, aucune des parties n'a choisi d'exercer son droit à un contre-interrogatoire relativement à la preuve par affidavit déposée par l'autre. Les règles n'imposent pas, selon moi, l'obligation absolue à l'une ou l'autre des parties de mener un contre-interrogatoire, bien que le défaut d'une partie de se prévaloir de ce droit puisse peut-être avoir un effet défavorable sur ces prétentions en raison du manque de preuve. Pareil défaut ne constitue pas pour autant une infraction aux règles, ni ne justifie en soi une conclusion défavorable.

L'appelante, qui aurait normalement dû déposer sa propre preuve, en vertu des règles, pour répondre à celle des intimés, s'est contentée de déposer l'affidavit d'un représentant de l'appelante, dont la teneur ne différait pas beaucoup de celle de l'affidavit portant demande de mandat. Je reconnais que l'appelante n'avait probablement aucun contrôle sur les sources possibles d'éléments de preuve pouvant étayer son affirmation selon laquelle le mazout lourd a été commandé par les propriétaires du navire, ou en leur nom, et sur le crédit du navire. Ces sources se situent dans différents pays du monde—situation courante dans les causes en matière d'amirauté soumises à la Cour, dont la compétence *in rem* s'étend au monde entier dans la mesure où la chose se trouve dans son ressort au moment de l'introduction de l'action. Il m'est impossible de conclure à partir du dossier que l'appelante a retenu des éléments de preuve qui auraient dû être déposés en réponse à la requête ou, en fait, que l'appelante était dans une situation qui lui permettait de faire des déclarations allant au-delà de celles énoncées dans les affidavits déposés—soit que le mazout lourd a été fourni sur la foi des assertions faites dans la télécopie envoyée le 30 juin 1994 par la société Marine Oil Brokering Co.

Il reste à décider s'il existait une «question sérieuse à instruire». Les intimés ont, de toute évidence, raison d'affirmer que leur preuve porte que le mazout lourd n'a pas été commandé par les proprié-

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or by anyone acting on their behalf. But that evidence, it seems to me, does no more than put in conflict the equally clear evidence set forth in the appellant's affidavits that the bunkers were ordered "in accordance with instructions received from purchaser M/V SARLA and owners". The respondents' evidence falls short of establishing the truth of the matter even though it disputes in no uncertain terms the truth of the appellant's evidence. It remains to be resolved, however, just where in fact the truth really lies. Credibility is very much involved in that determination, which cannot be made by a motions judge or by this Court.

Looked at in isolation, the contracts contained in the charter party and related documents may well suggest that responsibility for bunkering the defendant ship and the cost thereof fell on the charterers and not on the owners. However, that owners may have authorized the particular purchase despite the language of the charter party and related documents cannot be entirely ruled out. In the *Jensen Star*, *supra* (a case involving claims for materials supplied and repairs to a ship), at page 216, Marceau J.A. reaffirmed the principle enshrined in a line of cases in the Exchequer Court of Canada and in the Trial Division of this Court, that "an action *in rem* is sustainable only if the owner is personally liable for the amount claimed". He then went on to sketch three possible scenarios out of which a shipowner's liability may arise [at pages 216-217]:

> ... the owner may have contracted himself, or he may have authorized someone to contract on his personal credit, or he may have expressly or implicitly authorized a person, in possession and control of a ship, to contract on the credit of the ship (rather than on the entirety of his personal assets).

What is not clear in the present case is whether owners ordered the bunkers through their agents or whether they were ordered out of some necessity by the master, who remained in charge of the ship, with actual or apparent authority of owners.

taires du navire, ni par qui que ce soit agissant en leur nom. Selon moi, cette preuve a néanmoins pour seul effet de contredire la preuve tout aussi claire contenue dans les affidavits de l'appelante selon laquelle le mazout lourd a été commandé [TRADUCTION] «en conformité avec les instructions reçues de l'acheteur M/V SARLA et de ses propriétaires». La preuve des intimés n'établit pas vraiment la véracité des faits, bien qu'elle attaque sans équivoque la véracité de la preuve de l'appelante. Toutefois, la question de savoir ce qui s'est véritablement passé n'est toujours pas résolue. Cette question tient en grande partie à la crédibilité des parties et elle ne peut être résolue par un juge chargé des requêtes ni par la présente Cour.

Pris isolément, les contrats compris dans la charte-partie et les documents connexes peuvent bien laisser entendre que ce sont les affréteurs, et non les propriétaires du navire, qui sont responsables de l'approvisionnement en carburant du navire défendeur et du coût du carburant. Toutefois, il n'est pas possible d'exclure catégoriquement que les propriétaires aient pu autoriser cet achat particulier, malgré les stipulations de la charte-partie et des documents connexes. Dans l'arrêt *Jensen Star*, précité (une affaire concernant des matériels fournis et à des réparations effectuées à un navire), à la page 216, le juge Marceau, J.C.A., a réaffirmé le principe consacré par une série de jugements de la Cour de l'Échiquier du Canada et de la Section de première instance de la présente Cour, selon lequel «une action *in rem* est possible seulement si le propriétaire a engagé personnellement sa responsabilité à l'égard de la somme réclamée». Il a ensuite dressé trois scénarios possibles pouvant engager la responsabilité du propriétaire d'un navire [à la page 217]:

> ... le propriétaire peut avoir conclu le contrat lui-même, il peut avoir autorisé quelqu'un à s'engager sur son crédit personnel, ou il peut avoir autorisé expressément ou implicitement une personne qui a la possession et le contrôle du navire à tirer du crédit du navire (plutôt que de la totalité de ses biens personnels).

En l'espèce, il n'est pas clair si les propriétaires ont commandé le mazout lourd par l'intermédiaire de leurs agents, ou si c'est le capitaine, qui demeurait responsable du navire, qui les a commandées par nécessité avec l'autorisation réelle ou apparente de ses propriétaires.

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In my opinion, the respondents' evidence does not disprove the assertion in the appellant's evidence that the bunkers were ordered "in accordance with instructions received from purchaser M/V SARLA and owners". That statement must not be removed from its factual matrix which includes that at the time the bunkers were supplied the defendant ship may have been already redelivered to owners pursuant to the charter party.

I have concluded that there is here a "genuine issue" of fact which can only be resolved at trial. Accordingly, I would allow the appeal with costs and set aside the order of the Trial Division.

MARCEAU J.A.: I agree.

LINDEN J.A.: I agree.

Selon moi, la preuve des intimés ne réfute pas l'allégation contenue dans la preuve de l'appelante selon laquelle le mazout lourd a été commandé [TRADUCTION] «en conformité avec les instructions reçues de l'acheteur M/V SARLA et de ses propriétaires». Cette déclaration ne doit pas être dissociée de son contexte et notamment du fait qu'au moment où le carburant a été fourni au navire défendeur, celui-ci avait peut-être été remis à ses propriétaires en vertu de la charte-partie.

J'ai conclu qu'il existe une «question» de fait «sérieuse» qui ne peut être résolue qu'à l'issue d'une instruction. En conséquence, j'accueillerais l'appel avec dépens et j'annulerais l'ordonnance de la Section de première instance.

LE JUGE MARCEAU, J.C.A.: Je souscris à ces motifs.

LE JUGE LINDEN, J.C.A.: Je souscris à ces motifs.

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A-621-88

**Mount Royal/Walsh Inc.** (*Plaintiff*)

*v.*

**The Ship *Jensen Star*, Jensen Shipping Limited,** and **the owners and all others interested in the Ship *Jensen Star*** (*Defendants*)

*INDEXED AS: MOUNT ROYAL/WALSH INC. v. JENSEN STAR (THE) (C.A.)*

Court of Appeal, Marceau, MacGuigan and Desjardins JJ.A.—Montréal, April 4; Ottawa, May 23, 1989.

*Federal Court jurisdiction — Trial Division — Maritime law — Appeal from judgment allowing action in rem for materials supplied and repairs to ship — Ownership of ship transferred prior to commencement of action — New owners demise chartering ship to pre-transfer owners — S. 43(3) Federal Court Act requiring continuity of ownership as condition for exercise of Court's jurisdiction in rem with respect to claim based on s. 22(2)(m) and (n) of Act — "Beneficial owner" in s. 43(3) not encompassing demise charterer — Estoppel cannot be raised to confer jurisdiction expressly denied by statute — Pre-transfer claim not sustainable as s. 43(3) requirement not met — Post-transfer claim allowed.*

*Maritime law — Action in rem — Jurisdiction — Appeal from judgment allowing action in rem for repairs and materials supplied to ship — Transfer of ownership of vessel prior to commencement of action — S. 43(3) Federal Court Act requiring continuity of ownership for jurisdiction in rem to be exercised — Condition met only as to claim arising after transfer of ownership — Post-transfer claim raising issue of nature and extent of owner's involvement for right in rem to exist under Act, s. 43(3) — Involvement must be complete and direct enough to entail owner's personal liability — Owner's actions tacit authorization to charterer to contract on credit of vessel — Post-transfer claim allowed.*

*Maritime law — Practice — Phrase "owners and all others interested in" ship (R. 1002) indicative of manner to commence action in rem — For judgment in personam to issue, party must be personally impleaded.*

This is an appeal against a judgment of the Trial Division granting an action brought by Mount Royal/Walsh Inc. for repairs done and materials supplied to the ship *Jensen Star*.

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**Mount Royal/Walsh Inc.** (*demanderesse*)

*c.*

**Le navire *Jensen Star*, Jensen Shipping Limited,** et **les propriétaires et toutes les autres personnes ayant un droit sur le navire *Jensen Star*** (*défendeurs*)

*RÉPERTORIÉ: MOUNT ROYAL/WALSH INC. c. JENSEN STAR (LE) (C.A.)*

Cour d'appel, juges Marceau, MacGuigan et Desjardins, J.C.A.—Montréal, 4 avril; Ottawa, 23 mai 1989.

*Compétence de la Cour fédérale — Section de première instance — Droit maritime — Appel interjeté contre un jugement accueillant une action en matière réelle pour matériaux fournis et réparations d'un navire — Propriété du navire transférée avant l'introduction de l'action — Les nouveaux propriétaires ont cédé le navire affrété aux propriétaires avant le transfert proprement dit — L'art. 43(3) de la Loi sur la Cour fédérale exige qu'il y ait continuité quant à la propriété pour que la Cour puisse exercer sa compétence en matière réelle relativement à une demande fondée sur l'art. 22(2)m) et n) de la Loi — L'expression «beneficial owner» de l'art. 43(3) ne comprend pas l'affréteur par voie de cession à bail — On ne peut opposer une fin de non-recevoir pour conférer au tribunal une compétence que la loi lui refuse expressément — La réclamation antérieure au transfert ne peut être accueillie puisque la condition de l'art. 43(3) n'a pas été remplie — La réclamation postérieure au transfert est accueillie.*

*Droit maritime — Action en matière réelle — Compétence — Appel interjeté contre un jugement accueillant une action en matière réelle pour réparations et matériaux fournis à un navire — Transfert de la propriété du navire avant l'introduction de l'action — L'art. 43(3) de la Loi sur la Cour fédérale exige qu'il y ait continuité quant à la propriété pour que la Cour puisse exercer sa compétence en matière réelle — La condition n'est satisfaite qu'en ce qui concerne la réclamation postérieure au transfert de la propriété — Une telle réclamation soulève la question de la nature et de l'étendue de la participation de propriétaire pour que le droit in rem puisse exister en vertu de l'art. 43(3) de la Loi — La participation doit être complète et directe au point d'entraîner la responsabilité personnelle du propriétaire — Les actes du propriétaire constituent une autorisation tacite accordée à l'affréteur de tirer du crédit du navire — La réclamation postérieure au transfert est accueillie.*

*Droit maritime — Pratique — L'expression «aux propriétaires et à toutes les autres personnes ayant un droit sur» le navire (Règle 1002) indique la façon d'introduire l'action in rem — Pour qu'un jugement puisse être rendu en matière personnelle, une partie doit être poursuivie personnellement.*

Il s'agit d'un appel interjeté contre un jugement de la Section de première instance qui a accueilli une action intentée par Mount Royal/Walsh Inc., pour réparations et matériaux four-

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The claim was based on paragraphs 22(2)(*m*) and (*v*) of the *Federal Court Act*. Although the judgment under attack is one *in rem* against the ship and *in personam* against Jensen Shipping Ltd., only the *in rem* part of the judgment is challenged.

It was established at trial that, prior to the commencement of the action, Jensen Shipping transferred ownership of the vessel to Jensen Marine Holdings Ltd. The latter turned over the ship to Jensen Shipping under a demise bareboat charter. The appellants, relying on subsection 43(3) of the Act, contend that the Court cannot exercise its jurisdiction *in rem* since at the time the action was commenced, the ship was not beneficially owned by the person who was the benefical owner at the time the cause of action arose. The Trial Judge affirmed the Court's jurisdiction *in rem* stating that, for the purposes of subsection 43(3), Jensen Shipping remained, at all times, the beneficial owner of the ship or, alternatively, that Jensen Shipping and Jensen Marine Holdings were estopped from asserting that Jensen Shipping was not the beneficial owner at the time the cause of action arose.

*Held*, the judgment of the Trial Division should be varied so as to limit the respondent's claim to the services and materials supplied to the ship after transfer of the ownership.

Neither of the propositions relied upon by the Trial Judge was legally correct. The expression "beneficial owner" in subsection 43(3) does not encompass a demise charterer. Whatever be the meaning of the qualifying term "beneficial", the word "owner" can only normally be used in reference to title in the *res* itself, a title characterized essentially by the right to dispose of the *res*. The French corresponding word "*propriétaire*" is clear in that regard.

Nor could it be held that the defendants were estopped from taking the position that Jensen Shipping was not the beneficial owner when action was commenced. It did not appear that the factual basis for estoppel was here present since no one had altered his position to his detriment due to any promise or assurance held out. In any event, the requirement of continuity of ownership imposed by subsection 43(3) to allow an action *in rem* goes to the very jurisdiction of the Court, and no estoppel can give a court jurisdiction expressly denied by statute.

The action *in rem* relating to the respondent's claim which arose prior to the transfer of ownership cannot be entertained. The requirement of subsection 43(3) had not been met. The statutory right *in rem* that the respondent could have exercised to secure payment was extinguished by the transfer of ownership.

The question raised with respect to the services and materials supplied to the ship after transfer of ownership is not one of jurisdiction since the subsection 43(3) condition for the exercise of the Court's jurisdiction in the case of the post-transfer invoices has clearly been met. The question is whether the nature and extent of the relationship between the owner of the

nis au navire *Jensen Star*. La réclamation était fondée sur les alinéas 22(2)*m*) et *v*) de la *Loi sur la Cour fédérale*. Même si le jugement contesté a été prononcé, à la fois, en matière réelle contre le navire, et en matière personnelle contre Jensen Shipping Ltd., seule la portion du jugement prononcé en matière réelle est contestée.

Il a été établi en première instance qu'antérieurement à l'introduction de l'action, Jensen Shipping avait transféré la propriété du navire à Jensen Marine Holdings Ltd. Cette dernière a remis le navire à Jensen Shipping en vertu d'un contrat d'affrètement coque nue. En se fondant sur le paragraphe 43(3) de la Loi, les appelants prétendent que la Cour ne peut exercer sa compétence en matière réelle puisque, au moment où l'action a été intentée, le navire n'appartenait pas à la personne qui était le véritable propriétaire au moment où la cause d'action a pris naissance. Le juge de première instance a confirmé la compétence de la Cour en matière réelle lorsqu'il a déclaré que, pour les fins du paragraphe 43(3), Jensen Shipping était en tout temps demeurée la véritable propriétaire du navire ou, subsidiairement, que Jensen Shipping et Jensen Marine Holdings étaient empêchées de prétendre que Jensen Shipping n'était pas le véritable propriétaire du navire au moment où la cause d'action a pris naissance.

*Arrêt*: le jugement de la Section de première instance devrait être modifié de manière à limiter la réclamation de l'intimée aux services et aux matériaux fournis au navire à la suite du transfert de la propriété.

Ni l'une ni l'autre propositions invoquées par le juge de première instance n'étaient exactes en droit. L'expression «*beneficial owner*» qui figure au paragraphe 43(3) n'inclut pas l'affréteur par voie de cession à bail. Quel que soit le sens du qualificatif «*beneficial*», le terme «*owner*» est normalement utilisé uniquement pour désigner celui qui possède un titre dans la chose elle-même, titre qui comporte principalement le droit d'aliéner la chose. Le terme français correspondant «propriétaire» est clair à cet égard.

On ne pouvait non plus statuer que les défendeurs étaient empêchés de prétendre que Jensen Shipping n'était pas la véritable propriétaire au moment où l'action a été intentée. Les faits essentiels justifiant l'*estoppel* ne semblaient pas exister en l'espèce puisque personne n'a modifié sa position à son détriment par suite d'une promesse ou d'une garantie qui aurait été faite. De toute manière, le paragraphe 43(3) exige qu'il y ait continuité quant à la propriété du navire pour donner lieu à une action *in rem* et permettre à la Cour d'exercer sa compétence, et aucune fin de non-recevoir ne peut donner à un tribunal une compétence que la loi lui refuse expressément.

L'action *in rem* relative à la réclamation de l'intimée qui a pris naissance antérieurement au transfert de la propriété du navire ne peut être accueillie. La condition prévue au paragraphe 43(3) n'a pas été remplie. Le droit *in rem* que l'intimée aurait pu exercer pour se faire rembourser les sommes dues était éteint par suite du transfert de la propriété du navire.

La question soulevée à propos des services et matériaux fournis au navire par suite de son transfert de propriété n'a rien à voir avec la compétence de la Cour, puisque la condition prévue au paragraphe 43(3) pour que la Cour puisse exercer sa compétence relativement aux comptes postérieurs au transfert a été clairement remplie. La question est de savoir si la nature et

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vessel and the supplier of necessaries are such as to enforce a statutory right *in rem*.

The principle underlying subsection 43(3) is that, for the right *in rem* to come into existence, the owner must, in all cases, be involved in the contract under which the services were rendered. This condition is specific to Canadian law and what it involves cannot be determined by reference to English law.

The Trial Division of this Court has consistently held that the involvement of the owner in the supplying of necessaries has to be complete and direct enough to entail his personal liability. An action *in rem* is sustainable only if the owner is personally liable for the amount claimed. To contend that an action *in rem* could be sustained even in the absence of any personal liability on the part of the owner would defeat the underlying principle which is the protection of the owner. Liability as a result of some personal behaviour and attitude on the part of the owner is required whether the latter contracted himself, or has authorized someone to contract on his personal credit or has expressly or implicitly authorized a person, in possession and control of a ship, to contract on the credit of the ship (rather than on the entirety of his personal assets).

The nature and extent of the involvement of Jensen Marine Holdings in the supplying of services by the respondent were such as to render valid the action *in rem*. That involvement consisted in acting through its president in such a manner as to authorize tacitly Jensen Shipping to contract on the credit of the vessel and engage, to that extent, its personal liability. It had to be kept in mind that the president of Jensen Marine Holdings was also president of Jensen Shipping, and that he did not treat those entities as separate but, on the contrary, never considered his legal authority over the ship to have changed.

In any event, Jensen Marine Holdings cannot dispute such an interpretation. It is well established that necessaries supplied to a vessel are *prima facie* presumed to have been supplied on the credit of the vessel and its owner. No attempt was made to rebut that presumption.

The Trial Judge could not have done otherwise than render judgment *in personam* only against Jensen Shipping: no judgment *in personam* could have been pronounced against Jensen Marine Holdings since there was no formal order of the Court authorizing amendment of the statement of claim to implead it personally. The phrase "the owners and all others interested in" the ship is merely the manner indicated by Rule 1002 to commence an action *in rem* and it can only lead to a judgment *in rem*.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

*Bank Act*, R.S.C., 1985, c. B-1, s. 2.
*Canada Business Corporations Act*, R.S.C., 1985, c. C-44, s. 2.

l'étendue du lien entre le propriétaire du navire et le fournisseur d'approvisionnements sont telles qu'elles justifient l'exercice d'un droit *in rem*.

Le principe qui sous-tend le paragraphe 43(3) est que le propriétaire doit, dans tous les cas, participer au contrat en vertu duquel les services ont été rendus pour que le droit *in rem* puisse exister. Cette condition est particulière au droit canadien et on ne saurait définir cette exigence en fonction du droit anglais.

D'après toutes les décisions rendues par la Section de première instance de cette Cour, il faut que la participation du propriétaire dans la fourniture des approvisionnements nécessaires soit suffisamment complète et directe pour que celui-ci engage sa responsabilité personnelle. Une action *in rem* est possible seulement si le propriétaire a engagé personnellement sa responsabilité à l'égard de la somme réclamée. Prétendre qu'une action *in rem* pourrait être accueillie même en l'absence de toute responsabilité personnelle du propriétaire serait contraire au principe qui sous-tend le système, c'est-à-dire la protection du propriétaire. Le propriétaire doit avoir engagé sa responsabilité par un comportement ou une attitude quelconque, peu importe qu'il ait conclu le contrat lui-même ou qu'il ait autorisé quelqu'un à s'engager sur son crédit personnel ou qu'il ait autorisé expressément ou implicitement une personne qui a la possession et le contrôle du navire à tirer du crédit du navire (plutôt que de la totalité de ses biens personnels).

La nature et l'étendue de l'intérêt de Jensen Marine Holdings concernant la prestation des services par l'intimée étaient telles qu'elles rendaient valide l'action *in rem*. Cet intérêt consistait à agir par l'intermédiaire de son président de manière à autoriser tacitement Jensen Shipping à tirer du crédit du navire et à engager, dans cette mesure, sa responsabilité personnelle. Il fallait garder à l'esprit que le président de Jensen Marine Holdings était également président de Jensen Shipping et qu'il ne considérait pas ces entités comme étant distinctes, bien au contraire, il n'a jamais pensé que ses droits sur le navire avaient changé.

De toute manière, Jensen Marine Holdings ne peut contredire une telle interprétation. Il est bien établi que les approvisionnements nécessaires fournis à un navire sont présumés *prima facie* l'avoir été sur le crédit du navire et de son propriétaire. Aucune tentative n'a été faite pour réfuter cette présomption.

Le juge de première instance ne pouvait faire autrement que de rendre un jugement *in personam* uniquement contre Jensen Shipping: aucun jugement *in personam* ne pouvait être prononcé contre Jensen Marine Holdings, puisqu'il n'y avait aucune ordonnance formelle de la Cour autorisant la modification de la déclaration et permettant de la poursuivre personnellement. L'expression «aux propriétaires et à toutes les autres personnes ayant un droit sur le navire», est simplement la façon prévue par la Règle 1002 pour intenter une action *in rem*, qui ne peut aboutir qu'à un jugement *in rem*.

LOIS ET RÈGLEMENTS

*Convention internationale pour l'unification de certaines règles sur la saisie conservatoire des navires de mer*, 10 mai 1952, 439 R.T.N.U. 193.

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*Canada Shipping Act*, R.S.C., 1985, c. S-9, s. 654 (rep. and sub. by R.S.C., 1985 (3rd Supp.), c. 6, s. 84).
*Federal Court Act*, R.S.C., 1985, c. F-7, ss. 22(2)*m*),*n*), 43(2),(3).
*Federal Court Rules*, C.R.C., c. 663, R. 1002.
*International Convention Relating to the Arrest of Seagoing Ships*, May 10, 1952, 439 U.N.T.S. 193.
*Supreme Court Act 1981*, 1981, c. 54, s. 21(4) (U.K.).

CASES JUDICIALLY CONSIDERED

NOT FOLLOWED:

*Thorne Riddell Inc. v. Nicolle N Enterprises Inc.*, [1985] 2 F.C. 31 (T.D.).

REFERRED TO:

*I Congreso Del Partido*, [1977] 1 Lloyd's Rep. 536 (Q.B. (Adm. Ct.)); *The Andrea Ursula*, [1971] 1 Lloyd's Rep. 145 (Adm.); *The Permina 3001*, [1979] 1 Lloyd's Rep. 327 (Sing. C.A.); *ITO–International Terminal Operators Ltd. v. Miida Electronics et al.*, [1986] 1 S.C.R. 752; *The Mecca*, [1897] A.C. 286 (H.L.); *Coastal Equipment Agencies Ltd. v. The "Comer"*, [1970] Ex.C.R. 12; *The Henrich Björn* (1886), 11 App. Cas. 270 (H.L.); *The Castlegate*, [1893] A.C. 38 (H.L.); *Westcan Stevedoring Ltd. v. The "Armar"*, [1973] F.C. 1232 (T.D.); *Sabb Inc. v. Shipping Ltd.*, [1976] 2 F.C. 175 (T.D.); *Waterside Ocean Navigation Co., Inc. v. International Navigation Ltd.*, [1977] 2 F.C. 257 (T.D.); *McCain Produce Co. Ltd. v. The "Rea"*, [1978] 1 F.C. 686 (T.D.); *Logistec Corp. v. The "Sneland"*, [1979] 1 F.C. 497 (T.D.); *Kuhr v. The "Friedrich Busse"*, [1982] 2 F.C. 709 (T.D.); *Marlex Petroleum Inc. v. The Ship "Har Rai"*, [1984] 2 F.C. 345 (T.D.); *Imperial Oil Limited v. Ship "Expo Spirit" and Hoverwest Ferry Services Inc.* (1986), 6 F.T.R. 156 (F.C.T.D.); *Western Stevedoring Co. v. Ship "Anadolu Guney" Cargo et al.* (1988), 23 F.T.R. 117 (F.C.T.D.); *Foong Tai & Co. v. Buchheister & Co.*, [1908] A.C. 458 (P.C.); *The Banco*, [1971] 1 Lloyd's Rep. 49 (C.A.); *The August 8*, [1983] 2 A.C. 450 (P.C.).

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COUNSEL:

*Sean J. Harrington* for plaintiff [respondent].

*Loi sur la Cour fédérale*, L.R.C. (1985), chap. F-7, art. 22(2)*m*),*n*), 43(2),(3).
*Loi sur la marine marchande du Canada*, L.R.C. (1985), chap. S-9, art. 654 (abrogé et remplacé par L.R.C. (1985) (3e suppl.), chap. 6, art. 84).
*Loi sur les banques*, L.R.C. (1985), chap. B-1, art. 2.
*Loi sur les sociétés par actions*, L.R.C. (1985), chap. C-44, art. 2.
*Règles de la Cour fédérale*, C.R.C., chap. 663, Règle 1002.
*Supreme Court Act 1981*, 1981, chap. 54, art 21(4) (R.-U.).

JURISPRUDENCE

DÉCISION NON SUIVIE:

*Thorne Riddell Inc. c. Nicolle N Enterprises Inc.*, [1985] 2 C.F. 31 (1re inst.).

DÉCISIONS CITÉES:

*I Congreso Del Partido*, [1977] 1 Lloyd's Rep. 536 (Q.B. (Adm. Ct.)); *The Andrea Ursula*, [1971] 1 Lloyd's Rep. 145 (Adm.); *The Permina 3001*, [1979] 1 Lloyd's Rep. 327 (C.A. Sing.); *ITO–International Terminal Operators Ltd. v. Miida Electronics Inc. et autre*, [1986] 1 R.C.S. 752; *The Mecca*, [1897] A.C. 286 (H.L.); *Coastal Equipment Agencies Ltd. v. The «Comer»*, [1970] R.C.É. 12; *The Henrich Björn* (1886), 11 App. Cas. 270 (H.L.); *The Castlegate*, [1893] A.C. 38 (H.L.); *Westcan Stevedoring Ltd. c. Le «Armar»*, [1973] C.F. 1232 (1re inst.); *Sabb Inc. c. Shipping Ltd.*, [1976] 2 C.F. 175 (1re inst.); *Waterside Ocean Navigation Co., Inc. c. International Navigation Ltd.*, [1977] 2 C.F. 257 (1re inst.); *McCain Produce Co. Ltd. c. Le «Rea»*, [1978] 1 C.F. 686 (1re inst.); *Logistec Corp. c. Le «Sneland»*, [1979] 1 C.F. 497 (1re inst.); *Kuhr c. Le «Friedrich Busse»*, [1982] 2 C.F. 709 (1re inst.); *Marlex Petroleum Inc. c. Le navire «Har Rai»*, [1984] 2 C.F. 345 (1re inst.); *Imperial Oil Limited c. Navire «Expo Spirit» et Hoverwest Ferry Services Inc.* (1986), 6 F.T.R. 156 (C.F. 1re inst.); *Western Stevedoring Co. c. Navire «Anadolu Guney» Cargo et autres* (1988), 23 F.T.R. 117 (C.F. 1re inst.); *Foong Tai & Co. v. Buchheister & Co.*, [1908] A.C. 458 (P.C.); *The Banco*, [1971] 1 Lloyd's Rep. 49 (C.A.); *The August 8*, [1983] 2 A.C. 450 (P.C.).

DOCTRINE

*Halsbury's Laws of England*, 4th ed., vol. 16, no. 1515. London: Butterworths, 1975.
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Tetley, W. *Maritime Liens and Claims*. London: Business Law Communications Ltd., 1985.

AVOCATS:

*Sean J. Harrington* pour la demanderesse [intimée].

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*Gerald P. Barry* for defendants [appellants].

SOLICITORS:

*McMaster Meighen*, Montréal, for plaintiff.

*Barry & Associates*, Montréal, for defendants.

*The following are the reasons for judgment rendered in English by*

MARCEAU J.A.: This appeal is taken against a judgment of the Trial Division [(1988), 17 F.T.R. 289 (F.C.T.D.)] which has granted an action brought by a ship repairer for work done and material supplied to a ship. Originally commenced as a pure action *in rem* against the ship for necessaries, the proceedings were later amended to implead personally, as a party defendant, the shipping company at the behest of which the services had been rendered. The judgment under attack is thus one *in personam* against the shipping company as well as *in rem* against the ship. Only its *in rem* part, however, is actually disputed, which permits us to leave aside some other grounds of defence raised with respect to the action as a whole but rejected by the Trial Judge and accept as it is the amount of condemnation, $237,243.68, even if there are some difficulties with how the figure was reached. But even so limited, the appeal raises a very difficult question which relates to the treatment Canadian maritime law reserves to a claim for necessaries supplied to a ship and to the *in rem* jurisdiction of the Federal Court on its admiralty side.

The facts put in evidence before the Trial Judge were somewhat involved but, of course, there is no need to go over those pertaining to grounds of defence which have been finally disposed of, such as the contention by the shipping company that the charges made were excessive or the allegation that some of the amounts claimed were either not in

*Gerald P. Barry* pour les défendeurs [appelants].

PROCUREURS:

*McMaster Meighen*, Montréal, pour la demanderesse.

*Barry et Associés*, Montréal, pour les défendeurs.

*Ce qui suit est la version française des motifs du jugement rendus par*

LE JUGE MARCEAU, J.C.A.: Appel est interjeté contre un jugement de la Section de première instance [(1988), 17 F.T.R. 289 (C.F. 1re inst.)] qui a accueilli l'action intentée par la demanderesse relativement à des travaux de réparation qu'elle a faits et à des matériaux qu'elle a fournis à un navire. L'action a d'abord été prise en matière réelle contre le navire pour la fourniture d'approvisionnements nécessaires, mais la demanderesse a subséquemment modifié sa déclaration afin de poursuivre personnellement, à titre de partie défenderesse, la société de transport maritime qui avait requis les services en question. Le jugement de la Section de première instance a donc été prononcé à la fois en matière personnelle (*in personam*) contre la société de transport maritime et en matière réelle (*in rem*) contre le navire. Toutefois, seule la portion du jugement qui a été prononcée en matière réelle est contestée en l'espèce, ce qui nous permet de mettre de côté certains autres moyens de défense qui ont été soulevés au cours de l'action prise dans son ensemble, mais que le juge de première instance a rejetés, et d'accepter tel quel le montant de la condamnation, soit 237 243,68 $, même si la façon dont cette somme a été calculée pose certaines difficultés. Quoi qu'il en soit, même ainsi délimité, l'appel soulève une question très difficile, à savoir le traitement que le droit maritime canadien réserve à une réclamation relative aux approvisionnements nécessaires fournis à un navire, ainsi que la compétence en matière réelle de la Cour fédérale s'agissant d'amirauté.

Les faits mis en preuve devant le juge de première instance sont assez compliqués, mais il n'est évidemment pas nécessaire de réexaminer ceux qui se rapportent aux moyens de défense qui ont, de façon définitive, été rejetés, par exemple l'affirmation de la société de transport maritime voulant que les sommes réclamées par la demanderesse

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relation to maritime services or else had already been paid. What has to be known of the factual background to be able to deal with the issue that the appeal is concerned with is relatively simple.

Mount Royal/Walsh Inc., (hereinafter Mount Royal), the respondent (plaintiff in the Court below), is a company which carries on the business of marine and industrial repairs in Montréal. Over the period from August 1982 until June 1984, Mount Royal was requested by Niels Jorgensen, the president and principal shareholder of Jensen Shipping Limited, also of Montréal (hereinafter Jensen Shipping), to do approximately 25 separate jobs on five different ships operated by the company, among which was the *Jensen Star*. Seventeen of these 25 jobs, for a total amount of $264,036.66, were in respect of the *Jensen Star*, the first and last invoices for which were dated August 30, 1982 and May 21, 1984. All that time, Mount Royal was working on credit, although some partial payments were received by it on two occasions (about which I will speak later). Such an extended period of credit may appear surprising for commercial operations but in fact there was a very special association between Jorgensen and the president and principal shareholder of Mount Royal, John Hynes. Jorgensen and Hynes had been partners in a marine repair and shipping business until 1982 when, quite amicably, they had decided to go their separate ways: Hynes, in the repair business with the existing but renamed firm, Jorgensen, in the shipping business with a newly incorporated company, Jensen Shipping, to which the *Jensen Star*, the one ship that belonged to the old operation, had been transferred. The patience of Mount Royal is, in that context, understandable. It was not limitless, however, and there came a time when legal proceedings finally appeared to be required.

As mentioned at the outset, the action was commenced, on August 9, 1984, as an action *in rem* directed against the *Jensen Star*, the ship defendant being described in the title of the state-

étaient trop élevées ou qu'une partie de ces sommes avait été payée ou ne concernait pas la prestation de services maritimes. Tout compte fait, les éléments qu'il convient de retenir de la preuve aux fins du présent appel sont assez simples.

L'intimée (demanderesse en première instance), Mount Royal/Walsh Inc. (ci-après appelée Mount Royal), est une société qui s'occupe de réparations navales et industrielles à Montréal. Durant la période d'août 1982 à juin 1984, elle a effectué, à la demande de Niels Jorgensen, président et principal actionnaire de Jensen Shipping Limited, société également située à Montréal (ci-après appelée Jensen Shipping), quelque vingt-cinq travaux sur cinq navires différents, dont le *Jensen Star*, qu'exploitait la société. Le *Jensen Star* a bénéficié de dix-sept de ces vingt-cinq travaux, dont le coût s'est élevé à 264 036,66 $, comme l'attestent des factures dont la première remonte au 30 août 1982 et la dernière, au 21 mai 1984. Durant toute cette période, la demanderesse a effectué ces travaux à crédit, bien qu'elle ait reçu des paiements partiels à deux occasions (il en sera question plus loin). L'octroi d'une période de crédit aussi longue à une société commerciale peut surprendre, mais il ne faut pas oublier que Jorgensen et le président et principal actionnaire de Mount Royal, John Hynes, entretenaient des rapports très particuliers. En effet, Jorgensen et Hynes étaient, jusqu'en 1982, les actionnaires d'une entreprise qui s'occupait de réparations navales et de transport maritime. En 1982, les deux associés, qui étaient en bons termes, ont décidé de se séparer: Hynes est devenu l'actionnaire principal de la société demanderesse, qu'il a rebaptisée, et a continué de s'occuper de réparations navales, tandis que Jorgensen a conservé les activités de transport maritime et a constitué une nouvelle société appelé Jensen Shipping, à qui a été transférée la propriété du navire *Jensen Star*, qui appartenait à l'ancienne société. Dans ces circonstances, il est naturel que la demanderesse ait accepté de patienter. Toutefois, comme la défenderesse a dépassé les bornes, la demanderesse a dû se résoudre à intenter une poursuite contre elle.

Comme on l'a mentionné au début, l'action intentée le 9 août 1984 était une action *in rem* contre le navire *Jensen Star*, et dans l'intitulé de la déclaration, le navire défendeur a été décrit de la

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ment of claim in the manner indicated by Rule 1002 of the Rules of this Court [*Federal Court Rules*, C.R.C., c. 663], namely: the owners and all others interested in the Ship *Jensen Star*. The action was brought under paragraphs 22(2)(*m*) and (*n*) and subsection 43(2) of the *Federal Court Act* [R.S.C. 1970 (2nd Supp.), c. 10], which give this Court jurisdiction to entertain a claim for materials and services supplied to a ship and provide for this jurisdiction to be exercised *in rem* against the ship.[1] Security was immediately given in order to avoid arrest, Jorgensen appearing in the Court's documents as the individual taking charge of the defence on behalf of the owners. On October 18, 1984, a statement of defence and counterclaim, alleging exaggerated accounts, partial payments and amounts due otherwise by plaintiff to "defendants", was filed in the name of the "defendants", referred to in the pleading as "Jensen". On April 29, 1985, the plaintiff sought and obtained leave to amend the statement of claim so as to implead Jensen Shipping personally as a party defendant and pray for a judgment against it *in personam* for the whole amount owed by it for all the jobs done, along with the condemnation *in rem* against the ship for those accounts directly related to it.

façon prévue à la Règle 1002 des Règles de cette Cour [*Règles de la Cour fédérale*, C.R.C., chap. 663], à savoir les propriétaires et toutes les autres personnes ayant un droit sur le navire *Jensen Star*. L'action était fondée sur les alinéas 22(2)*m*) et *n*) et le paragraphe 43(2) de la *Loi sur la Cour fédérale* [S.R.C. 1970 (2e Supp.), chap. 10]. Ces dispositions donnent à la Cour compétence relativement à toute demande portant sur des matériaux et des services fournis à un navire et précisent que cette compétence peut être exercée en matière réelle contre le navire[1]. Un cautionnement a immédiatement été versé afin d'éviter la saisie du navire, et c'est le nom de Jorgensen qui figure dans les documents de la Cour comme personne responsable de la défense au nom des propriétaires. Dans l'exposé de la défense et la demande reconventionnelle déposés le 18 octobre 1984 au nom des «défendeurs», appelés «Jensen», on a prétendu que les comptes étaient excessifs, qu'une partie de ces comptes avait été payée et que la demanderesse devait par ailleurs des sommes aux «défendeurs». Le 29 avril 1985, la demanderesse a demandé et obtenu la permission de modifier sa déclaration afin de poursuivre personnellement Jensen Shipping à titre de partie défenderesse et de prier la Cour de prononcer contre cette dernière un jugement en matière personnelle pour la totalité des sommes dues, outre la condamnation en matière réelle contre le navire pour les comptes s'y rapportant directement.

[1] Paragraphs 22(2)(*m*), 22(2)(*n*) and subsection 43(2) read as follows:

**22.** . . .

(2) Without limiting the generality of subsection (1), it is hereby declared for greater certainty that the Trial Division has jurisdiction with respect to any claim or question arising out of one or more of the following:

. . .

(*m*) any claim in respect of goods, materials or services wherever supplied to a ship for her operation or maintenance including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;

(*n*) any claim arising out of a contract relating to the construction, repair or equipping of a ship;

. . .

**43.** . . .

(2) Subject to subsection (3), the jurisdiction conferred on the Court by section 22 may be exercised *in rem* against the ship, aircraft or other property that is the subject of the action, or against any proceeds of sale thereof that have been paid into court.

[1] Les alinéas 22(2)*m*) et *n*) et le paragraphe 43(2) sont ainsi libellés:

**22.** . . .

(2) Sans restreindre la portée générale du paragraphe (1), il est déclaré pour plus de certitude que la Division de première instance a compétence relativement à toute demande ou à tout litige de la nature de ceux qui sont ci-après mentionnés:

. . .

*m*) toute demande relative à des marchandises, fournitures ou services fournis à un navire, où que ce soit, pour son exploitation ou son entretien, et notamment, sans restreindre la portée générale de ce qui précède, les demandes relatives à l'aconage ou gabarage;

*n*) toute demande née d'un contrat relatif à la construction, à la réparation ou à l'équipement d'un navire;

. . .

**43.** . . .

(2) Sous réserve du paragraphe (3), la compétence conférée à la Cour par l'article 22 peut être exercée en matière réelle pour toute demande relative à un navire, à un aéronef, à d'autres biens ou à tout produit de leur vente qui a été consigné au tribunal.

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The amended statement of claim naturally elicited a renewed statement of defence. One was filed on July 12, 1985 by substituted counsel. It reiterated all the allegations of the original one including those relating to the counterclaim, and its prayer for relief was again a simple dismissal of the action. But there was in it an allegation completely novel. Its paragraph 4 read thus: "The beneficial ownership of Defendant vessel was sold by this Defendant [Jensen Shipping] to Jensen Marine Holdings Ltd. on 24 November 1983." Nothing else was said about this Jensen Marine Holdings Ltd., but the revelation in itself, if accurate, was no doubt of major consequence to the *in rem* side of the proceedings.

The allegation was accurate. It was established at trial that indeed a transfer of ownership of the vessel had taken place in 1983 as part of a refinancing scheme rendered necessary by the precarious situation of Jorgensen and his shipping operation. On November 24, 1983, by statutory bill of sale which had been regularly registered, the *Jensen Star* had been acquired by a recently formed corporation—Jensen Marine Holdings Ltd., the shares of which were equally divided between Jorgensen and the two individuals who had accepted to inject the money needed—which corporation had immediately demise chartered it to Jensen Shipping, for twelve years, by bareboat charterparty dated December 8, 1983.

As to the ground of defence that counsel drew from these facts, it was directly related to the limitation of the *in rem* jurisdiction of this Court in maritime matters imposed by subsection 43(3) of the *Federal Court Act*, which reads:

**43.** . . .

(3) Notwithstanding subsection (2), the jurisdiction conferred on the Court by section 22 shall not be exercised *in rem* with respect to a claim mentioned in paragraph 22(2)(*e*), (*f*), (*g*), (*h*), (*i*), (*k*), (*m*), (*n*), (*p*) or (*r*) unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.

La modification de la déclaration a naturellement entraîné celle l'exposé de la défense. Un nouvel exposé a été déposé le 12 juillet 1985 par un avocat nouvellement constitué. On y a reproduit toutes les allégations du premier exposé, y compris celles relatives à la demande reconventionnelle et on s'est à nouveau contenté de demander dans les conclusions le rejet de l'action. L'exposé contenait cependant une allégation tout à fait nouvelle à l'alinéa 4: «Le droit de propriété en *equity* du navire défendeur a été vendu par la défenderesse [Jensen Shipping] à Jensen Marine Holdings le 24 novembre 1983.» Aucune autre précision n'était fournie à propos de Jensen Marine Holdings Ltd., mais il ne faisait aucun doute que cette mention allait être lourde de conséquences pour l'action *in rem* si elle s'avérait exacte.

L'allégation était exacte. La défenderesse a fait la preuve que le droit de propriété du navire avait effectivement été transféré en 1983 dans le cadre d'un plan de refinancement rendu nécessaire à cause de la situation précaire de Jorgensen et de son entreprise de transport maritime. Par acte de vente légal en date du 24 novembre 1983 qui a été dûment enregistré, le *Jensen Star* a été cédé à la nouvelle société Jensen Marine Holdings Ltd., dont les actions étaient réparties également entre Jorgensen et deux personnes qui avaient accepté de fournir les capitaux nécessaires. Jensen Marine Holdings Ltd. a aussitôt signé le 8 décembre 1983 un contrat d'affrètement coque nue faisant de Jensen Shipping l'affréteur du navire pour une période de douze ans.

Le moyen de défense que le procureur a invoqué à partir de ces faits avait directement trait à la restriction que le paragraphe 43(3) de la *Loi sur la Cour fédérale* impose à la compétence en matière réelle de la Cour pour ce qui touche les questions maritimes. Ce paragraphe est libellé ainsi:

**43.** . . .

(3) Nonobstant le paragraphe (2), la compétence conférée à la Cour par l'article 22 ne peut être exercée en matière réelle relativement à une demande dont il est fait mention aux alinéas 22(2)*e*), *f*), *g*), *h*), *i*), *k*), *m*), *n*), *p*) ou *r*) à moins que, au moment où l'action est intentée, le navire, l'aéronef ou les autres biens qui font l'objet de l'action n'aient pour propriétaire en *equity* celui qui en était propriétaire en *equity* au moment où la cause d'action a pris naissance.

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The contention was, of course, that the Court had no jurisdiction to entertain the proceedings against the ship, since there had occurred a change in the beneficial ownership of the *Jensen Star* between the time the cause of action had arisen and the time the action had been commenced.

The Trial Judge rejected the contention and affirmed his jurisdiction on the basis of a two-tier reasoning which he summarized in his reasons as follows:

> In my view this Court has the right to exercise *in rem* jurisdiction notwithstanding the transfer because, for the purpose of subsection 43(3), Jensen Shipping remained the beneficial owner of the ship or, in the alternative, Jensen Shipping and Jensen Holdings are estopped from claiming that Jensen Shipping was not the beneficial owner of the ship at the time this action was commenced.

The appellants submit again before this Court that the Trial Judge lacked jurisdiction to condemn the ship and ask that this part of the judgment be set aside.

My first comments will be to express, with respect, my difficulty with the reasoning on the basis of which the Trial Judge has arrived at his conclusion. In fact, I do not think that either of the two propositions relied on by him is legally correct.

1. It seems to me impossible to hold that Jensen Shipping could have remained the beneficial owner of the ship for the purposes of subsection 43(3) of the *Federal Court Act*, unless the transfer from Jensen Shipping to Jensen Marine Holdings Ltd., on November 24, 1983, could be seen as only a sham aimed at concealing the true ownership of the vessel in order to shield it from risk of seizure as security, and the Trial Judge was satisfied that this was not so.

To arrive at his conclusion that Jensen Shipping had remained the beneficial owner of the ship, the Trial Judge accepted the view, expressed in *obiter* by Mr. Justice Addy in a previous case,[2] that the demise charter of a vessel should be regarded as carrying with it an ownership interest sufficient to support an action *in rem*, a position our courts should adopt, even if it meant departing from the

[2] *Thorne Riddell Inc. v. Nicolle N Enterprises Inc.*, [1985] 2 F.C. 31 (T.D.).

La défense a donc soutenu que la Cour n'avait pas la compétence voulue pour être saisie de la poursuite contre le navire parce que le droit de propriété du *Jensen Star* avait été transféré entre le moment où la cause d'action a pris naissance et le moment où la poursuite a été intentée.

Le juge de première instance a rejeté cette prétention et a fondé sa compétence sur les deux propositions suivantes qu'il a résumées ainsi dans ses motifs:

> À mon avis, cette Cour a le droit d'exercer sa compétence en matière réelle malgré le transfert, parce que, pour les besoins du paragraphe 43(3), Jensen Shipping est demeurée la véritable propriétaire du navire ou, subsidiairement, Jensen Shipping et Jensen Holdings sont empêchées de prétendre que Jensen Shipping n'était pas la propriétaire véritable du navire au moment où l'action a été intentée.

Les appelants font de nouveau valoir devant cette Cour que le juge de première instance n'avait pas la compétence voulue pour condamner le navire et demandent que cette partie du jugement soit infirmée.

Je veux tout d'abord dire que j'ai de la difficulté à comprendre le raisonnement sur la base duquel le juge de première instance a pu en arriver à sa conclusion. À mon avis, ni l'une ni l'autre propositions invoquées par lui ne sont exactes en droit.

1. Il me semble impossible d'affirmer que Jensen Shipping a pu demeurer la véritable propriétaire du navire pour les fins du paragraphe 43(3) de la *Loi sur la Cour fédérale*, à moins de considérer la transaction du 24 novembre 1983 entre Jensen Shipping et Jensen Marine Holdings Ltd. comme un subterfuge destiné à dissimuler le vrai propriétaire et ainsi mettre le navire à l'abri d'une saisie à titre de garantie. Or, le juge de première instance a rejeté cette hypothèse.

Pour en arriver à la conclusion que Jensen Shipping est demeurée la propriétaire véritable du navire, le juge de première instance a souscrit à l'opinion incidente qu'a exprimée le juge Addy dans une cause antérieure[2], selon laquelle on devrait considérer que l'affrètement par voie de cession à bail d'un navire confère un droit de propriété suffisant pour justifier une action *in rem*.

[2] *Thorne Riddell Inc. c. Nicolle N Enterprises Inc.*, [1985] 2 C.F. 31 (1re inst.).

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English decisions which had refused to accept that a demise charterer could be the beneficial owner referred to in an English statutory provision akin to subsection 43(3) of the *Federal Court Act*.

That the English decisions referred to should be considered with caution is obvious since they were rendered in the context of a statutory framework quite different from ours. When section 43 of the *Federal Court Act* was adopted, the corresponding provision conferring Admiralty jurisdiction to the High Court in England was subsection 3(4) of the *Administration of Justice Act, 1956*, 1956, 4 & 5 Eliz. 2, c. 46 (U.K.).[3] This provision had been enacted in the context of Britain's ratification of the *International Convention Relating to the Arrest of Seagoing Ships*, Brussels, May 10, 1952 [439 U.N.T.S. 193]; its aim was essentially to extend the *in rem* jurisdiction of the Court, not only to the ship in respect of which a maritime claim had arisen, but also to any sister ship, i.e. to any ship belonging to the same owner; and the reference in it was to the "beneficial owner of all the shares" in the ship. Canada has not adhered to the 1952 Brussels Convention; the *in rem* jurisdiction conferred by our provision is strictly limited to the ship to which the services have been rendered, and the text speaks of "beneficial owner of the ship", with no reference to shares. A passive importation of the English case law would no doubt be unwarranted. As to the preoccupations of

[3] It read thus:

**3.** . . .

(4) In the case of any such claim as is mentioned in paragraphs (*d*) to (*r*) of subsection (1) of section one of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court . . . may . . . be invoked by an action in rem against—

(*a*) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or

(*b*) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid.

Selon le juge Addy, c'est une position que nos tribunaux devraient adopter même s'il faut pour cela s'écarter de certaines décisions anglaises dans lesquelles les tribunaux ont refusé de considérer qu'un affréteur par voie de cession à bail pouvait être le propriétaire véritable visé par des dispositions législatives anglaises semblables à celles du paragraphe 43(3) de la *Loi sur la Cour fédérale*.

Il est bien évident qu'il faut consulter avec prudence ces décisions des tribunaux anglais car elles s'inscrivent dans un contexte législatif fort différent du nôtre. À l'époque où le législateur canadien a adopté l'article 43 de la *Loi sur la Cour fédérale*, il y avait en Angleterre des dispositions correspondantes qui conféraient à la Haute Cour une compétence en matière d'amirauté; elles figuraient au paragraphe 3(4) de l'*Administration of Justice Act, 1956*, 4 & 5 Eliz. 2, 1956, chap. 46 (R.-U.)[3]. Ces dispositions découlaient de la ratification par la Grande-Bretagne de la *Convention internationale pour l'unification de certaines règles sur la saisie conservatoire des navires de mer*, Bruxelles, le 10 mai 1952 [439 R.T.N.U. 193] et visaient principalement à assujettir à la compétence en matière réelle de la Cour non seulement le navire qui faisait l'objet d'une réclamation, mais aussi tout autre navire-jumeau, c'est-à-dire qui appartenait au même propriétaire. D'ailleurs, on désignait ce dernier comme le [TRADUCTION] «véritable propriétaire de la totalité» du navire. Le Canada n'a pas adhéré à la Convention de Bruxelles de 1952. La compétence en matière réelle que le paragraphe 43(3) confère à la Cour se limite donc au navire à l'égard duquel des services

[3] Il était ainsi libellé:

[TRADUCTION] **3.** . . .

(4) Dans le cas des réclamations mentionnées aux alinéas *d*) à *r*) du paragraphe (1) de l'article premier de la présente Loi, si la réclamation se rapporte à un navire et que la personne qui serait tenue responsable dans une action personnelle était, au moment où la cause d'action a pris naissance, le propriétaire ou l'affréteur du navire, ou encore la personne qui en avait la possession ou le contrôle, la Haute Cour . . . peut . . . exercer sa compétence en matière d'amirauté dans une action réelle contre—

*a*) ce navire si ladite personne était la véritable propriétaire de la totalité du navire au moment où la poursuite a été intentée, ou

*b*) tout autre navire dont ladite personne était la véritable propriétaire en totalité au moment où la poursuite a été intentée.

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Mr. Justice Addy and the Trial Judge, who would want to assure a greater protection to the supplier of necessaries when there was nothing to warn him, at the time his services were requested, that the ship was not then in the possession and control of her owners or their employees, no one could deny their legitimacy.[4]

The problem, however, is that I simply do not see how a court could suppose that Parliament may have meant to include a demise charterer in the expression "beneficial owner" as it appears in subsection 43(3). Whatever be the meaning of the qualifying term "beneficial", the word owner can only normally be used in reference to title in the *res* itself, a title characterized essentially by the right to dispose of the *res*. The French corresponding word "*propriétaire*" is equally clear in that regard. These words are clearly inapt to describe

ont été rendus, et on parle du «propriétaire en *equity* du navire» sans faire allusion à la portion qu'il détient. Il ne serait certainement pas justifié d'introduire passivement dans notre droit la jurisprudence anglaise. Quant aux craintes exprimées par le juge Addy et le juge de première instance, qui voudraient bien assurer une meilleure protection au fournisseur d'approvisionnements nécessaires lorsque rien ne lui permet de savoir, au moment où ses sevices sont requis, que celui qui a la possession ou le contrôle du navire n'est ni le propriétaire ni le préposé de ce propriétaire, nul ne peut douter de leur légitimité[4].

Le problème, toutefois, c'est que je ne comprends tout simplement pas comment un juge pourrait supposer que le législateur a pu vouloir inclure l'affréteur par voie de cession à bail dans l'expression «*beneficial owner*» qui figure au paragraphe 43(3). Quel que soit le sens du qualificatif «*beneficial*», le terme «*owner*» est normalement utilisé uniquement pour désigner celui qui possède un titre dans la chose elle-même, titre qui comporte principalement le droit d'aliéner la chose. Le terme français correspondant «propriétaire» est tout aussi clair. Ces mots ne sauraient désigner la possession d'un affréteur par voie de cession à

[4] Addy J. could not express his views in this regard more forcefully [at pp. 37-38]:

> Where an owner turns over a ship to another person under a demise bare boat charter, knowing full well that it will be sailing to foreign ports and that it will be obliged to take on fuel and other supplies from time to time, it would seem, at first sight, in any event, to be impractical and unnecessarily restrictive of commerce and of the movement of ships to expect that the suppliers in all these cases would be required to receive prepayment in specie or to check with the actual registered owners at or through the port of registry in whatever corner of the world it might be, to enquire whether proper authority had been granted before supplying that ship with the essential requirements to enable it to continue on its voyage. Whether it be by virtue of presumed or implied authority or otherwise, unless the supplier is put on notice or has reason to suspect that the actual owner has forbidden the credit of the ship to be pledged, then it would seem that an action for such necessaries might well be maintainable *in rem* against the ship when its owner *pro tempore*, that is, the charterer by way of demise, would be responsible at law for those supplies.

[4] Le juge Addy aurait difficilement pu être plus catégorique sur cette question [aux p. 37 et 38]:

> Lorsqu'un propriétaire livre un navire à une autre personne en vertu d'un affrètement coque nue, sachant parfaitement que ce navire mouillera dans des ports étrangers et que, de temps à autre, il devra se procurer du carburant et d'autres provisions, il serait, à première vue en tout cas, peu réaliste et ce serait restreindre inutilement le commerce et la mobilité des navires si l'on s'attendait à ce que les fournisseurs soient, dans tous ces cas, tenus d'être payés d'avance en espèces ou de vérifier auprès des véritables propriétaires inscrits au port d'immatriculation pouvant se trouver dans n'importe quel coin du monde ou par l'entremise de ce port pour savoir si une autorisation appropriée a été accordée avant de fournir au navire les approvisionnements nécessaires pour qu'il continue son voyage. Que ce soit en vertu d'un pouvoir présumé ou implicite ou autrement, à moins que le fournisseur ne soit avisé ou n'ait des raisons de soupçonner que le véritable propriétaire a interdit l'engagement du crédit du navire, il semble qu'une action en recouvrement de ces approvisionnements nécessaires puisse très bien être intentée *in rem* contre le navire lorsque son propriétaire *pro tempore*, c'est-à-dire l'affréteur par voie de cession à bail, est en droit responsable de ces approvisionnements.

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the possession of a demise charterer.[5] In my view, the expression "beneficial owner" was chosen to serve as an instruction, in a system of registration of ownership rights, to look beyond the register in searching for the relevant person. But such search cannot go so far as to encompass a demise charterer who has no equitable or proprietary interest which could burden the title of the registered owner. As I see it, the expression "beneficial owner" serves to include someone who stands behind the registered owner in situations where the latter functions merely as an intermediary, like a trustee, a legal representative or an agent. The French corresponding expression "*véritable propriétaire*" (as found in the 1985 revision, R.S.C., 1985, c. F-7) leaves no doubt to that effect.[6]

Only Parliament, in my view, can relax the constraints of subsection 43(3) by placing the demise charterer on the same level as a beneficial owner. This cannot be done by the courts.

2. It seems to me likewise impossible to hold that the defendants-appellants could be estopped from claiming that Jensen Shipping was not the beneficial owner of the ship at the time the action was commenced.

It is clear on the evidence that at no time did Jorgensen give Mount Royal notice of the transfer of ownership of the vessel, or act in such a way as

[5] See the comments of Mr. Justice Goff in *I Congreso Del Partido*, [1977] 1 Lloyd's Rep. 536 (Q.B. (Adm. Ct.)), at pp. 560 *et seq.* where he vigorously disputes the possibility to attribute to a demise charterer the characteristics of a beneficial owner, refusing to follow in that respect the previous decision of Mr. Justice Brandon in *The Andrea Ursula*, [1971] 1 Lloyd's Rep. 145 (Adm.). See also *The Permina 3001*, [1979] 1 Lloyd's Rep. 327 (Sing. C.A.).

[6] In both the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, section 2 and the *Bank Act*, R.S.C., 1985, c. B-1, section 2, where the expression "beneficial ownership", again translated by "*véritable propriétaire*", is also to be found, it is made clear there that it is used in the sense I suggest.
Elsewhere, in that Part of the *Canada Shipping Act* dealing with pollution, prevention and control, when it is sought to give a name to "the person having for the time being, either by law or by contract, the rights of the owner of the ship as regards the possession and use thereof" (R.S.C. 1970, c. S-9, s. 727 (rep. and sub. by S.C. 1987, c. 7, s. 81)) [now R.S.C., 1985, c. S-9, s. 654 (rep. and sub. by R.S.C., 1985 (3rd Supp.), c. 6, s. 84)], a special and express definition of the word "owner" is employed, rather than the addition of the qualifying term "beneficial".

bail[5]. À mon avis, l'expression «*beneficial owner*» a été choisie pour indiquer que dans un système d'enregistrement des droits de propriété, il faut regarder au-delà du nom inscrit dans le registre. On ne saurait cependant remonter jusqu'à l'affréteur par voie de cession à bail, qui n'a aucun droit en *equity* ou à titre de propriétaire susceptible de grever le titre du propriétaire inscrit. Selon moi, cette expression permet d'inclure celui qui se dissimule derrière le propriétaire inscrit lorsque celui-ci sert purement d'intermédiaire, par exemple un fiduciaire, un ayant droit ou un mandataire. L'équivalent français «véritable propriétaire» (qui figure dans la refonte de 1985, L.R.C. (1985), chap. F-7) ne laisse subsister aucun doute à cet égard[6].

Seul le législateur peut, à mon sens, adoucir les contraintes du paragraphe 43(3) en plaçant l'affréteur par voie de cession à bail sur le même pied que le véritable propriétaire. Les tribunaux n'ont pas ce pouvoir.

2. Il m'apparaît tout aussi impensable d'affirmer que les défendeurs-appelants pourraient être empêchés de prétendre que Jensen Shipping n'était pas la véritable propriétaire du navire au moment où l'action a été intentée.

Il ressort clairement de la preuve qu'à aucun moment Jorgensen n'a avisé Mount Royal du transfert de propriété du navire, ni agi de manière

[5] Voir les remarques du juge Goff dans l'arrêt *I Congreso Del Partido*, [1977] 1 Lloyd's Rep. 536 (Q.B., Adm. Ct.), aux p. 560 et suivantes; il conteste vigoureusement la possibilité d'attribuer à un affréteur par voie de cession à bail les caractéristiques d'un propriétaire véritable et refuse de souscrire à ce propos à la décision du juge Brandon dans l'arrêt *The Andrea Ursula*, [1971] 1 Lloyd's Rep. 145 (Adm.). Voir aussi *The Permina 3001*, [1979] 1 Lloyd's Rep. 327 (C.A. Sing.).

[6] Dans la *Loi sur les sociétés par actions*, L.R.C. (1985), chap. C-44, article 2 et dans la *Loi sur les banques*, L.R.C. (1985), chap. B-1, article 2, l'expression «véritable propriétaire» est également l'équivalent français du «*beneficial ownership*» dont parle le législateur, et il est évident qu'elle est employée dans le sens que je lui donne.
Dans la partie de la *Loi sur la marine marchande du Canada* qui porte sur la prévention et le contrôle de la pollution, le législateur a préféré donner une définition particulière au terme «propriétaire» au lieu d'y ajouter le qualificatif «véritable» pour désigner «la personne qui, au moment considéré, a, en vertu de la loi ou d'un contrat, les droits du propriétaire du navire en ce qui a trait à l'usage et à la possession de celui-ci» (S.R.C. 1970, chap. S-9, art. 727 (abrogé et remplacé par L.C. 1987, chap. 7, art. 81)) [maintenant L.R.C. (1985), chap. S-9, art. 654 (abrogé et remplacé par L.R.C. (1985) (3e suppl.), chap. 6, art. 84)].

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to suggest that his authority to bind the ship could have changed. It is also somewhat disturbing to see that Jensen Shipping presented itself in the proceedings as the owner of the ship, up until the filing of the amended statement of defence when the transfer was revealed. But nevertheless I do not see how the doctrine of estoppel could come into play here so as to preclude any effect flowing from the fact that the vessel had become the property of Jensen Marine Holdings Ltd. and was no longer that of Jensen Shipping.

à laisser croire que le pouvoir qu'il avait de grever le navire avait changé. Il est par ailleurs étonnant de constater que Jensen Shipping s'est identifiée comme propriétaire du navire dans les actes de procédure jusqu'au moment du dépôt de l'exposé de la défense modifié, dans lequel le transfert de propriété a été révélé. Quoi qu'il en soit, je ne vois pas comment on pourrait appliquer en l'espèce la doctrine de l'*estoppel* (fin de non-recevoir) de manière à effacer toute répercussion découlant du fait que le navire avait cessé d'appartenir à Jensen Shipping et était devenu la propriété de Jensen Marine Holdings.

Assuming that the conditions for an estoppel could be seen to be present here, which I seriously doubt since there was no promise or assurance having induced anyone to alter his position to his detriment; and assuming further that such an estoppel could have effect against Jensen Marine Holdings Ltd., the registered owners, which appears to me difficult to accept, since it, itself, has never expressly denied its title; even so, the requirement of continuity of ownership imposed by subsection 43(3) to allow an action *in rem* is one that goes to the very jurisdiction of the Court, and no estoppel can give a court a jurisdiction expressly denied by statute (*Halsbury's Laws of England*, Vol. 16, no. 1515, fn. 3; *Snell's Principles of Equity*, 27th ed., page 563).

Il faudrait supposer que les conditions nécessaires pour donner lieu à une fin de non-recevoir sont réunies, ce dont je doute fort car il n'y a pas eu de promesse ni de garantie qui aurait amené quelqu'un à modifier sa position à son détriment. Il faudrait aussi supposer qu'une telle fin de non-recevoir peut jouer contre la propriétaire inscrite, Jensen Marine Holdings Ltd., ce que j'ai de la difficulté à accepter car celle-ci n'a jamais expressément nié son titre de propriété. Malgré cela, le paragraphe 43(3) exige qu'il y ait continuité quant à la propriété pour donner lieu à une action *in rem* et permettre à la Cour d'exercer sa compétence, et aucune fin de non-recevoir ne peut donner à un tribunal une compétence que la loi lui refuse expressément (*Halsbury's Laws of England*, vol. 16, nº 1515, note 3; *Snell's Principles of Equity*, 27 éd., page 563).

I therefore conclude that the reasons given by the Trial Judge to reject the jurisdictional argument advanced against the action *in rem* are not valid. Does that mean that the conclusion itself was totally unjustified? I do not think so and I will try to explain why.

J'en arrive donc à la conclusion que les motifs sur lesquels le juge de première instance s'est fondé pour rejeter l'argument relatif à la compétence de la Cour invoqué par les défendeurs pour contester l'action *in rem* ne sont pas valables. Cette décision est-elle entièrement mal fondée pour autant? Je ne le pense pas et je vais tenter d'expliquer pourquoi.

It will be recalled that Mount Royal claimed in its action *in rem* the aggregate of the amounts due to it for seventeen different jobs done on the *Jensen Star* at different dates between August 30, 1982 and May 21, 1984. Six of these seventeen jobs predated November 24, 1983, the date of sale of the vessel by Jensen Shipping to Jensen Marine Holdings Ltd. In my view of the situation, since I reject the possibility that Jensen Shipping be seen as having remained beneficial owner of the ship

On se souviendra que Mount Royal a réclamé dans son action *in rem* la totalité des sommes qui lui étaient dues pour dix-sept travaux effectués sur le *Jensen Star* entre le 30 août 1982 et le 21 mai 1984. Six de ces dix-sept travaux ont été effectués avant le 24 novembre 1983, date à laquelle Jensen Shipping a vendu le navire à Jensen Marine Holdings Ltd. Comme je ne pense pas, vu ce qui précède, que Jensen Shipping soit demeurée la véritable propriétaire du navire après le 24 novem-

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after November 24, 1983, the action *in rem* in regard to the costs involved in these six "pre-sale jobs" cannot be entertained. There is no doubt that the requirement of continuity of ownership established by paragraph 43(3) is not met. The statutory right *in rem* that Mount Royal could have exercised in order to secure payment of its due for the six first jobs it did on the *Jensen Star* has been definitely extinguished by the transfer of the vessel to new owners. The judgment *in rem* appealed from cannot stand with respect to those six jobs, the invoices for which amounted to the sum of $102,875.66.

I need to pause here for a moment to say a few words about an alternative ground of appeal raised by the appellants in their submissions to which I have not yet made reference. In my review of the facts at the outset, I made allusion to some partial payments that Jensen Shipping had made to Mount Royal on account of its outstanding debts for all the jobs done to the several vessels it was operating. On making those partial payments, on December 31, 1983 and April 23, 1984, Jensen Shipping did not specify which particular accounts were to be discharged thereby. On June 20, 1984, Mount Royal sent to Jensen Shipping a statement of accounts in which the invoices were listed chronologically and the partial payments were entered, on their proper dates, as reducing the total debt then due, which appeared to mean that they were being attributed on the basis of "first invoice in—first out", but otherwise no express declaration was made by either party as to how the payments were to be imputed.

Upon commencing its action *in rem* before the Court, however, Mount Royal purported to apply the partial payments to accounts relating to vessels other than the *Jensen Star*, which permitted it to arrest the ship for most of the invoices relating to it, regardless of their dates ($237,243.68). The defendants objected to such allocation claiming essentially that Mount Royal had already made an allocation in its June 1984 statement as a result of which the oldest accounts, including the six first relating to the *Jensen Star*, had been extinguished. The objection was denied by the Trial Judge on the basis that the common law principles relating to attribution of payments between debtor and

bre 1983, j'en conclus que l'action *in rem* visant les comptes relatifs aux six travaux antérieurs à la vente du navire ne peut être accueillie. En effet, il n'y a pas de doute que la condition prévue au paragraphe 43(3), à savoir l'existence d'un même propriétaire, n'a pas été remplie. Le transfert du navire à un nouveau propriétaire a définitivement éteint le droit *in rem* prévu dans la loi que Mount Royal aurait pu exercer afin de se faire rembourser les sommes dues pour les six premiers travaux faits sur le *Jensen Star*. Le jugement *in rem* dont il est interjeté appel ne peut être confirmé en ce qui concerne ces six travaux, dont le montant s'élève à 102 875,66 $.

Je me permets ici d'ouvrir une parenthèse au sujet d'un autre moyen d'appel qu'ont invoqué les appelants dans leur mémoire et dont je n'ai pas encore parlé. Dans l'exposé des faits qui figure au début, j'ai fait état des paiements partiels que Jensen Shipping a versés à Mount Royal à l'égard des comptes en souffrance relatifs à tous les travaux effectués sur plusieurs navires exploités par Jensen Shipping. Lorsqu'elle a fait ces paiements partiels le 31 décembre 1983 et le 23 avril 1984, Jensen Shipping n'a pas précisé à quel compte ils devaient être imputés. Le 20 juin 1984, Mount Royal a fait parvenir à Jensen Shipping un relevé de compte dans lequel les factures étaient présentées par ordre chronologique et dans lequel on avait défalqué du total de la dette à l'époque les paiements partiels en question aux dates précitées. La demanderesse semble donc avoir imputé ces sommes aux factures les plus anciennes, et aucune déclaration expresse n'a été faite par l'une ou l'autre partie quant à l'imputation de ces sommes.

Toutefois, lorsqu'elle a intenté l'action *in rem* devant la Cour, Mount Royal a prétendu avoir imputé ces paiements aux comptes relatifs aux travaux effectués sur des navires autres que le *Jensen Star*, ce qui lui a permis de saisir ce navire pour la plupart des factures qui s'y rapportaient, indépendamment de leur date (237 243,68 $). Les défendeurs se sont opposés à une telle répartition des paiements et ont surtout fait valoir que la demanderesse les avait déjà répartis dans son relevé de juin 1984, de sorte que les comptes plus anciens, y compris les six premiers comptes relatifs aux travaux effectués sur le *Jensen Star*, avaient été acquittés. Le juge de première instance a rejeté

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creditor were applicable and that those principles had been illustrated in the judgment of the House of Lords in *The Mecca*, [1897] A.C. 286 (H.L.) where it had been decided that, in the absence of a specific appropriation by the debtor, the creditor remains free to elect at any time and may do so in bringing his action.

While the Trial Judge was no doubt correct in referring to the rules of common law as they are applied in Admiralty matters (*ITO–International Terminal Operators Ltd. v. Miida Electronics et al.*, [1986] 1 S.C.R. 752), I am not sure that the reasoning in *The Mecca* would necessarily lead to the conclusion he adopted and, more particularly, that the June 20, 1984 statements are not to be seen as a plain and irrevocable expression of intention to which effect should be given. But, be that as it may, it will be seen that my conclusion as to the lack of jurisdiction to entertain the action *in rem* for the "pre-sale invoices" (which include all those claimed by the appellants to have been extinguished by the initial appropriation) renders the issue moot.

I now revert to my analysis.

The "post-sale accounts", for a total amount of $145,582, are to be completely distinguished from the "pre-sale" ones. The problem they raise has nothing to do with jurisdiction. In their case, the condition, established by subsection 43(3) of the *Federal Court Act*, for the exercise by this Court of its jurisdiction *in rem* is obviously met. The problem with them is of a totally different order.

The problem with the "post-sale accounts" relates to the required relationship between the supplier of necessaries and the owner of the vessel for the statutory right *in rem* to be eventually recognized and enforced. Here is what I mean.

cette objection en déclarant que les principes de *common law* concernant la répartition des paiements entre débiteur et créancier s'appliquaient et que ces principes étaient illustrés dans l'arrêt *The Mecca*, [1897] A.C. 286 (H.L.). La Chambre des lords a statué dans cette cause que si le débiteur ne donnait aucune précision quant à l'imputation des sommes dues, le créancier pouvait alors exercer n'importe quand le droit de répartition, même au moment d'intenter l'action.

Le juge de première instance a sans doute eu raison de se référer aux principes de *common law* qui s'appliquent en matière d'amirauté (*ITO—International Terminal Operators Ltd. c. Miida Electronics Inc. et autre*, [1986] 1 R.C.S. 752), mais je ne suis pas convaincu que le raisonnement formulé dans l'arrêt *The Mecca* permette nécessairement d'en arriver à la même conclusion que lui et, en particulier, d'affirmer que le relevé du 20 juin 1984 ne doit pas être considéré comme l'expression claire et irrévocable d'une intention à laquelle il faut donner effet. Quoi qu'il en soit, on constatera que cette question devient sans importance vu la conclusion à laquelle j'arrive quant à l'absence de compétence en matière réelle de la Cour au sujet des comptes relatifs aux travaux antérieurs à la vente (ce qui comprend tous les comptes qui, selon les appelants, ont été payés à la suite de la première imputation).

Je ferme cette parenthèse et je poursuis mon analyse.

Il faut bien faire la distinction entre les comptes relatifs aux travaux effectués après la vente, qui s'élèvent à 145 582 $, et ceux qui concernent les travaux antérieurs à la vente. Les premiers n'ont rien à voir avec la compétence de la Cour. De fait, la condition prévue au paragraphe 43(3) de la *Loi sur la Cour fédérale* quant à l'exercice de la compétence en matière réelle de cette Cour est remplie. Les difficultés que ces comptes posent sont d'un tout autre ordre.

Le problème avec les comptes relatifs aux travaux effectués après la vente, c'est qu'il doit y avoir un lien entre le fournisseur d'approvisionnements nécessaires et le propriétaire du navire pour que le droit *in rem* accordé par la loi finisse par être reconnu et appliqué. Voici ce que je veux dire.

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As it is well known, the so-called statutory right *in rem* that the Canadian law accords to the supplier of necessaries is quite different from a maritime lien. A maritime lien is, in effect, a privilege against a ship which attaches and gains priority by pure effect of the law and travels with the ship wherever it goes and in whosever hands it comes. (See: William Tetley, *Maritime Liens and Claims*, 1985, c. 1, more specially at page 40.) A statutory right *in rem* is merely a right to sue the ship itself to obtain payment. The action *in rem*, which, as noted by Noël J. in *Coastal Equipment Agencies Ltd. v. The "Comer"*, [1970] Ex.C.R. 12, originated in England as a procedural device whose object was to grant a claimant pre-judgment security and to safeguard by so doing the Admiralty Court jurisdiction against intrusions by the courts of common law, was in due course implanted in Canada where it has become a basic feature of our maritime law.

This so far is easy enough. But a question immediately arises. Does that right to sue *in rem* exist by the sole fact that necessaries were supplied? The difference between a statutory right *in rem* and a maritime lien, entrenched by the judgments in *The Henrich Björn* (1886), 11 App. Cas 270 (H.L.) and *The Castlegate*, [1893] A.C. 38 (H.L.), precludes an affirmative answer. The protection of the owners was seen to be more important than that of the suppliers. The provision of subsection 43(3) of the *Federal Court Act* may appear, at first, to be concerned only with the protection of a new owner, but it is clear that the theory behind it is that the owner must, in all cases, be directly involved in the creation of the cause of action. The broad answer to the question set forth is therefore that the supplier of necessaries will have the right to sue *in rem* if the owner of the vessel has been involved in the contract under which his services were rendered. But this answer needs to be completed, as it lacks precision as the nature and extent of the involvement required.

Comme on le sait très bien, le droit *in rem* accordé par le droit canadien aux fournisseurs d'approvisionnements nécessaires n'est pas du tout un privilège maritime, lequel est un avantage qui s'exerce sur le navire. Le privilège maritime confère à son titulaire un droit de préférence par le seul effet de la loi et lui permet de suivre le navire où qu'il soit et entre les mains de quelque personne qu'il passe. (Voir: William Tetley, *Maritime Liens and Claims*, 1985, chap. 1, en particulier la page 40). En revanche, le droit *in rem* prévu par la loi permet simplement à son titulaire d'intenter une action contre le navire comme tel pour se faire payer. Comme le fait remarquer le juge Noël dans l'arrêt *Coastal Equipment Agencies Ltd. v. The «Comer»*, [1970] R.C.É. 12, l'action *in rem* est une procédure qui a pris naissance en Angleterre dans le but d'accorder au créancier une garantie avant jugement et de protéger, par le fait même, la compétence de la Cour d'amirauté contre l'ingérence des tribunaux de *common law*. Elle a finalement été introduite au Canada et elle est devenue une caractéristique fondamentale de notre droit maritime.

Jusque-là, c'est assez clair. Toutefois, une question surgit immédiatement. Est-ce que ce droit d'intenter une action *in rem* existe du seul fait que des approvisionnements nécessaires ont été fournis? La distinction qui a été faite dans les arrêts *The Henrich Björn* (1886), 11 App. Cas 270 (H.L.) et *The Castlegate*, [1893] A.C. 38 (H.L.) entre un droit *in rem* prévu par la loi et un privilège maritime ne permet pas de répondre par l'affirmative. On a en effet considéré que la protection des propriétaires était plus importante que celle des fournisseurs. À première vue, le paragraphe 43(3) de la *Loi sur la Cour fédérale* peut sembler ne se soucier que de la protection d'un nouveau propriétaire, mais il est clair, d'après la théorie qui le sous-tend, que le propriétaire doit, chaque fois, participer directement à la création de la cause d'action. Par conséquent, la réponse en termes généraux à la question formulée ci-dessus est que le fournisseur d'approvisionnements nécessaires pourra intenter une action *in rem* si le propriétaire du navire était partie au contrat en vertu duquel lesdits approvisionnements ont été fournis. Il convient cependant d'étoffer cette réponse, qui manque de précision quant à la nature et à l'étendue de cette participation.

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As I have already mentioned, the United Kingdom has adopted in 1956 a special legislation respecting the right *in rem* of a claimant in maritime law. According to that legislation (which is now contained in the *Supreme Court Act 1981*, 1981, c. 54, (U.K.) at subsection 21(4)), the action *in rem* is only receivable if "the owner as respects all the shares in the vessel" or (a significant amendment) its demise charterer, at the time the action is commenced "would be liable on the claim in an action *in personam*". In other words, whether the situation of the person at the behest of whom the services were rendered was that of owner, charterer, or mere possessor of the vessel, the action *in rem* lies if that person is owner or demise charterer at the time of the action.[7] The focus is there put almost exclusively on the personal liability of the owner or the demise charterer at the time of the action, which is quite understandable since, as I said, the right of the supplier to sue *in rem* exists, not only with respect to the ship for the benefit of which the services were rendered, but also with respect to any sister ship. So, this condition that the owner of the vessel be involved in the supplying of the necessaries for the right *in rem* to come into existence, is now wholly peculiar to our law, and what it involves can in no way be determined by reference to English law.

Comme je l'ai déjà mentionné, le Royaume-Uni a adopté en 1956 des dispositions législatives portant spécifiquement sur le droit *in rem* du créancier en droit maritime. Conformément à ces dispositions (qui figurent maintenant au paragraphe 21(4) de la *Supreme Court Act 1981*, 1981, chap. 54 (R.-U.)), l'action *in rem* n'est recevable que si «le propriétaire de la totalité du navire» ou (ce qui constitue une modification importante) l'affréteur par voie de cession à bail du navire peuvent, au moment où l'action est intentée, «être tenus responsables dans une action *in personam*». Autrement dit, que les services aient été rendus sur l'ordre du propriétaire, de l'affréteur ou du simple possesseur du navire, l'action *in rem* est possible si cette personne est le propriétaire ou l'affréteur par voie de cession à bail au moment où la poursuite est intentée[7]. Ces dispositions mettent presque exclusivement l'accent sur la responsabilité personnelle du propriétaire ou de l'affréteur par voie de cession à bail au moment où l'action est intentée, ce qui est tout à fait compréhensible car, comme je l'ai mentionné, le droit qu'a le fournisseur d'intenter une action *in rem* existe non seulement à l'égard du navire au profit duquel les services ont été rendus, mais aussi à l'égard de tout autre navire-jumeau. Comme il est donc tout à fait particulier à notre droit d'exiger que le propriétaire du navire soit partie au contrat de fourniture des approvisionnements nécessaires pour que le droit *in rem* puisse exister, on ne saurait en aucune façon définir cette exigence en fonction du droit anglais.

[7] I have already reproduced the text of subsection 3(4) of the *Administration of Justice Act, 1956*. Here is that of subsection 21(4) of the *Supreme Court Act 1981*.

**21.** . . .

(4) In the case of any such claim as is mentioned in section 20(2)(*e*) to (*r*), where—

(*a*) the claim arises in connection with a ship; and

(*b*) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against—

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or

(*Continued on next page*)

[7] J'ai déjà cité le texte du paragraphe 3(4) de l'*Administration of Justice Act, 1956*. Voici le texte du paragraphe 21(4) de la *Supreme Court Act 1981*.

[TRADUCTION] **21.** . . .

(4) Lorsqu'il s'agit d'une réclamation mentionnée aux alinéas 20(2)*e*) à *r*), et que—

*a*) la réclamation concerne un navire,

*b*) la personne qui peut être tenue responsable dans une action in personam («la personne concernée») était, au moment où la cause d'action a pris naissance, la propriétaire ou l'affréteur du navire, ou la personne qui en avait la possession ou le contrôle,

une action in rem peut être intentée (indépendamment de l'existence d'un privilège maritime sur ce navire) devant la Haute Cour contre

(i) ce navire si, au moment où l'action est intentée, la personne concernée est la véritable propriétaire de la totalité du navire ou en est l'affréteur par voie de cession à bail; ou

(*Suite à la page suivante*)

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Most of the decisions of the Trial Division of this Court rendered since 1970 have taken the view that the involvement of the owner in the supplying of the necessaries has to be complete and direct enough to entail his personal liability. These decisions repeat, in effect, that an action *in rem* is sustainable only if the owner is personally liable for the amount claimed. (See: *Westcan Stevedoring Ltd. v. The "Armar"*, [1973] F.C. 1232 (T.D.); *Sabb Inc. v. Shipping Ltd.*, [1976] 2 F.C. 175 (T.C.); *Waterside Ocean Navigation Co., Inc. v. International Navigation Ltd.*, [1977] 2 F.C. 257 (T.D.); *McCain Produce Co. Ltd. v. The "Rea"*, [1978] 1 F.C. 686 (T.D.); *Logistec Corp. v. The "Sneland"*, [1979] 1 F.C. 497 (T.D.); *Kuhr v. The "Friedrich Busse"*, [1982] 2 F.C. 709 (T.D.); *Marlex Petroleum Inc. v. The Ship "Har Rai"*, [1984] 2 F.C. 345 (T.D.); *Thorne Riddell Inc. v. Nicolle N Enterprises Inc.*, [1985] 2 F.C. 31 (T.D.); *Imperial Oil Limited v. Ship "Expo Spirit" and Hoverwest Ferry Services Inc.* (1986), 6 F.T.R. 156 (F.C.T.D.). Some doubts have occasionally been expressed as to the validity of this view (for instance *Thorne Riddell Inc.* referred to above, *Western Stevedoring Co. v. Ship "Anadolu Guney" Cargo et al.* (1988), 23 F.T.R. 117 (F.C.T.D.), and of course the decision under attack here), but I believe that it is basically indisputable. To contend that an action *in rem* could be sustained even in the absence of any personal liability on the part of the owner would go against the whole idea behind the system which is, again, the protection of the owner. A claim against a ship cannot be viewed apart from the owner; it is essentially a claim against the owner. It may be that the terms in which the principle has been put in many decisions was somewhat too broad. This personal liability of the owner could exist, I suggest, only in relation to the vessel, that is to say only to the extent to which the proceeds of sale of the vessel may be applied to the claim; in other words, a liability to be satisfied strictly out of the *res* (see in that respect the interesting decision of the Privy Council in *Foong Tai & Co. v. Buchheister & Co.*, [1908] A.C. 458 (P.C.)). It is not a fact that there are three possibilities which have to be reckoned: the owner may have contract-

(*Continued from previous page*)

(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

D'après la plupart des décisions rendues par la Section de première instance de cette Cour depuis 1970, il faut que la participation du propriétaire dans la fourniture des approvisionnements nécessaires soit suffisamment complète et directe pour que celui-ci engage sa responsabilité personnelle. Ces décisions confirment en fait qu'une action *in rem* est possible seulement si le propriétaire a engagé personnellement sa responsabilité à l'égard de la somme réclamée. (Voir: *Westcan Stevedoring Ltd. c. Le «Armar»*, [1973] C.F. 1232 (1re inst.); *Sabb Inc. c. Shipping Ltd.*, [1976] 2 C.F. 175 (1re inst.); *Waterside Ocean Navigation Co., Inc. c. International Navigation Ltd.*, [1977] 2 C.F. 257 (1re inst.); *McCain Produce Co. Ltd. c. Le «Rea»*, [1978] 1 C.F. 686 (1re inst.); *Logistec Corp. c. Le «Sneland»*, [1979] 1 C.F. 497 (1re inst.); *Kuhr c. Le «Friedrich Busse»*, [1982] 2 C.F. 709 (1re inst.); *Marlex Petroleum Inc. c. Le navire «Har Rai»*, [1984] 2 C.F. 345 (1re inst.); *Thorne Riddell Inc. c. Nicolle N Enterprises Inc.*, [1985] 2 C.F. 31 (1re inst.); *Imperial Oil Limited c. Navire «Expo Spirit» et Hoverwest Ferry Services Inc.* (1986), 6 F.T.R. 156 (C.F. 1re inst.). Le bien-fondé de ce point de vue est parfois mis en doute (par exemple dans *Thorne Riddell Inc.* précité, dans *Western Stevedoring Co. c. Navire «Anadolu Guney» Cargo et autres* (1988), 23 F.T.R. 117 (C.F. 1re inst.) et, bien entendu, dans la décision dont on interjette appel en l'espèce), mais sa justesse m'apparaît indiscutable. Le fait de prétendre qu'une action *in rem* pourrait être accueillie même en l'absence de toute responsabilité personnelle du propriétaire serait contraire au principe qui sous-tend le système, c'est-à-dire la protection du propriétaire. Une réclamation contre un navire ne peut être dissociée du propriétaire de ce navire; c'est avant tout une réclamation contre le propriétaire. C'est possible que ce principe ait été énoncé en des termes trop généraux dans bon nombre de décisions. À mon sens, cette responsabilité personnelle du propriétaire ne pourrait exister qu'en rapport avec le navire, c'est-à-dire seulement dans la mesure où le produit de la vente pourrait être affecté au paiement de la réclamation. En d'autres termes, c'est une responsabilité qui se limiterait strictement à la chose (voir à cet égard la décision

(*Suite de la page précédente*)

(ii) tout autre navire dont la personne concernée est, au moment où l'action est intentée, la véritable propriétaire en totalité.

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ed himself, or he may have authorized someone to contract on his personal credit, or he may have expressly or implicitly authorized a person, in possession and control of a ship, to contract on the credit of the ship (rather than on the entirety of his personal assets). But, I essentially agree that liability as a result of some personal behaviour and attitude on the part of the owner is required. Would that mean, though, that a judgment *in rem* cannot be rendered without being accompanied by a judgment *in personam* against the owner? If it were so, the whole notion of a distinct action *in rem* would be defeated, it seems to me, and to my knowledge no one has ever contended that such could be the case (comp. D. C. Jackson, *Enforcement of Maritime Claims*, 1985, at page 59).

intéressante du Conseil privé dans *Foong Tai & Co. v. Buchheister & Co.*, [1908] A.C. 458 (P.C.)). N'y a-t-il pas trois possibilités dont il faut tenir compte: le propriétaire peut avoir conclu le contrat lui-même, il peut avoir autorisé quelqu'un à s'engager sur son crédit personnel ou il peut avoir autorisé expressément ou implicitement une personne qui a la possession et le contrôle du navire à tirer du crédit du navire (plutôt que de la totalité de ses biens personnels). J'admets parfaitement que le propriétaire doit avoir engagé sa responsabilité par un comportement ou une attitude quelconque. Mais faut-il en conclure qu'un tribunal ne peut rendre un jugement *in rem* contre le propriétaire sans obligatoirement prononcer un jugement *in personam*? Dans l'affirmative, il me semble que l'action *in rem* perdrait tout à fait son caractère distinct; à ma connaissance, nul n'a jamais prétendu que tel pourrait être le cas (comp. D. C. Jackson, *Enforcement of Maritime Claims*, 1985, à la page 59).

It is on the basis of that understanding of our law that I have come to the conclusion that, in the circumstances of this case, the action *in rem* must be sustained in respect of all of the "post-sale invoices". It should be recalled that Jensen Marine Holdings Ltd. was created for financing purposes only; that Jorgensen, who ran Jensen Shipping, was also president of Jensen Marine Holdings Ltd.; that Jorgensen himself did not treat Jensen Shipping and Jensen Marine Holdings Ltd. as two separate entities, but on the contrary showed, by his conduct at the moment of the contracts as well as his attitude at the time of the action, that he never considered his legal authority over the ship to have changed. I have no difficulty in finding that Jensen Marine Holdings Ltd., have had, in the supplying of the services by Mount Royal, the involvement required for the validity of the action *in rem*, involvement which consisted in acting through its president in such a manner as to authorize tacitly Jensen Shipping to contract on the credit of the vessel and engage, to that extent, its personal liability. Whether or not the terms of the charterparty governing the contractual relations *inter se* between the two corporations would bear that interpretation of the situation is immaterial.

Interprétant ainsi notre droit, j'en conclus que dans les circonstances de l'espèce, il faut accueillir l'action *in rem* à l'égard de tous les comptes relatifs aux travaux postérieurs à la vente. Il convient de rappeler que Jensen Marine Holdings Ltd. a été constituée en société à des fins de financement seulement; que Jorgensen, qui dirigeait Jensen Shipping, était également président de Jensen Marine Holdings Ltd.; que Jorgensen lui-même ne considérait pas Jensen Shipping et Jensen Marine Holdings Ltd. comme deux entités distinctes, bien au contraire, car d'après sa conduite à l'époque où les contrats ont été exécutés et son attitude durant l'instance, il n'a jamais pensé que ses droits sur le navire avaient changé. Je n'ai aucune hésitation à conclure que Jensen Marine Holdings Ltd., lorsqu'elle a demandé à Mount Royal de fournir les services en question, possédait l'intérêt requis pour que l'action *in rem* soit valide, cet intérêt consistant à agir par l'intermédiaire de son président de manière à autoriser tacitement Jensen Shipping à tirer du crédit du navire et à engager, dans cette mesure, sa responsabilité personnelle. Il importe peu que les clauses de la charte-partie qui régissaient les rapports contractuels entre les deux sociétés confirment ou non cette interprétation de la situation.

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In fact, I do not even believe that Jensen Marine Holdings Ltd. can now dispute such an interpretation. It is well established that necessaries supplied to a vessel are *prima facie* presumed to have been supplied on the credit of the vessel and its owner. The presumption is a rebuttable one, of course, but here, not only was it not in fact rebutted, no attempt was even made to do so. It is true that the Trial Judge did not formally pronounce on the question of the personal liability of Jensen Marine Holdings Ltd. and rendered judgment *in personam* only against Jensen Shipping; but, in my view, he could not do otherwise, since, on the action as it came before him, judgment *in personam* could issue against the latter company only, and not the former which had never been personally impleaded.

In relation to that last statement of mine, I must say here the surprise I felt when I noticed, in the course of analyzing the file, that the style of cause on the appeal book (which had been prepared by counsel for the appellants) was not the same as the one appearing on the Trial Division documents, including the judgment: Jensen Marine Holdings Ltd. had been added as a party defendant. Apparently the change was explained to the registry as being based on the following passage in the judgment [at page 296]:

> There remains to consider the defendant's third line of defence, that the plaintiff has no claim *in rem* against the ship because the beneficial owner of the ship at the time this action was commenced was not the beneficial owner of the ship at the time the claim arose.

Before I deal with that submission on the part of the defendant, however, I must deal with an application made by counsel for the defendant in the course of the trial to amend the statement of defence to show Jensen Shipping Limited and Jensen Marine Holdings Limited as defendants. Counsel for the defendant claimed it was his intention, when he filed his defence in July of 1985, to file it on behalf of Jensen Holdings as well as on behalf of Jensen Shipping and that he made that fact clear in paragraph 4 of the defence which pleaded the following:

> 4. The beneficial ownership of defendant vessel was sold by this defendant to Jensen Marine Holdings Ltd. on 24 November 1983;

Counsel for the plaintiff opposed the application to show Jensen Holdings as a defendant on the grounds that having previously identified Jensen Shipping as the owner of the vessel Jensen Shipping was precluded from later claiming that Jensen

De fait, je ne pense pas que Jensen Marine Holdings Ltd. puisse maintenant contredire une telle interprétation. Il est bien établi que les approvisionnements nécessaires fournis à un navire sont présumés *prima facie* l'avoir été sur le crédit du navire et de son propriétaire. C'est une présomption que l'on peut réfuter mais, en l'espèce, non seulement elle ne l'a pas été, mais aucune tentative dans ce sens n'a été faite. Il est vrai que le juge de première instance ne s'est pas prononcé officiellement sur la question de la responsabilité personnelle de Jensen Marine Holdings Ltd. et a prononcé un jugement *in personam* contre Jensen Shipping seulement. Toutefois, il n'avait pas d'autre choix, selon moi, car vu l'action dont il a été saisi, le jugement *in personam* pouvait être prononcé contre Jensen Shipping seulement, Jensen Marine Holdings Ltd. n'ayant jamais été poursuivie personnellement.

À ce propos, je dois dire ici qu'en consultant le dossier, j'ai constaté avec surprise que l'intitulé de la cause dans le dossier d'appel (qui a été préparé par le procureur des appelants) n'était pas le même que celui qui figurait dans les documents de la Section de première instance, y compris dans le jugement: Jensen Marine Holdings Ltd. avait été constituée partie défenderesse. Selon l'explication qu'a reçue le greffe, cette modification résulterait de l'extrait suivant du jugement [à la page 296]:

> [TRADUCTION] Il reste à examiner le troisième moyen de défense invoqué, soit que la demanderesse ne peut faire de réclamation réelle contre le navire parce que le propriétaire en *equity* du navire au moment où l'action a été intentée n'était pas le propriétaire en *equity* du navire au moment où la réclamation a pris naissance.

Avant de traiter l'argument de la défenderesse, je dois disposer d'une requête que son avocat a déposée au cours du procès pour modifier l'exposé de la défense afin que les défenderesses inscrites soient Jensen Shipping Limited et Jensen Marine Holdings Limited. Il prétend que lors du dépôt de sa défense au mois de juillet 1985, son intention était de déposer pour Jensen Holdings autant que pour Jensen Shipping et qu'il a expliqué ce point à l'alinéa 4 de la défense comme suit:

> 4. Le droit de propriété en *equity* du navire défendeur a été vendu par la défenderesse à Jensen Marine Holdings le 24 novembre 1983.

L'avocat de la demanderesse s'est opposé à la demande visant à faire inscrire Jensen Holdings comme défenderesse en soutenant que, puisque Jensen Shipping s'était déjà identifiée comme propriétaire du navire, elle ne pouvait pas ultérieurement décla-

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Holdings was the owner. Counsel for the defendant Jensen Shipping appeared to be concerned that unless Jensen Holdings was made a party to the action he, as counsel for Jensen Shipping, might not be able to argue that Jensen Holdings was the owner.

I must confess that I did not appreciate the significance of the application by counsel for Jensen Shipping at the time nor did I appreciate the significance of the opposition to the motion by counsel for the plaintiff.

For whatever reason counsel for Jensen Shipping sometimes filed documents as solicitor for the defendant and sometimes as solicitor for the defendants. The defence itself was filed as the "statement of defence of Jensen Shipping Limited" and filed by "solicitors for the defendants". It appears that counsel was laying the grounds for claiming either that Jensen Holdings was or was not before the court depending on which submission would be most advantageous at the time it had to be made.

In view of the documents filed with the court showing the transfer of the ship from Jensen Shipping to Jensen Holdings on November 24, 1983, the fact that counsel claims he intended to act on behalf of Jensen Holdings as well as Jensen Shipping, and the fact that the owner is named as one of the defendants, I am satisfied that Jensen Holdings is a party to the action and is represented by Barry & Associates as its solicitors.

While the last words used by the Trial Judge were somewhat equivocal, it was nevertheless clear that what was meant was that the defendants were entitled to argue that the ship was owned by Jensen Marine Holdings Ltd. The phrase "the owners and all others interested in" the ship is, I repeat, merely the manner indicated by the Rules of the Court (Rule 1002) to commence an action *in rem*, which by itself can only lead to a judgment *in rem*. To implead the owner so as to obtain against him a judgment *in personam*, a plaintiff, it seems to me, has to amend, with leave, his statement of claim, specially the style of cause thereof and the prayer for relief. On the other hand, if it must be accepted, as it seems to be in England, that by raising a defence to the action *in rem* on the basis of absence of liability on his part, an owner submits himself to the jurisdiction of the Court with the result that the action continues against him as an action *in personam* as well as *in rem* (see *The Banco*, [1971] 1 Lloyd's Rep. 49 (C.A.) and *The August 8*, [1983] 2 A.C. 450 (P.C.), at page 456), it would appear to me difficult to understand that, by simply coming before the Court to reveal his ownership, without raising the issue of his personal liability, as here, an owner would automatically become a party defendant against whom judgment *in personam* must be

rer que Jensen Holdings en était la propriétaire. L'avocat de Jensen Shipping semblait craindre de ne pouvoir, en sa qualité de représentant de cette défenderesse, faire valoir que Jensen Holdings était la propriétaire du navire, si cette dernière n'était pas partie à l'action.

*a* Je dois avouer que je n'ai pas compris l'importance de la requête de l'avocat de Jensen Shipping à ce moment, pas plus que de l'opposition à la requête soulevée par l'avocat de la demanderesse.

Pour je ne sais quelle raison, l'avocat de Jensen Shipping a *b* déposé des documents tantôt comme procureur de la défenderesse, tantôt comme procureur des défenderesses. L'exposé de la défense déposé par les «procureurs des défenderesses» était intitulé «Exposé de la défense de Jensen Shipping Limited». Il semble que l'avocat préparait le terrain pour faire valoir que Jensen Holdings était ou n'était pas partie à l'action devant *c* cette cour selon l'argument qui serait le plus favorable en temps voulu.

Compte tenu des documents déposés devant la Cour attestant le transfert du navire de Jensen Shipping à Jensen Holdings le 24 novembre 1983, du fait que l'avocat prétend avoir voulu agir pour le compte de Jensen Holdings aussi bien que pour Jensen *d* Shipping, et du fait que la propriétaire est désignée comme étant l'une des défenderesses, je suis convaincu que Jensen Holdings est partie à l'action et qu'elle est représentée par Barry & Associates.

Même si les derniers mots du juge de première *e* instance sont équivoques, il est néanmoins clair qu'il a voulu dire que les défendeurs étaient en droit de prétendre que le navire appartenait à Jensen Marine Holdings Ltd. Après tout, l'expression «aux propriétaires et à toutes les autres per- *f* sonnes ayant un droit sur le navire» est simplement la façon prévue dans les Règles de la Cour (Règle 1002) pour intenter une action *in rem* qui, par la force des choses, ne peut aboutir qu'à un jugement *in rem*. Selon moi, celui qui veut poursuivre le *g* propriétaire pour obtenir un jugement *in personam* doit demander la permission de modifier sa déclaration, en particulier l'intitulé de la cause et la demande de redressement. Par contre, si l'on *h* admet, comme cela semble être le cas en Angleterre, que le propriétaire qui, ne s'estimant pas responsable, invoque un moyen de défense à l'encontre de l'action *in rem* puisse tomber sous la compétence de la Cour de sorte que l'action *i* devient une action à la fois *in personam* et *in rem* contre lui (voir *The Banco*, [1971] 1 Lloyd's Rep. 49 (C.A.) et *The August 8*, [1983] 2 A.C. 450 (P.C.), à la page 456), j'ai de la difficulté à comprendre comment ce propriétaire, en dévoilant *j* simplement à la Cour son titre de propriété sans soulever la question de sa responsabilité personnelle, comme c'est le cas en l'espèce, deviendrait

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entered, failing which the judgment *in rem* could not sand. In any event, he who prepared the appeal book should know that a change in the style of cause requires a formal order of the Court. I repeat that, in my view, no judgment *in personam* could have been pronounced against Jensen Marine Holdings Ltd.

My conclusion therefore is that if the judgment *in rem* rendered by the Trial Judge is not sustainable with respect to the "pre-sale jobs", it is, on the contrary, well founded with respect to all of the "post-sale invoices". I would then vary the judgment *a quo* so as to limit the amount to $145,582. I do not think an award for costs would in the circumstances be warranted.

MACGUIGAN J.A.: I agree.

DESJARDINS J.A.: I concur.

automatiquement une partie défenderesse à l'égard de laquelle il faudrait rendre un jugement *in personam*, à défaut de quoi aucun jugement *in rem* ne pourrait être prononcé. Quoi qu'il en soit, celui qui a préparé le dossier d'appel devrait savoir qu'il faut un ordre formel de la Cour pour modifier l'intitulé d'une cause. Je répète qu'à mon sens, aucun jugement *in personam* n'aurait pu être prononcé contre Jensen Marine Holdings Ltd.

J'en arrive donc à la conclusion que le jugement *in rem* que le juge de première instance a prononcé ne peut être accueilli à l'égard des comptes relatifs aux travaux qui ont précédé la vente, mais qu'il est bien fondé en ce qui concerne les comptes relatifs aux travaux postérieurs à la vente. Je modifierais donc le jugement de première instance de façon à ramener le montant de la réclamation à 145 582 $. Je ne crois pas qu'il soit justifié dans les circonstances d'adjuger les dépens.

LE JUGE MACGUIGAN, J.C.A.: Je souscris à ces motifs.

LE JUGE DESJARDINS, J.C.A.: Je souscris à ces motifs.

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T-500-82

**Walter Kuhr,** and **Walter Kuhr, Charles R. Hart, Robert Allen** and **Walter Kuhr Jr., carrying on business as Dona Genoveva Partnership,** and **the said Dona Genoveva Partnership** (*Plaintiffs*)

*v.*

**The Ship *Friedrich Busse*** and **Hochseefischerei Nordstern A.G.** (*Defendants*)

Trial Division, Addy J.—Vancouver, February 8 and 17, 1982.

*Maritime law — Jurisdiction — Plaintiffs contracted to supply fish at sea to defendant vessel which was obliged to remain within specified fishing areas and to receive delivery of and pay for fish — Plaintiffs allege breach of contract — Defendants seek to set aside statement of claim and to dismiss action for lack of jurisdiction or because Canadian court is forum non conveniens — Defendants argue no action in rem against ship because there is no allegation against shipowner in statement of claim and therefore no action in personam — Whether Trial Division has jurisdiction under s. 22(2) of Federal Court Act over claims arising out of contract to supply fish — Whether general substance of matter falls within jurisdiction of Trial Division over Canadian maritime law pursuant to s. 22(1) of Federal Court Act — Whether Federal Court constitutes forum conveniens — Motion dismissed — Supply of fish is essential to operation of vessel — Matter is predominantly maritime in character — Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 22(1),(2)(i),(m).*

The owners of the defendant ship, a fish processing vessel, apply for an order to strike out the statement of claim and to dismiss the action. The plaintiffs allege that the defendants are in breach of a contract whereby the plaintiffs were to supply fish at sea to the defendant vessel which was obliged to remain within the specified fishing areas and receive delivery of and pay for the fish. The defendant owners submit that the Court has no jurisdiction to entertain the action for three reasons: (1) there is no action *in rem* against the ship because there is no allegation against the shipowner as owner in the statement of claim, and therefore no action *in personam* (2) the supplying of fish under a contract does not fall within paragraph 22(2)(*i*) of the *Federal Court Act* which gives the Trial Division jurisdiction over claims arising out of agreements relating to the use of a ship, nor within paragraph 22(2)(*m*) which gives the Trial Division jurisdiction over matters relating to the supply of goods to a ship for her operation, and (3) the substance of the matter does not fall within the general jurisdiction in admiralty matters granted to the Federal Court by section 22 of the *Federal Court Act*. The defendants further argue that a Canadian court constitutes a *forum non conveniens*.

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**Walter Kuhr,** et **Walter Kuhr, Charles R. Hart, Robert Allen** et **Walter Kuhr, fils, associés sous la raison sociale Dona Genoveva Partnership,** et **ladite Dona Genoveva Partnership** (*demandeurs*)

*c.*

**Le navire *Friedrich Busse*** et **Hochseefischerei Nordstern A.G.** (*défendeurs*)

Division de première instance, juge Addy—Vancouver, 8 et 17 février 1982.

*Droit maritime — Compétence — Les demandeurs doivent, par contrat, fournir du poisson en mer au navire défendeur obligé de demeurer sur certains champs de pêche spécifiés pour recevoir livraison des prises et les payer — Inexécution du contrat selon les demandeurs — Conclusion des défenderesses à la radiation de la déclaration et au rejet de l'action pour incompétence ou pour motif qu'une juridiction canadienne constitue un forum non conveniens — Selon les défendeurs, il n'y a pas d'action réelle contre le navire puisque rien dans la déclaration n'est allégué contre le propriétaire et qu'il n'y a donc pas d'action personnelle — La Division de première instance est-elle compétente aux termes de l'art. 22(2) de la Loi sur la Cour fédérale en matière de demande née d'un contrat de fourniture de poissons? — Le litige est-il de la compétence de la Division de première instance en matière de droit maritime canadien en vertu de l'art. 22(1) de la Loi sur la Cour fédérale? — La Cour fédérale est-elle un forum conveniens? — Requête rejetée — La fourniture de poissons est indispensable à l'exploitation du navire — Matière de nature essentiellement maritime — Loi sur la Cour fédérale, S.R.C. 1970 (2e Supp.), c. 10, art. 22(1),(2)i),m).*

Les propriétaires du navire défendeur, un navire-usine traitant le poisson, demandent la radiation de la déclaration et le rejet de l'action. Les demandeurs soutiennent que les défendeurs n'ont pas observé le contrat par lequel les demandeurs se sont engagés à remettre leurs prises en mer au navire défendeur, ce dernier devant demeurer sur certains champs de pêche spécifiés, prendre livraison des prises des demandeurs et en verser le prix. Les propriétaires défendeurs soutiennent que la Cour n'est pas compétente pour connaître de la demande pour trois raisons: (1) on ne peut engager une action réelle contre le navire parce que rien dans la déclaration n'est spécifiquement articulé contre le propriétaire du navire en sa qualité de propriétaire et qu'en conséquence aucune action personnelle ne peut être intentée contre lui; (2) la fourniture de poissons sur la base d'un contrat ne tombe pas sous l'emprise de l'alinéa 22(2)*i*) de la *Loi sur la Cour fédérale* qui confère à la Division de première instance compétence en matière de toute demande née d'une convention relative à l'utilisation d'un navire, ni sous celle de l'alinéa 22(2)*m*) qui lui confère compétence en matière de fourniture à un navire des marchandises nécessaires à son exploitation; et (3) la matière du litige n'est pas de la compétence générale en matière maritime attribuée à la Cour fédérale par l'article 22 de la *Loi sur la Cour fédérale*. Les défendeurs soutiennent aussi qu'une juridiction canadienne est en l'espèce un *forum non conveniens*.

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*Held*, the motion is dismissed. The statement of claim contains allegations against the defendant company for amounts due and for damages. This claim would be maintainable against the owners since they signed the contract and would be reaping the benefits of the contract. When the owner undertakes that his ship will be in a certain place at a certain time and will perform certain tasks, in this case take delivery of and pay for the fish caught by the plaintiffs, the owner is responsible at law for the performance of that contract. The supplying of fish to a vessel cannot be construed as an agreement relating to the use of a ship as contemplated by paragraph 22(2)(*i*). The use referred to is use of the ship by a party other than the owner. Paragraph 22(2)(*m*) must necessarily include, but is not limited to, the supplying of necessaries. In other words, the supplying of goods need not be necessary for the operation of the vessel but may be ancillary or complementary thereto as long as they are used or intended for use in the operation of the ship. In this case, the obtaining of fish is essential to the vessel being operated for the purpose for which it exists, the business of fishing. As to the third argument, the contract deals with the actual transfer and delivery of possession of goods on the high seas between two ships. The goods are to come from an agreed area of the sea and the contracting parties have mutually agreed that their vessels are to operate there and carry out the provisions of the contract in that specified area. It is difficult to conceive of a situation or of an undertaking which is more maritime in nature. The Admiralty Court of England from which the Federal Court derives its jurisdiction in admiralty matters would necessarily have assumed jurisdiction. Applying the test formulated in *Sumitomo Shoji Canada Ltd. v. The Ship "Juzan Maru"* [1974] 2 F.C. 488 of the true essence of the contract in all the circumstances and facts of the case, and the test formulated in *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board* [1960] O.R. 416, of dominant features and objects, it is clear that the matter is predominantly maritime in character, and falls within the subject-matter of Canadian maritime law as provided for in subsection 22(1). As to the argument of *forum non conveniens*, the ship was arrested in Vancouver whilst undergoing repairs which had nothing to do with the performance of the contract. The plaintiffs are American, the defendant company is German, the ship is registered in Germany, the contract was made there and was to be performed out of this jurisdiction and payment was tendered and accepted in United States currency. However, as indicated in *Antares Shipping Corporation v. The Ship "Capricorn"* [1977] 2 S.C.R. 422, the overriding consideration must be the existence of another forum more appropriate for securing the ends of justice and therefore other factors have a direct bearing on the issue. An inspection revealed that the ship was probably underlogging fish and misrepresenting the contents of blocks of fish. The ship allegedly left American fishing waters to dispose of the catch and to avoid prosecution. The plaintiffs allege that in doing so the defendants were in breach of contract. In light of the alleged fraudulent conduct of the defendants and the fear that the release of the ship without proper security would result in their losing any chance of recovery, this Court is the forum most suitable for the ends of justice.

*Arrêt*: la requête est rejetée. Selon la déclaration, la société défenderesse doit certaines sommes et des dommages-intérêts. Les propriétaires peuvent être reconnus débiteurs de cette créance puisqu'ils ont signé le contrat et doivent en tirer profit. Lorsque le propriétaire s'engage à ce que son navire soit présent dans un certain secteur à une époque donnée et à ce qu'il effectue certaines tâches, en l'espèce prendre livraison et verser le prix des prises des demandeurs, il est, en droit, responsable de l'exécution de ce contrat. La fourniture de poissons à un navire ne saurait être considérée comme une convention relative à l'utilisation d'un navire au sens de l'alinéa 22(2)*i*). L'utilisation dont il s'agit c'est l'utilisation que fait d'un navire un tiers autre que le propriétaire. L'alinéa 22(2)*m*) doit nécessairement inclure la fourniture des approvisionnements nécessaires sans y être limité. En d'autres termes, la fourniture de marchandises peut ne pas être nécessaire à l'exploitation du navire mais seulement complémentaire ou accessoire, tant qu'elle concourt, ou est destinée à concourir, à l'exploitation du navire. En l'espèce, la livraison du poisson est absolument essentielle au navire exploité pour ce qui est sa raison d'être, en l'occurrence, la pêche. Quant au troisième point, le contrat traite du transbordement effectif de marchandises et de leur livraison en haute mer d'un navire à l'autre. Ces marchandises doivent provenir d'un secteur marin précis et les parties contractantes sont convenues que leurs navires doivent procéder aux opérations prévues et à l'exécution des stipulations du contrat dans ce secteur spécifié. Il est difficile de concevoir un cas, un contrat, qui ait un caractère plus maritime. La Cour d'amirauté d'Angleterre, de laquelle la Cour fédérale tient sa compétence en matière maritime, se serait assurément présumée compétente. Compte tenu de la décision *Sumitomo Shoji Canada Ltd. c. Le navire «Juzan Maru»* [1974] 2 C.F. 488, qui applique le critère de l'essence véritable du contrat à la lumière de tous les faits et du cas d'espèce, et de la décision *Underwater Gas Developers Ltd. c. Ontario Labour Relations Board* [1960] O.R. 416, qui applique celui des caractéristiques et objets dominants, il est clair que le caractère maritime prédomine et qu'il s'agit d'une matière de droit maritime canadien comme le prévoit le paragraphe 22(1). Quant à la question du *forum non conveniens*, le navire a été saisi à Vancouver alors qu'on y effectuait des réparations qui n'avaient rien à voir avec l'exécution du contrat. Les demandeurs sont américains; la société défenderesse est allemande; le navire a été immatriculé en Allemagne; le contrat a été conclu dans ce dernier pays et devait être exécuté hors de notre juridiction; paiement a été offert et accepté en monnaie américaine. Toutefois, comme l'indique l'arrêt *Antares Shipping Corporation c. Le Navire «Capricorn»* [1977] 2 R.C.S. 422, la considération primordiale doit être l'existence d'un autre tribunal plus approprié à la réalisation des fins de la justice; il s'ensuit que d'autres facteurs ont un impact direct sur le litige. Une inspection a révélé qu'en toute probabilité le navire sous-rapportait les quantités de prises et que le contenu de certains blocs de poissons avait été faussement marqué. Le navire aurait quitté les eaux de pêche américaines dans le but de se débarrasser des prises et d'échapper aux poursuites. Les demandeurs soutiennent que ces actions constituent une inexécution du contrat de la part des défendeurs. Compte tenu de la conduite frauduleuse reprochée aux défendeurs et de la crainte que la levée de la saisie du navire, en l'absence de toute sûreté appropriée, ait pour résultat la perte de toute possibilité d'indemnisation, la Cour constitue le tribunal le plus à même de servir les fins de la justice.

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*Western Nova Scotia Bait Freezers Limited v. The Ship "Shamrock"* [1939] Ex.C.R. 53, followed. *Sumitomo Shoji Canada Ltd. v. The Ship "Juzan Maru"* [1974] 2 F.C. 488, applied. *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board* [1960] O.R. 416, applied. *Antares Shipping Corporation v. The Ship "Capricorn"* [1977] 2 S.C.R. 422, applied. *Westcan Stevedoring Ltd. v. The Ship "Armar"* [1973] F.C. 1232, distinguished. *Elesguro Inc. v. Ssangyong Shipping Co. Ltd.* [1981] 2 F.C. 326, distinguished. *Marazura Navegacion S.A. v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1977] 1 Lloyd's Rep. 283 (Q.B. (Com. Ct.)), distinguished.

MOTION.

COUNSEL:

*John R. Cunningham* for plaintiffs.
*D. G. Rae* for defendants.

SOLICITORS:

*Macrae, Montgomery & Cunningham*, Vancouver, for plaintiffs.
*Russell & DuMoulin*, Vancouver, for defendants.

*The following are the reasons for order rendered in English by*

ADDY J.: The defendant ship was arrested in Vancouver at the request of the plaintiffs at the time of the issuing of the statement of claim in this action. Following the granting of leave to enter a conditional appearance, the present application was made on behalf of the owners of the defendant ship for an order to strike out the statement of claim herein and to dismiss the action on the ground of lack of jurisdiction or, alternatively, on the ground that a Canadian court constitutes a *forum non conveniens*.

The *Friedrich Busse*, which is registered in Germany, is a fish processing vessel and the plaintiffs, owners of the *Dona Genoveva*, who were fishing off the coast of Alaska and the Aleutian Islands, were delivering fish to the *Friedrich Busse* for processing at sea pursuant to a contract made and signed in Germany between the defendant company and a representative of the plaintiffs. In that contract (para. 2) the defendant company described itself as the owner of the *Friedrich Busse*. It now turns out, according to the affidavit evidence of the applicant, that the ship was and is, in fact, the property of a wholly owned subsidiary

Jurisprudence: décision suivie: *Western Nova Scotia Bait Freezers Limited c. Le navire «Shamrock»* [1939] R.C.É. 53. Décisions appliquées: *Sumitomo Shoji Canada Ltd. c. Le navire «Juzan Maru»* [1974] 2 C.F. 488; *Underwater Gas Developers Ltd. c. Ontario Labour Relations Board* [1960] O.R. 416; *Antares Shipping Corporation c. Le Navire «Capricorn»* [1977] 2 R.C.S. 422. Distinction faite avec les décisions: *Westcan Stevedoring Ltd. c. Le navire «Armar»* [1973] C.F. 1232; *Elesguro Inc. c. Ssangyong Shipping Co. Ltd.* [1981] 2 C.F. 326; *Marazura Navegacion S.A. c. Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1977] 1 Lloyd's Rep. 283 (Q.B. (Com.Ct.)).

REQUÊTE.

AVOCATS:

*John R. Cunningham* pour les demandeurs.
*D. G. Rae* pour les défendeurs.

PROCUREURS:

*Macrae, Montgomery & Cunningham*, Vancouver, pour les demandeurs.
*Russell & DuMoulin*, Vancouver, pour les défendeurs.

*Voici les motifs de l'ordonnance rendus en français par*

LE JUGE ADDY: Le navire défendeur a été saisi à Vancouver à l'instigation des demandeurs au moment de la production de la déclaration en cette action. Par suite de l'autorisation donnée de comparaître sous condition, la présente demande a été faite au nom des propriétaires du navire défendeur; elle conclut à une fin de non-recevoir de la déclaration en cause et au rejet de l'action au motif d'incompétence ou, subsidiairement, au motif qu'une juridiction canadienne constituerait un *forum non conveniens*.

Le *Friedrich Busse*, immatriculé en Allemagne, est un navire-usine traitant le poisson et les demandeurs, propriétaires du *Dona Genoveva*, qui pêchaient au large de l'Alaska et des îles Aléoutiennes, remettaient leurs prises au *Friedrich Busse* pour qu'il les traite en mer conformément à un contrat conclu et signé en Allemagne entre la société défenderesse et un représentant des demandeurs. Dans ce contrat (au par. 2), la société défenderesse se présente comme propriétaire du *Friedrich Busse*. Il semble finalement, d'après la déposition sous serment qu'administra en preuve le requérant, que le navire aurait appartenu, et

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company of the defendant, namely Reederei Friedrich Busse Hochseefischerei Nordstern A.G. & Co. Kommanditgesellschaft.

In view of the similarity of names, the fact that the actual owners are a subsidiary of the defendant company and that the latter held itself out to be the owner, I attach no importance whatsoever to the fact that the contract was not in the name of the actual owner. I am assuming at this stage and for the purpose of the present motion and in the absence of any evidence to the contrary, that the contract was executed on behalf of the actual owners and with their full knowledge and consent.

The first ground alleged, namely that this Court has no jurisdiction to entertain the action, is based on three arguments.

The first one is that there is no action *in rem* against the ship because there exists no action *in personam* against the shipowner. Counsel for the applicant argues in support of this proposition that the statement of claim contains no allegation against the shipowner as owner, nor could any claim against the owner be maintained at law even if such an allegation existed. The applicant relies on this in the case of *Westcan Stevedoring Ltd. v. The Ship "Armar"* [1973] F.C. 1232. I fully agree with the principle approved and adopted by my brother Collier J. in that case, to the effect that a right *in rem* against a vessel is dependent upon the existence of a liability on the part of its owner apart from statute and that Parliament did not, in granting admiralty jurisdiction to the Federal Court, intend to alter that principle. In the last-mentioned case, however, it is very important to remember that, unlike the case at bar, it is undisputed that there existed no liability on the part of the owners. This is brought out quite clearly by Mr. Justice Collier at page 1234 of the above-mentioned report:

> Mr. Lutz candidly admitted he never at any time dealt with the owners of the vessel or the master of the vessel in respect of the supplying of these stevedoring services. He said his company was not looking to the credit of the vessel or her owners, but was supplying the services on the credit of the charterers or their subagents. [Emphasis added.]

In the present case the statement of claim in issue contains allegations against the defendant

appartiendrait, en fait à une filiale appartenant elle-même entièrement à la défenderesse, la Reederei Friedrich Busse Hochseefischerei Nordstern A.G. & Co. Kommanditgesellschaft.

Vu la similarité des noms, que les propriétaires véritables sont une filiale de la société défenderesse et que cette dernière est considérée elle-même comme propriétaire, je n'accorde aucune importance au fait que le contrat ne soit pas au nom du propriétaire réel. Je présume en cet état de la cause, pour les fins de la présente requête, en l'absence de preuve contraire, que le contrat a été conclu au nom des propriétaires véritables, qu'ils le savaient parfaitement et y consentaient.

Le premier moyen invoqué, que la Cour est incompétente pour connaître de la demande, comporte trois volets.

Le premier serait qu'on ne pourrait engager une action réelle contre le navire parce qu'il n'existerait aucune action personnelle contre le propriétaire du navire. L'avocat du requérant fait valoir, au soutien de cet argument, que rien dans la déclaration n'est articulé contre le propriétaire du navire en tant que propriétaire et qu'aucune créance dont le propriétaire serait débiteur ne serait reconnue en droit si elle était articulée. Le requérant invoque l'arrêt *Westcan Stevedoring Ltd. c. Le navire «Armar»* [1973] C.F. 1232. Je souscris entièrement au principe qu'approuva, le faisant sien, le juge Collier dans cette espèce: une créance réelle contre un navire dépend de l'existence d'une dette de son propriétaire indépendamment de la législation et le Parlement n'avait pas l'intention, en attribuant à la Cour fédérale compétence en matière maritime, de modifier ce principe. Dans cette dernière espèce toutefois, il importe de se rappeler que, contrairement à l'espèce en cause, il avait été reconnu que les propriétaires n'étaient nullement débiteurs. C'est ce que fait ressortir fort clairement le juge Collier à la page 1234 du recueil précité:

> Lutz a de bonne foi reconnu qu'il n'avait jamais discuté avec les propriétaires du navire ou son capitaine de cette question d'aconage. Il a déclaré que sa compagnie ne s'est pas fondée sur le crédit du navire ou de ses propriétaires, mais qu'elle a fourni ses services au vu du crédit des affréteurs ou de leurs sous-agents. [C'est moi qui souligne.]

En l'espèce en cause, la déclaration articule que la société défenderesse doit le montant des prises

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company for amounts due for fish supplied the ship and for damages for failure of the ship to remain in the fishing waters in the Bering Sea, Aleutian Islands and Gulf of Alaska fishing areas. This claim would be maintainable against the owners as such, since they signed the contract (or for the reasons previously stated are, for the purpose of this motion, to be considered as having signed it) and would be reaping the benefits of the contract. When the owner undertakes that his ship will be in a certain area at a certain time and will perform certain tasks, in this case take delivery of and pay for the fish caught by the plaintiffs, the owner is obviously responsible at law for the performance of that contract. The first argument of the applicant therefore cannot be sustained.

The second argument is to the effect that no action is maintainable against the ship in any event because the supplying of fish under a contract does not fall within any of the paragraphs of subsection 22(2) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, or, more particularly, within paragraphs (*i*) and (*m*), on which the plaintiffs rely. This argument is also related to the third one to the effect that, in addition, the substance of the matter does not, in any event, fall within the general jurisdiction in admiralty matters granted to this Court by subsection 22(1). I shall deal with both these arguments at the same time.

The relevant portions of section 22 read as follows:

**22.** (1) The Trial Division has concurrent original jurisdiction as well between subject and subject as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

(2) Without limiting the generality of subsection (1), it is hereby declared for greater certainty that the Trial Division has jurisdiction with respect to any claim or question arising out of one or more of the following:

. . .

(*i*) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;

. . .

(*m*) any claim in respect of goods, materials or services wherever supplied to a ship for her operation or maintenance including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;

fournies au navire et des dommages-intérêts parce que le navire n'est pas demeuré dans les eaux de pêche de la mer de Bering ni sur les champs de pêche des îles Aléoutiennes et du golfe d'Alaska. Les propriétaires à ce titre pourraient être reconnus débiteurs de cette créance puisqu'ils ont signé le contrat (ou, pour les raisons précitées, pour les fins de la présente requête, doivent être considérés comme l'ayant signé) et qu'ils en profiteront. Lorsque le propriétaire s'engage à ce que son navire soit présent dans un certain secteur à une certaine époque et à ce qu'il effectue certaines tâches, en l'espèce prendre livraison et verser le prix des prises des demandeurs, il est, en droit, de toute évidence responsable de l'exécution de ce contrat. Le premier argument du requérant donc ne saurait être retenu.

Le second consiste à dire qu'aucune action ne saurait être accueillie contre le navire de toute façon car la fourniture de poissons sur le fondement d'un contrat ne tombe pas sous l'emprise des divers alinéas du paragraphe 22(2) de la *Loi sur la Cour fédérale*, S.R.C. 1970 (2e Supp.), c. 10, plus particulièrement des alinéas *i*) et *m*) qu'invoquent les demandeurs. Ce moyen est en fait relié à un troisième selon lequel, en outre, la matière du litige ne serait pas de toute façon de la compétence générale en matière maritime attribuée à notre juridiction par le paragraphe 22(1). Je traiterai ces deux moyens comme un seul.

Voici les portions pertinentes de l'article 22:

**22.** (1) La Division de première instance a compétence concurrente en première instance, tant entre sujets qu'autrement, dans tous les cas où une demande de redressement est faite en vertu du droit maritime canadien ou d'une autre loi du Canada en matière de navigation ou de marine marchande, sauf dans la mesure où cette compétence a par ailleurs fait l'objet d'une attribution spéciale.

(2) Sans restreindre la portée générale du paragraphe (1), il est déclaré pour plus de certitude que la Division de première instance a compétence relativement à toute demande ou à tout litige de la nature de ceux qui sont ci-après mentionnés:

. . .

*i*) toute demande née d'une convention relative au transport de marchandises à bord d'un navire, à l'utilisation ou au louage d'un navire soit par charte-partie, soit autrement;

. . .

*m*) toute demande relative à des marchandises, fournitures ou services fournis à un navire, où que ce soit, pour son exploitation ou son entretien, et notamment, sans restreindre la portée générale de ce qui précède, les demandes relatives à l'aconage ou gabarage;

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I agree that a contract for the supplying of fish to a vessel, merely by reason of the fact that the vessel is processing the fish and is thus using the fish supplied, cannot fairly be construed as an "agreement relating to . . . the use . . . of a ship" as contemplated by paragraph (*i*). When the word "use" is considered in that context it seems clear that the use referred to is use of the ship by a party other than the owner: an agreement for use and an ordinary contract for hiring would be *ejusdem generis*.

However, the question as to whether paragraph (*m*) applies is not nearly so clear. It might well be that the word "operation" in that paragraph does not refer only to the actual navigation of a ship over the water but to its operation generally where it has another function such as receiving delivery of fish on the high seas and processing same, even though the actual processing might well be the same as the operation carried on by a fish processing factory situated ashore.

Nowhere in the specifically enumerated matters in subsection (2) of section 22 is there any mention of contracts for the supplying of necessaries for a ship. This has long been recognized as a claim falling within the ambit of Canadian maritime law and also the jurisdiction of the former Exchequer Court of Canada and thus the Federal Court of Canada.

A decision of the Exchequer Court in point is that of *Western Nova Scotia Bait Freezers Limited v. The Ship "Shamrock"* [1939] Ex.C.R. 53. That vessel was also engaged in the fishing business. The contract was for the supply of bait and ice to the ship to enable it to carry on with fishing. It was held therein that the bait and ice were necessaries having regard to the nature of the business of the ship. The learned Judge states at pages 54 and 55 of the above-mentioned report:

> There are two defences set up to the action, the first that the goods supplied were not "necessaries" within the meaning of that word as interpreted by Courts of Admiralty, and in any event there is no proof that the bait and ice were necessary at the time of delivery. This vessel was engaged in the fishing business and it is shown by the evidence that ice and bait are essential for the prosecution of that industry as carried on by the *Shamrock*. I think, too, that without any evidence of the situation here one having knowledge of the business in which this vessel was engaged is bound to reach the conclusion that bait and ice were necessary for the proper prosecution of that

J'admets qu'un contrat de fourniture de poissons à un navire ne saurait être considéré, simplement du fait que le navire traite du poisson et utilise le poisson fourni, comme une «convention relative . . . à l'utilisation . . . d'un navire» aux termes de l'alinéa *i*). Il est clair que dans ce contexte, l'emploi du terme «utilisation» vise l'utilisation que fait d'un navire un tiers autre que le propriétaire: une convention pour son usage de même qu'un contrat de nolisement ordinaire seraient *ejusdem generis*.

Toutefois, la question de savoir si l'alinéa *m*) s'applique n'est pas aussi claire. Il se peut fort bien que le terme «exploitation» de cet alinéa vise non seulement le fait pour ce navire de naviguer mais aussi l'exploitation générale de toutes ces fonctions comme celle de recevoir livraison de poissons en haute mer et de les traiter même lorsque ce traitement consiste en la même opération que celle qu'effectue une usine de traitement de poissons à terre.

Nulle part dans l'énumération du paragraphe (2) de l'article 22 ne mentionne-t-on les contrats de fourniture d'équipement nécessaire au navire. Ces créances ont longtemps été reconnues comme relevant du droit maritime canadien ainsi que de la compétence de l'ancienne Cour de l'Échiquier du Canada et donc, aujourd'hui, de la Cour fédérale du Canada.

L'espèce *Western Nova Scotia Bait Freezers Limited c. Le navire «Shamrock»* [1939] R.C.É. 53, une décision de la Cour de l'Échiquier, l'illustre bien. Le navire en cause se livrait aussi à des opérations de pêche. Le contrat concernait la fourniture de bouette et de glace au navire pour lui permettre de poursuivre sa pêche. On statua que la bouette et la glace constituaient des fournitures nécessaires compte tenu de la vocation du navire. Le docte juge dit, aux pages 54 et 55 du recueil précité:

> [TRADUCTION] Deux défenses sont opposées à l'action: la première, que les biens fournis n'étaient pas des «fournitures nécessaires» au sens que donnent à ce terme les juridictions d'amirauté; d'ailleurs, il n'y a aucune preuve que la bouette et la glace aient été nécessaires au moment de la livraison. Le bâtiment se livrait à des activités de pêche et la preuve administrée montre que la glace et la bouette sont essentielles à cette industrie de la façon dont s'y livrait le *Shamrock*. Je pense aussi, indépendamment de toute preuve des faits du cas d'espèce, si l'on connaît l'activité à laquelle se livrait le navire, que l'on doit en conclure que la bouette et la glace lui sont

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business because "necessaries" has been judicially interpreted as "whatever is fit and proper for the service in which the vessel is engaged; whatever the owner of that vessel as a prudent man would order if present at the time": Abbott C.J., in *Webster* v. *Seekamp* ((1821) 4 B. & E. Ald. 352; 106 E.R. 966).

It seems to me that the business of fishing can no more be considered navigation and shipping or the operation of a ship *qua ship* in a restricted sense, than the obtaining of delivery of fish on the high seas by purchase and the processing of same. In the case at bar the vessel was designed for and engaged in that business and nothing else. The obtaining of fish is absolutely essential to the vessel being operated for the purpose for which it exists. No distinction can reasonably be made on the facts between the two cases. I therefore feel that, failing an obvious error in law in the abovementioned decision or a subsequent change in the law since then, I am required to follow the decision. There is, in my view, no error in law and the only change in law is the enactment of section 22 of the *Federal Court Act*.

The expression "supplying of necessaries" is not to be found among the specifically enumerated matters in subsection 22(2) of the *Federal Court Act*. In essence, however, it would be contained within the wording of paragraph (*m*) above and, if one were attempting to establish a distinction in meaning between the two concepts, one could only find that the wording of paragraph (*m*) must necessarily include, but is not limited to, the supplying of necessaries; in other words, that the supplying of the goods, material or services need no longer be necessary for the operation but may be ancillary or complementary thereto, as long as they are used or intended for use in the operation of the ship. Altogether apart from the apparent extension given to the concept of ship's necessaries by paragraph 22(2)(*m*) of the *Federal Court Act*, we find that the rather restrictive interpretation originally applied to that term has been considerably widened. In Roscoe's *Admiralty Jurisdiction and Practice of the High Court of Justice* (5th Edition) we find the following at page 203:

... though primarily meaning indispensable repairs, anchors, cables, sails, and provisions, the term has now, it is clear, a wider signification, and has been and is being gradually ampli-

nécessaires comme approvisionnements d'équipement nécessaires car la jurisprudence interprète ceux-ci comme «tout ce qui convient à l'activité auquelle le navire est destiné; tout ce que le propriétaire du navire, en homme prudent, commanderait s'il était présent à ce moment-là»: le juge en chef Abbott, dans *a* l'arrêt *Webster* c. *Seekamp* ((1821) 4 B. & E. Ald. 352; 106 E.R. 966).

Il me semble qu'on ne peut pas considérer des activités de pêche comme de la navigation et du *b* transport maritime, comme l'exploitation d'un navire en tant que navire, au sens étroit, pas plus que l'obtention de la livraison de poissons en haute mer par achat et traitement de ceux-ci. En l'espèce, le navire a été conçu pour cette activité, à *c* laquelle il se livrait, et pour nulle autre. L'obtention de poissons est absolument essentielle au navire exploité pour cet objet dont c'est la raison d'être. On ne saurait raisonnablement différencier les faits des deux espèces. Je crois donc, en l'ab*d* sence d'erreur de droit manifeste dans la décision précitée, ou d'un changement subséquent du droit depuis lors, que je dois suivre cette décision. Il n'y a là, à mon avis, aucune erreur de droit et le seul changement dans le droit opéré depuis lors a été *e* l'adoption de l'article 22 de la *Loi sur la Cour fédérale*.

L'expression «fournitures nécessaires» ne se retrouve pas dans l'énumération du paragraphe *f* 22(2) de la *Loi sur la Cour fédérale*. En essence, toutefois, elle serait couverte par le libellé de l'alinéa *m*) précité; si l'on devait chercher à distinguer les deux notions, on ne pourrait que conclure que le libellé de l'alinéa *m*) doit nécessairement inclure *g* la fourniture des approvisionnements nécessaires sans y être limité. En d'autres mots, la fourniture de marchandises, de matériaux ou de services peut ne pas être nécessaire à l'exploitation mais seulement complémentaire, accessoire, tant qu'elle con*h* court, ou qu'on la destine à concourir, à l'exploitation du navire. D'ailleurs, mise à part l'extension apparente que l'alinéa 22(2)*m*) de la *Loi sur la Cour fédérale* apporte à cette notion d'équipement nécessaire du navire, nous constatons que l'inter*i* prétation plutôt restrictive originale qui en avait été faite a été considérablement élargie. Dans l'*Admiralty Jurisdiction and Practice of the High Court of Justice* de Roscoe (5e édition), nous trouvons ce qui suit, à la page 203:

*j* [TRADUCTION] ... quoique désignant d'abord les réparations indispensables, les ancres, câbles, voiles et approvisionnements, le terme a acquis maintenant, de toute évidence, un sens plus

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fied by modern requirements, as is instanced by the case of *The Mecca*, where canal dues were pronounced to be within the scope of the word. No distinction can be drawn between necessaries for the ship and necessaries for the voyage, and all things reasonably requisite for the particular adventure on which the ship is bound are comprised in this category.

large que les exigences des temps modernes ont amplifié et amplifient encore, graduellement, comme l'indique l'espèce *The Mecca* où l'on a statué que le péage des canaux tombait sous son emprise. On ne saurait distinguer entre l'équipement nécessaire au navire et l'équipement nécessaire au voyage; tout ce qui raisonnablement est nécessaire à l'activité particulière à laquelle s'adonne le navire doit être compris dans cette catégorie.

What is of equal importance, however, is the question of whether a contract between the owners of two ships, one of which is to supply the fish on the high seas to the other which is obliged to remain within the specified fishing areas and receive delivery of and pay for the fish, would fall within the meaning of the words "Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping" contained in subsection 22(1).

Ce qui est tout aussi important toutefois, c'est de savoir si un contrat intervenu entre les propriétaires de deux navires, dont l'un doit fournir le poisson en haute mer à l'autre, qui, lui, doit demeurer sur certains champs de pêche spécifiés pour y recevoir livraison du poisson et le payer, tombe sous l'emprise des termes «droit maritime canadien ou d'une autre loi du Canada en matière de navigation ou de marine marchande» du paragraphe 22(1).

It is well established that the Federal Court of Canada, as was its predecessor the Exchequer Court of Canada, in addition to any other statutory jurisdiction it might possess in admiralty matters or otherwise, is vested with the jurisdiction formerly exercised by the Admiralty Courts of England at the time that jurisdiction in admiralty matters was acquired by the Exchequer Court of Canada. It is obvious that fish processing ships did not and could not exist at that time and, therefore, there was no factual situation on which the Admiralty Courts of England could have exercised their jurisdiction. The question one must ask, therefore, is not whether they did in fact exercise their jurisdiction in such cases but whether they would have been justified in law in doing so at the time, had the question arisen.

Il est bien établi que la Cour fédérale du Canada, comme la Cour de l'Échiquier du Canada qui la précéda, outre toute compétence d'attribution qu'elle peut avoir en matière maritime ou autrement, possède la compétence dont jouissait formellement les juridictions d'amirauté d'Angleterre à l'époque où la Cour de l'Échiquier du Canada acquit sa compétence en matière maritime. Il est évident que les navires-usines n'existaient pas et ne pouvaient exister à cette époque et donc, qu'en fait, les cours d'amirauté anglaises n'auraient pas pu exercer leur compétence. La question qu'il faut donc se poser n'est pas de savoir si effectivement elles ont exercé leur compétence dans de tels cas mais si elles auraient été, en droit, justifiées de le faire à l'époque si la question s'était posée.

The contract is not merely one covering the transfer of property in goods but also more essentially one which deals with the actual transfer and delivery of possession of those goods on the high seas between two ships. The goods themselves are to come from an agreed area of the sea and the contracting parties have mutually agreed that their vessels are to operate there and carry out the provisions of the contract in that specified area. It is difficult to conceive of a situation or of an undertaking which is more maritime in nature than the subject-matter covered by the contract in issue and I feel confident that had any Admiralty Court in England been faced with that factual

Ce contrat ne stipule pas une simple translation de la propriété de certains biens mais traite aussi, ce qui est plus essentiel, de leur transbordement véritable et de leur délivrance en haute mer d'un navire à l'autre. Ces biens doivent provenir d'une aire de la mer dont les parties contractantes sont convenues et leurs navires doivent être exploités là et ils doivent exécuter les stipulations du contrat dans cette aire spécifiée. Il est difficile de concevoir un cas, un contrat, qui ait un caractère plus maritime. Je suis sûr que toute Cour d'amirauté anglaise saisie des mêmes faits se serait assurément présumée compétente et fondée en droit à statuer sur le litige opposant les parties.

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situation, it would necessarily have assumed jurisdiction and legally disposed of the issue between parties.

The applicant also relied on another decision of Mr. Justice Collier in support of his argument, namely the case *Sumitomo Shoji Canada Ltd. v. The Ship "Juzan Maru"* [1974] 2 F.C. 488; 49 D.L.R. (3d) 277. In that case the Court declined jurisdiction, but it was clearly on the basis that, on examining the true essence of the contract in the light of all the circumstances and the particular facts of the case, it appeared that the maritime or shipping aspects of the business arrangement between the parties were miniscule or incidental, (ref. p. 284 of the above-mentioned report) [[1974] 2 F.C. at pp. 496-497], and that the essence of the arrangement was not maritime. I fully agree with that principle and with the test of dominant features and objects applied in the case of *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board* (1960) 24 D.L.R. (2d) 673; [1960] O.R. 416. Those are precisely the tests which, when applied to the facts of the present case, convince me that the matter is predominantly maritime in character.

I therefore find that, altogether apart from the question of whether the contract covers the supplying of necessaries or whether it falls within paragraph 22(2)(*m*), it would in any event fall within the subject-matter of Canadian maritime law as provided for in subsection 22(1).

I now turn to the argument of *forum non conveniens*.

The ship was arrested in Vancouver whilst undergoing repairs and therefore this Court has jurisdiction *in rem* over the vessel. The question of *forum conveniens* is, of course, a completely different question from that of jurisdiction and does not arise unless the Court has jurisdiction.

The plaintiffs are American, the defendant company is German, the ship is registered in Germany, the contract was made there and was to be performed out of our jurisdiction, payment was tendered and accepted in United States currency and the repair and maintenance of the ship which led to its being in a Canadian port and to its arrest has nothing to do with the performance of the contract

Le requérant s'est aussi appuyé sur une autre décision du juge Collier, soit l'espèce *Sumitomo Shoji Canada Ltd. c. Le navire «Juzan Maru»* [1974] 2 C.F. 488; 49 D.L.R. (3e) 277. Dans cette espèce, la Cour déclina sa compétence manifestement parce que, à l'examen de l'essence véritable du contrat, à la lumière de tous les faits et du cas d'espèce, il apparaissait que les aspects maritimes des arrangements d'affaires intervenus entre les parties étaient minimes voire accidentels (voir p. 284 du recueil précité) [[1974] 2 C.F. aux pp. 496 et 497]; l'essence de l'arrangement n'était pas maritime. Je souscris entièrement à ce principe et au critère dit des caractéristiques et objets dominants appliqué dans l'espèce *Underwater Gas Developers Ltd. c. Ontario Labour Relations Board* (1960) 24 D.L.R. (2e) 673; [1960] O.R. 416. Ce sont précisément ces critères qui, appliqués aux faits de l'espèce en cause, me convainquent que son caractère maritime prédomine.

Je juge donc, indépendamment de la question de savoir si le contrat concerne la fourniture d'équipements nécessaires ou s'il relève de l'alinéa 22(2)*m*), que de toute façon il s'agit d'une matière de droit maritime canadien comme le prévoit le paragraphe 22(1).

J'en viens maintenant à la question du *forum non conveniens*.

Le navire a été saisi à Vancouver alors qu'on y effectuait des réparations et, en conséquence, notre juridiction a compétence territoriale sur le bâtiment. La question du *forum conveniens* est, bien entendu, une question totalement différente de celle de la compétence; elle ne se pose que si la Cour est compétente.

Les demandeurs sont américains; la société défenderesse est allemande; le navire a été immatriculé en Allemagne; le contrat a été conclu là-bas et devait être exécuté hors de notre juridiction; paiement a été offert et accepté en monnaie américaine et la réparation et l'entretien du navire, qui l'ont amené dans un port canadien, et ont donc permis sa saisie, n'ont rien à voir avec l'exécution

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which led to the present action. It would seem at first glance in the light of these facts that a Canadian court would not constitute a *forum conveniens* to try the present issue between these parties.

There are, however, other factors which have a direct bearing on the issue. Although operations of the defendant ship were carried out to a very large extent within the U.S. 200-mile fishing limits, it is not subject to arrest there in admiralty matters, unless it also be within the 3-mile territorial waters portion of same, the remaining 197 miles being among other things a zone for management of fisheries but not subject to the general territorial jurisdiction of the United States.

During the performance of this contract and following reports that the defendant ship was in breach of its U.S. fishing authorization or licence to operate in U.S. Fishing Management waters, the vessel was boarded by inspectors of the U.S. Department of Commerce, National Oceanic and Atmospheric Administration. According to the report prepared by counsel for the U.S. Government, who recommends prosecution of the vessel, the inspection revealed that it had in all probability underlogged between 750 and 1,400 metric tons of cod and that, of the 100 samples of fish taken from blocks labelled as pollock, 94 samples were, in fact, cod. Conviction on the proposed charges would lead to very substantial penalties, that is, $2,500 per day for the period 13 January 1981 to the date of boarding, that is, 13 April 1981, and to the possibility of seizure of the vessel. The ship left American fishing waters on the day following the boarding and apparently went to Mexico, allegedly for repairs but, according to the plaintiffs, in order to escape action and to get rid of the catch. Part of the plaintiffs' claim is based on the allegation that, in leaving the fishing area, the defendants were in breach of contract.

The vessel did touch in at Dutch Harbour, Alaska, approximately five times since the dispute arose but apparently only for very short periods. The plaintiffs were unable to determine in advance when it would touch in at that port and evidence

du contrat, fondement de l'action. Il semblerait à première vue, à la lumière de ces faits, qu'une juridiction canadienne ne constitue pas un *forum conveniens* lorsque se pose la question d'instruire l'actuel litige.

Il existe cependant d'autres facteurs ayant un impact direct sur le litige. Bien que les opérations du navire défendeur aient eu lieu dans une large mesure à l'intérieur des limites de pêche américaines de 200 milles, il ne pouvait y être saisi pour une question de droit maritime à moins de se trouver dans les 3 milles d'eaux territoriales de ces limites, les 197 autres milles n'étant, entre autres choses, qu'une zone de gestion de la pêche échappant à la compétence territoriale générale des États-Unis.

Alors que le contrat était en vigueur, à la suite de rapports selon lesquels le navire défendeur enfreignait son autorisation ou licence de pêche lui permettant d'opérer dans la zone de gestion de pêche américaine, des inspecteurs de l'Administration nationale des océans et de l'atmosphère du département du Commerce des États-Unis montèrent à bord. D'après le rapport que prépara le procureur du gouvernement américain, lequel recommande de poursuivre le navire, l'inspection révéla qu'en toute probabilité avaient été sous-rapportées entre 750 et 1,400 tonnes métriques de morue et que sur 100 échantillons de poissons prélevés dans les blocs étiquetés merlan, 94 étaient en fait de la morue. En cas de condamnation sur les accusations retenues, des amendes considérables pouvaient s'ensuivre: $2,500 par jour à compter du 13 janvier 1981, jusqu'au 13 avril 1981, jour de l'inspection, et possibilité de saisie-exécution du bâtiment. Le navire quitta les eaux américaines de pêche le jour qui suivit l'inspection et apparemment gagna Mexico soi-disant pour y faire des réparations mais, d'après les demandeurs, dans le but inavoué d'échapper aux poursuites et de se débarrasser de sa pêche. Les demandeurs fondent en partie leur demande sur cette inexécution du contrat que constituerait ce départ des lieux de pêche.

Le bâtiment aurait relâché à Dutch Harbour en Alaska environ cinq fois depuis le début du litige mais, apparemment, pendant des intervalles fort courts uniquement. Les demandeurs auraient été incapables de connaître à l'avance quand il allait

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was tendered that Dutch Harbour is extremely remote from the United States Federal Court in Alaska and that it is most difficult to send a marshal in time to seize a ship there when it merely touches port for the purpose of taking on supplies or fuel. There is no evidence that the ship will be entering United States territorial waters again although there is evidence that it intends to return to the fishing areas off the coast of Alaska in order to continue its usual operations following the repairs presently being carried on here.

There is no evidence of any hardship on the defendants should there be any requirement on their part to provide bail for the release of the ship, such as existed in the case of *Marazura Navegacion S.A. v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1977] 1 Lloyd's Rep. 283 (Q.B. (Com.Ct.)).

Furthermore, as the ship will not be returning to Germany but will be remaining off the west coast of North America, that is, relatively close to this jurisdiction, I can foresee no particular difficulty for the defendants or prejudice to them from an evidentiary standpoint. In addition, the agent for the defendants in the United States is but a few miles away, in Seattle, in the State of Washington.

The cases of *Sumitomo Shoji Canada Ltd. v. The Ship "Juzan Maru"* [*supra*] and *Elesguro Inc. v. Ssangyong Shipping Co. Ltd.* [1981] 2 F.C. 326; 117 D.L.R. (3d) 105, referred to by the defendants are of little help and are readily distinguishable. In neither one of these do the causes of action pertain to the ship which was arrested.

The most recent leading case governing factors to be considered by a trial judge in exercising his discretion on the issue of *forum conveniens* is the decision of the Supreme Court of Canada in *Antares Shipping Corporation v. The Ship "Capricorn"* [1977] 2 S.C.R. 422. In that case Mr. Justice Ritchie in delivering judgment on behalf of the majority of the Court stated at page 448:

The factors affecting the application of this doctrine have been differently described in various cases, to some of which reference will hereafter be made, and they include the balance of

relâcher dans ce port et un commencement de preuve établirait que Dutch Harbour est fort éloigné de la Cour fédérale américaine d'Alaska et qu'il est donc fort difficile à un huissier de s'y rendre en temps utile pour procéder à la saisie d'un navire qui ne fait que s'y ravitailler. Aucune preuve n'existe que le navire réintégrera les eaux territoriales américaines à nouveau quoiqu'il ait, prétend-on, l'intention de regagner les champs de pêche au large de la côte d'Alaska pour y poursuivre ses opérations habituelles une fois terminées les réparations auxquelles on procède ici.

Il n'existe aucune preuve que les défendeurs subiraient un préjudice s'il leur fallait fournir une caution pour obtenir la levée du navire comme ce fut le cas en l'espèce *Marazura Navegacion S.A. c. Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1977] 1 Lloyd's Rep. 283 (Q.B. (Com.Ct.)).

De plus, comme le navire ne regagnera pas l'Allemagne mais demeurera au large de la côte occidentale de l'Amérique du Nord, c'est-à-dire fort à proximité de notre juridiction, je ne puis entrevoir aucune difficulté particulière pour les défendeurs ni préjudice à leur égard du point de vue de la preuve à administrer. En outre, l'agent des défendeurs aux États-Unis ne se trouve qu'à quelques milles, à Seattle, dans l'État de Washington.

Les espèces *Sumitomo Shoji Canada Ltd. c. Le navire «Juzan Maru»* [précitée] et *Elesguro Inc. c. Ssangyong Shipping Co. Ltd.* [1981] 2 C.F. 326; 117 D.L.R. (3e) 105, qu'ont citées les défendeurs ne sont que de peu d'utilité et peuvent être différenciées. Ni dans l'une ni dans l'autre, les causes de la demande ne portent sur le navire saisi.

L'arrêt de principe le plus récent régissant les facteurs que doit prendre en compte le juge du fond lorsqu'il exerce son pouvoir discrétionnaire en matière de *forum conveniens* est l'arrêt de la Cour suprême du Canada *Antares Shipping Corporation c. Le Navire «Capricorn»* [1977] 2 R.C.S. 422. Dans cet arrêt, son auteur, le juge Ritchie, au nom de la majorité de la Cour, a dit, à la page 448:

Plusieurs décisions décrivent sous différents aspects les divers facteurs qui influent sur l'application de cette doctrine, et nous en mentionnerons quelques-uns ci-dessous; parmi eux, on peut

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convenience to all the parties concerned, including the plaintiff, the undesirability of trespassing on the jurisdiction of a foreign state, the impropriety and inconvenience of trying a case in one country when the cause of action arose in another where the laws are different, and the cost of assembling foreign witnesses.

In my view the overriding consideration which must guide the Court in exercising its discretion by refusing to grant such an application as this must, however, be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice. Each such case must of necessity turn upon its own particular facts . . . .

At page 451 of the same report the learned Justice also quoted with approval the statement of Megarry J. in *G.A.F. Corporation v. Amchem Products Inc.* [1975] 1 Lloyd's Rep. 601 (C.A.), where the latter stated:

When I consider the *forum conveniens*, I bear in mind that it has been said that the term means not the 'convenient' Court, but the 'appropriate' Court or the court 'more suitable for the ends of justice': See *The Atlantic Star*, 1973 2 All E.R. 175.

At page 453, Mr. Justice Ritchie also quoted with approval the following pronouncement of Lord Sumner in *La Société du Gaz de Paris v. La Société Anonyme de Navigation Les Armateurs Francais* [1926] S.C. (H.L.) 13:

The real proposition is, I think, that the Court has to consider how best the ends of justice in the case in question and on the facts before it, so far as they can be measured in advance, can be respectively ascertained and served . . . The object, under the words '*forum non conveniens*' is to find that *forum* which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that *forum* is more likely to secure those ends.

He also approved the following statement of Lord Simon in *The Atlantic Star* [1973] 2 All E.R. 175 at 197-198:

Ships are elusive. The power to arrest in any port and found thereon an action in rem is increasingly required with the custom of ships being owned singly and sailing under flags of convenience. A large tanker may by negligent navigation cause extensive damage to beaches or to other shipping: she will take very good care to keep out of the ports of the 'convenient' forum. If the aggrieved party manages to arrest her elsewhere, it will be said forcibly (as the appellants say here): 'the defendant has no sort of connection with the forum except that she was arrested within its jurisdiction.' But that will frequently be the only way of securing justice.

Had the ship been arrested in U.S. waters or had security been furnished a U.S. Court, trial in that jurisdiction would certainly have been preferable. But such is not the case and, in the light of

citer les avantages réciproques pour toutes les parties intéressées, y compris le demandeur, l'inopportunité d'empiéter sur la juridiction d'un État étranger, l'inconvénient de juger une affaire dans un pays lorsque la cause d'action a pris naissance dans un autre, régi par des lois différentes, et ce qu'il en coûte pour réunir des témoins étrangers.

Selon moi, cependant, la considération primordiale qui doit guider la cour lorsqu'en exerçant son pouvoir discrétionnaire, elle refuse d'accéder à une telle requête, doit être l'existence d'un autre tribunal, plus commode et plus approprié à la poursuite de l'action et à la réalisation des fins de la justice. Il faut évidemment juger chaque cas selon les faits en cause . . . .

A la page 451 du même recueil, le juge cite aussi le juge Megarry dans l'espèce *G.A.F. Corporation c. Amchem Products Inc.* [1975] 1 Lloyd's Rep. 601 (C.A.), où il dit:

[TRADUCTION] Lorsque je prends en considération le *forum conveniens*, je n'oublie pas que l'on a dit que l'expression ne signifie pas le tribunal «commode», mais le tribunal «approprié» ou le tribunal «qui répond le mieux aux fins de la justice». Voir *The Atlantic Star*, 1973 2 All E.R. 175.

A la page 453, le juge Ritchie cite en l'approuvant la remarque suivante de lord Sumner dans l'arrêt *La Société du Gaz de Paris c. La Société Anonyme de Navigation Les Armateurs Francais* [1926] S.C. (C.L.) 13:

[TRADUCTION] Je crois qu'il faut envisager la question ainsi: la Cour doit rechercher la meilleure façon d'établir et de servir les fins de la justice en l'espèce, compte tenu des faits qui lui sont présentés et en autant qu'elle puisse les évaluer à l'avance . . . Il faut lire dans l'expression «*forum non conveniens*» l'intention de trouver le *tribunal* qui se prête davantage aux fins de la justice et qui est le plus approprié parce que la poursuite du procès devant lui offre le plus de chances d'atteindre ces fins.

Il approuve aussi le commentaire suivant de lord Simon dans l'espèce *The Atlantic Star* [1973] 2 All E.R. 175 aux pages 197 et 198:

[TRADUCTION] Les navires se dérobent facilement. Le pouvoir de les saisir dans n'importe quel port et d'intenter une action *in rem* est de plus en plus nécessaire, compte tenu de la coutume de la propriété unique des navires et l'usage des pavillons de complaisance. Un grand pétrolier, naviguant avec négligence, peut causer des dommages considérables aux plages ou à d'autres navires; il évitera soigneusement les ports situés dans le ressort d'un tribunal «compétent». Si la partie lésée parvient à le saisir ailleurs, on opposera énergiquement (comme le font les appelantes en l'espèce) que: «Le défendeur n'a aucun lien avec le tribunal, si ce n'est qu'il a été saisi dans son ressort». Mais souvent, ce sera la seule façon d'obtenir justice.

Le navire aurait-il été saisi dans les eaux américaines ou une garantie aurait-elle été fournie à un tribunal américain que l'instruction dans cette juridiction aurait certainement été préférable.

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the alleged fraudulent conduct of the defendants which is supported to some degree by evidence and the fear of the plaintiffs that the release of the ship without proper security being furnished would in all probability result in their losing any chance of recovery, the fact that the ship is arrested within this jurisdiction assumes added importance.

As has been stated in *The Atlantic Star* case and many other admiralty decisions, a ship, because of its very mobility is an elusive asset which can easily be disposed of in some distant place and the proceeds of the sale can easily be put beyond the reach of a legitimate claimant.

Having regard to the circumstances as they exist at the present time, I feel that this Court is the forum most suitable for the ends of justice and, in fact, it appears to be the only place where justice could be secured.

The defendants' motion will therefore be dismissed with costs.

Mais ce n'est pas le cas et, à la lumière de la conduite frauduleuse qu'on impute aux défendeurs, et que semble démontrer, jusqu'à un certain point, la preuve administrée, à la lumière aussi de la peur des demandeurs que la levée de la saisie en l'absence de toute sûreté appropriée aurait fort probablement pour résultat la perte de toute possibilité d'indemnisation, le fait que le navire a été saisi dans notre juridiction acquiert une importance accrue.

Comme il a été dit dans l'espèce *The Atlantic Star* et dans bien d'autres affaires maritimes, un navire, de par sa mobilité même, se dérobe; on peut l'aliéner facilement, en quelque lieu lointain et le produit de la vente peut tout aussi facilement être mis hors d'atteinte du plaideur légitime.

Compte tenu des circonstances existant actuellement, je crois que notre juridiction constitue le for le plus à même de servir les fins de la justice et en fait, semble-t-il, le seul où justice peut être rendue.

La requête des défendeurs sera donc rejetée avec dépens.

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**Wire Rope Industries of Canada (1966) Ltd.** (*Third Party*) *Appellant*;

and

**B.C. Marine Shipbuilders Ltd. and Straits Towing Ltd.** (*Plaintiffs*) *Respondents*;

and

**F. M. Yorke & Son Limited** (*Defendant*) *Respondent*;

and

**Wire Rope Industries of Canada (1966) Ltd.** (*Defendant*) *Appellant*;

and

**B.C. Marine Shipbuilders Ltd. and Straits Towing Ltd.** (*Plaintiffs*) *Respondents.*

1980: March 11, 12, April 23, 24; 1981: March 19.

Present: Martland, Ritchie, Dickson, Beetz, Estey, McIntyre and Chouinard JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Courts — Jurisdiction — Federal Court of Canada — Trial Division — Canadian maritime law — Third party proceedings, while related to action in maritime law, based in tort and contract — Whether or not jurisdiction to entertain third party proceeding — British North America Act, s. 91.10 — Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, ss. 2, 22(1), (2), 42 — The Admiralty Act, 1891, 1891 (Can.), c. 29, ss. 3, 4 — An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England, 1840 (U.K.), c. 65, s. 6 — The Admiralty Act, 1934, 1934 (Can.), c. 31 — Colonial Courts of Admiralty Act, 1890, 1890 (U.K.), c. 27.*

*Maritime law — Barge lost at sea — Towline socket failure — Socket resocketed under contract — Tug's contract requiring seaworthiness at outset of voyage — No liability of due diligence proved — Whether or not tug owner liable — Whether or not third party liable to indemnify other parties for loss of third party negligent in resocketing process.*

**Wire Rope Industries of Canada (1966) Ltd.** (*Tierce partie*) *Appelante*;

et

**B.C. Marine Shipbuilders Ltd. et Straits Towing Ltd.** (*Demanderesses*) *Intimées*;

et

**F. M. Yorke & Son Limited** (*Défenderesse*) *Intimée*;

et

**Wire Rope Industries of Canada (1966) Ltd.** (*Défenderesse*) *Appelante*;

et

**B.C. Marine Shipbuilders Ltd. et Straits Towing Ltd.** (*Demanderesses*) *Intimées.*

1980: 11, 12 mars, 23, 24 avril; 1981: 19 mars.

Présents: Les juges Martland, Ritchie, Dickson, Beetz, Estey, McIntyre et Chouinard.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

*Tribunaux — Compétence — Cour fédérale du Canada — Division de première instance — Droit maritime canadien — Demandes en indemnisation, en marge d'une action en droit maritime, fondée sur la négligence et l'inexécution d'un contrat — La Cour a-t-elle compétence pour entendre la demande en indemnisation? — Acte de l'Amérique du Nord britannique, art. 91.10 — Loi sur la Cour fédérale, S.R.C. 1970 (2e Supp.), chap. 10, art. 2, 22(1), (2), 42 — Acte de l'Amirauté de 1891, 1891 (Can.), chap. 29, art. 3, 4 — An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England, 1840 (R.-U.), chap. 65, art. 6 — Loi d'amirauté, 1934, 1934 (Can.), chap. 31 — Acte des Cours coloniales d'Amirauté, 1890, 1890 (R.-U.), chap. 27.*

*Droit maritime — Chaland perdu en mer — Rupture de l'attache du câble de remorquage — Attache remboîtée aux termes d'un contrat — Contrat de remorquage exigeant un bon état de navigabilité au commencement du voyage — Aucune preuve de responsabilité de diligence raisonnable — Le propriétaire du remorqueur est-il responsable? — La tierce partie est-elle tenue, du fait de sa négligence dans l'opération de remboîtement, d'indemniser les autres parties?*

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These appeals raised questions of liability for loss at sea of a log barge, owned by the respondent B.C. Marine Shipbuilders Ltd. and chartered to Straits Towing Ltd., while the barge was being towed by the *Lorne Yorke*, a tug owned by F. M. Yorke & Son Limited. Pursuant to the contract with the tug owner the ship had to be seaworthy at the outset of the voyage, and if it were otherwise, the burden lay on the tug owner to prove due diligence with respect to seaworthiness. The loss occurred because of the failure of a manganese steel socket that formed part of the towline between the tug and the barge. The socket had been resocketed—a process by which a socket was reattached to the wire rope or cable—and because the process had been performed by Wire Rope, that company was joined in the action as a third party. Claims were made by the owner and the charterer of the barge against the tug's owner; claims for indemnity were made against Wire Rope; as well, the jurisdiction of the Federal Court of Canada to deal with the third party claim was in issue.

At trial, judgment was ordered against Yorke in favour of Straits and B.C. Marine, and a reference directed. The actions against Wire Rope were dismissed. The Court of Appeal allowed Yorke's appeal from the judgment in favour of B.C. Marine but dismissed its appeal from judgment in favour of Straits. The third party claim by Yorke and the appeals by B.C. Marine and Straits against Wire Rope succeeded, rendering Yorke liable for the barge's loss with right of indemnity against Wire Rope and making Wire Rope liable to B.C. Marine and Straits for their losses. In this Court, Wire Rope appealed and sought the restoration of the trial judgment. B.C. Marine and Straits sought dismissal of the appeal made by Wire Rope and Yorke, and B.C. Marine also sought a reversal of the Court of Appeal's dismissal of its action against Yorke. Yorke cross-appealed the judgment made against it in favour of Straits, and alternatively, sought an order for indemnification against Wire Rope for damages and costs for which it could be held liable.

*Held:* The appeals of Wire Rope against the judgments in favour of B.C. Marine, Straits and Yorke should be allowed and the part of the trial judgment dismissing the actions against Wire Rope restored; the cross-appeal by Yorke should be allowed; the action by

Ces pourvois portent sur la responsabilité de la perte en mer d'un chaland de transport de billes de bois dont l'intimée B.C. Marine Shipbuilders Ltd. était propriétaire et que Straits Towing Ltd. avait affrété, alors que le chaland était à la remorque du *Lorne Yorke*, un remorqueur dont F.M. Yorke & Son Limited était propriétaire. Aux termes du contrat avec le propriétaire du remorqueur, le navire devait être en bon état de navigabilité au début du voyage, et dans le cas contraire, le propriétaire du remorqueur a le fardeau d'établir qu'il a exercé la diligence raisonnable pour mettre le navire en bon état de navigabilité. La perte est survenue du fait de la rupture d'une attache d'acier au manganèse qui faisait partie du câble de remorquage entre le remorqueur et le chaland. L'attache avait été remboîtée (une opération par laquelle une attache était attachée de nouveau au câble métallique ou câble) et parce que Wire Rope avait effectué cette opération, cette compagnie a été mise en cause dans l'action. Le propriétaire et l'affréteur du chaland ont poursuivi le propriétaire du remorqueur; Wire Rope a été poursuivie en dommages; le pourvoi soulève en outre la compétence de la Cour fédérale du Canada d'entendre la poursuite de la tierce partie.

En première instance, jugement a été prononcé contre Yorke en faveur de Straits et B.C. Marine, et un renvoi a été ordonné. Les actions contre Wire Rope sont rejetées. La Cour d'appel a accueilli l'appel de Yorke contre le jugement rendu en faveur de B.C. Marine mais a rejeté son appel contre le jugement rendu en faveur de Straits. La demande d'indemnisation de Yorke et les appels de B.C. Marine et Straits contre Wire Rope ont été accueillis; ainsi Yorke a été tenue responsable de la perte du chaland et autorisée à recouvrer des dommages-intérêts contre Wire Rope, et Wire Rope a été tenue responsable envers B.C. Marine et Straits pour les pertes qu'elles ont subies. Wire Rope se pourvoit devant cette Cour et demande de rétablir le jugement de première instance. B.C. Marine et Straits demandent le rejet des pourvois de Wire Rope et de Yorke, et B.C. Marine demande en outre d'infirmer le rejet, par la Cour d'appel, de son action contre Yorke. Yorke demande d'accueillir son pourvoi incident formé contre l'arrêt prononcé contre elle en faveur de Straits et, advenant le rejet de son pourvoi incident, elle demande à la Cour d'ordonner à Wire Rope de la garantir des dommages-intérêts et des frais qu'elle pourrait être tenue de payer.

*Arrêt*: Les pourvois de Wire Rope contre les décisions rendues en faveur de B.C. Marine, Straits et Yorke sont accueillis, la partie du jugement de première instance rejetant les actions contre Wire Rope est rétablie; le pourvoi incident de Yorke est accueilli; l'action de B.C.

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B.C. Marine and Straits against Yorke should be dismissed; and the cross-appeal of B.C. Marine and Straits should be dismissed.

The Federal Court had jurisdiction to deal with the claims made against Wire Rope. Those claims alleged breach of contract and negligence in the resocketing of the main towing cable which formed part of the equipment of the *Lorne Yorke*. The claims made against Wire Rope were encompassed within the meaning of "Canadian maritime law" as used in the *Federal Court Act*. Jurisdiction broad enough to include these claims had been granted the British High Court of Admiralty, and had been transmitted through a succession of courts to the Federal Court. In addition, the substantive law relating to the claims fell within federal legislative competence under s. 91.10 of the *British North America Act*. There was therefore law of Canada relating to the issues upon which the Federal Court could operate. It was of no significance that Yorke's claim was one for indemnity. Claims for indemnity and third party actions, generally, are not mere incidents to the principal action but are independent, standing on their own feet.

The appeals against Wire Rope were dismissed for it could not be shown that its work on the socket caused or contributed to the socket's failure leading to the loss of the barge. There was evidence to support the conclusion that resocketing did not significantly embrittle the socket and cause its failure. Any claim that the defect was caused by an indefinite number of resocketings could not be sustained for no affirmative evidence was adduced to establish more than one socketing and resocketing. As the resocketing did not cause the socket's failure, no liability could fall on Wire Rope.

Yorke was not liable in the main action brought by B. C. Marine and Straits for the loss of the barge. Any implied warranty respecting the ability of the crew, tackle and equipment at the outset of the voyage to meet the circumstances reasonably expected, was replaced by the inclusion of specific provisions in the contract between Yorke and Straits. Yorke was liable to B.C. Marine or Straits only if the *Lorne Yorke*, because of a failure by Yorke to exercise due diligence, was not seaworthy when it put out on the voyage that led to the accident, and if the loss was caused by lack of seaworthiness. Yorke successfully met the burden of showing that the socket's failure was caused by a latent defect. The exercise of due diligence would not have revealed the defect. Even if the socket had had no latent defect, there was evidence that the manganese steel socket could be

Marine et de Straits contre Yorke est rejetée; le pourvoi incident de B.C. Marine et Straits est rejeté.

La Cour fédérale a compétence pour entendre les réclamations contre Wire Rope. Ces réclamations allèguent l'inexécution du contrat et la négligence au cours du remboîtement du câble principal qui est une pièce de l'équipement du *Lorne Yorke*. Les réclamations contre Wire Rope relèvent du «droit maritime canadien» au sens que lui donne la *Loi sur la Cour fédérale*. Une juridiction suffisamment large pour inclure ces réclamations a été accordée à la Haute Cour d'Amirauté anglaise et a été transmise, de cour en cour, à la Cour fédérale. En outre, le droit positif concernant ces réclamations relève du pouvoir législatif fédéral aux termes du par. 91.10 de l'*Acte de l'Amérique du Nord britannique*. Il existe par conséquent un droit canadien se rapportant à ces questions sur lequel la Cour fédérale a compétence. Il n'est pas important que la réclamation de Yorke soit un recours en garantie. En général, les recours en garantie et les actions contre un tiers ne sont pas de simples incidents de l'action principale mais sont indépendantes et complètes en elles-mêmes.

Les pourvois à l'encontre de Wire Rope sont rejetés parce qu'on n'a pas pu établir que les travaux qu'elle a effectués à l'attache ont causé la rupture de l'attache à l'origine de la perte du chaland ou y ont contribué. La preuve permet de conclure que le remboîtement n'a pas affaibli l'attache de manière sensible ni causé sa rupture. On ne peut retenir l'affirmation que le défaut résulte d'un nombre indéfini d'opérations de remboîtement puisqu'on n'a fourni aucune preuve positive qui établisse plus d'un emboîtement et d'un remboîtement. Comme la rupture de l'attache ne résulte pas du remboîtement, Wire Rope ne doit assumer aucune responsabilité.

Yorke n'est pas responsable dans l'action principale intentée par B.C. Marine et Straits pour la perte du chaland. Toute garantie implicite quant à la compétence de l'équipage et au bon état de l'équipement, au départ, pour faire face aux conditions auxquelles on peut raisonnablement s'attendre a été remplacée par l'inclusion de dispositions précises au contrat entre Yorke et Straits. Yorke n'est responsable envers B.C. Marine ou Straits que si le *Lorne Yorke*, faute par Yorke d'avoir exercé toute la diligence raisonnable, n'était pas en bon état de navigabilité lorsqu'il a entrepris le voyage qui a conduit à l'accident, et si la perte est imputable au mauvais état de navigabilité. Yorke a réussi à établir que la rupture de l'attache résulte d'un défaut caché. L'exercice de la diligence raisonnable n'aurait pu permettre de trouver le défaut. Même si l'attache n'avait pas eu de défaut

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safely resocketed and that the practice of re-using sockets after resocketing was regularly followed in the industry with no apparent ill-effects. The state of the socket at the outset of the voyage was not such as to make the vessel unseaworthy and so render Yorke liable pursuant to the contract. There was no evidence of loss being caused by faulty navigation or seamanship.

*R. v. Thomas Fuller Construction Co. (1958) Limited and Foundation Company of Canada Limited,* [1980] 1 S.C.R. 695, distinguished; *Tropwood A.G. and the Owners of the Vessel Tropwood v. Sivaco Wire & Nail Company and Atlantic Lines & Navigation Company, Inc.,* [1979] 2 S.C.R. 157; *Quebec North Shore Paper Company et al. v. Canadian Pacific Limited, et al.,* [1977] 2 S.C.R. 1054; *McNamara Construction (Western) Limited et al. v. The Queen,* [1977] 2 S.C.R. 654; *Bank of Montreal v. Royal Bank of Canada,* [1933] S.C.R. 311; *Charles Goodfellow Lumber Sales Limited v. Borromée Verreault, Captain Fernand Hovington and Verreault Navigation Inc.,* [1971] S.C.R. 522, applied; *Maxine Footwear Company Ltd. et al. v. Canadian Government Merchant Marine Ltd.,* [1957] S.C.R. 801; *Western Canada Steamship Company Limited v. Canadian Commercial Corporation and Others,* [1960] S.C.R. 632; *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd., ("Muncaster Castle"),* [1961] A.C. 807; *Toronto Elevators Limited v. Colonial Steamship Limited,* [1950] Ex. C.R. 371; *Robin Hood Flour Mills Limited v. N. M. Paterson & Sons Limited,* [1967] 1 Ex. C.R. 431, aff'd [1968] 1 Ex. C.R. 175, referred to; *Scottish Metropolitan Assurance Company, Limited v. Canada Steamship Lines, Limited,* [1930] S.C.R. 262; *The "Dimitrios N. Rallias"* (1922), 13 Ll. L. R. 363, considered.

APPEALS AND CROSS-APPEALS from decisions of the Federal Court of Appeal[1], allowing the appeals from and varying the judgments of Gibson J. Appeals by Wire Rope against the judgments in favour of B.C. Marine, Straits, and Yorke allowed, and that part of the judgment at trial dismissing the actions against Wire Rope restored; cross-appeal by Yorke allowed; the action by B.C. Marine and Straits against Yorke dismissed; and the cross-appeal of B.C. Marine and

[1] (1978), 20 N.R. 486.

caché, la preuve révèle que les attaches d'acier au manganèse peuvent être remboîtées sans risque et qu'il était d'usage, dans ce commerce, de réutiliser des attaches remboîtées sans mauvais résultats apparents. L'état de l'attache au début du voyage n'a pas mis le navire en mauvais état de navigabilité et n'a pas rendu Yorke responsable en vertu du contrat. Il n'y a pas de preuve que la perte résulte de fautes de navigation ou de manœuvre.

Jurisprudence: distinction faite avec l'arrêt *R. c. Thomas Fuller Construction Co. (1958) Limited et Foundation Company of Canada Limited,* [1980] 1 R.C.S. 695; arrêts appliqués: *Tropwood A.G. et les propriétaires du navire Tropwood c. Sivaco Wire & Nail Company et Atlantic Lines & Navigation Company, Inc.,* [1979] 2 R.C.S. 157; *Quebec North Shore Paper Company et autre c. Canadien Pacifique Limitée et autre,* [1977] 2 R.C.S. 1054; *McNamara Construction (Western) Limited et autre c. La Reine,* [1977] 2 R.C.S. 654; *Banque de Montréal c. Banque Royale du Canada,* [1933] R.C.S. 311; *Charles Goodfellow Lumber Sales Limited c. Borromée Verreault, Capitaine Fernand Hovington et Verreault Navigation Inc.,* [1971] R.C.S. 522; arrêts mentionnés: *Maxine Footwear Company Ltd. et autre c. Canadian Government Merchant Marine Ltd.,* [1957] R.C.S. 801; *Western Canada Steamship Company Limited c. Canadian Commercial Corporation et autres,* [1960] R.C.S. 632; *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd., («Muncaster Castle»),* [1961] A.C. 807; *Toronto Elevators Limited c. Colonial Steamship Limited,* [1950] R.C. de l'É. 371; *Robin Hood Flour Mills Limited c. N.M. Paterson & Sons Limited,* [1967] 1 R.C. de l'É. 431, confirmé à [1968] 1 R.C. de l'É. 175; arrêts examinés: *Scottish Metropolitan Assurance Company, Limited c. Canada Steamship Lines, Limited,* [1930] R.C.S. 262; *The «Dimitrios N. Rallias»* (1922), 13 Ll. L. R. 363.

POURVOIS ET POURVOIS INCIDENTS à l'encontre des décisions de la Cour d'appel fédérale[1], qui ont accueilli les appels interjetés des jugements du juge Gibson et qui a modifié ces jugements. Les pourvois de Wire Rope à l'encontre des arrêts rendus en faveur de B.C. Marine, Straits et Yorke sont accueillis, et la partie du jugement de première instance rejetant les actions contre Wire Rope est rétablie; le pourvoi incident de Yorke est accueilli; l'action de B.C. Marine et de Straits

[1] (1978), 20 N.R. 486.

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Straits dismissed.

*D. Brander Smith* and *N. Daugulis*, for the appellant.

*W. O'M. Forbes*, for the respondents B.C. Marine Shipbuilders Ltd. and Straits Towing Ltd.

*J. R. Cunningham*, for the respondent F. M. Yorke & Son Limited.

The judgment of the Court was delivered by

McINTYRE J.—These appeals raise questions of liability for the loss at sea of a log barge owned by the respondent B.C. Marine Shipbuilders Ltd. Claims were made by the owners and charterers of the lost barge against the owners of the tug engaged to tow it; claims for indemnity were also made against a company which had performed certain services for the tug; as well the jurisdiction of the Federal Court of Canada to deal with the third party claim for indemnity was in issue.

The respondents B.C. Marine Shipbuilders Ltd. (B.C. Marine) and Straits Towing Ltd. (Straits) commenced these proceedings in the Federal Court against F. M. Yorke & Son Limited (Yorke) claiming damages for breach of a contract of towage and for negligence resulting in the loss of their barge, the *Westport Straits*. The breach alleged was that Yorke had failed to furnish a seaworthy tug. By the order of Mr. Justice Sheppard, dated January 7, 1970, Yorke issued a third party notice directed to Wire Rope Industries of Canada (1966) Ltd. (Wire Rope) and later filed a statement of claim for indemnity for any damages for which it might become liable to the respondents. Yorke alleged negligence on the part of Wire Rope in the resocketing of a cable used in towing the *Westport Straits*, a process I will describe later, and breach of an implied warranty of fitness of its work. On January 5, 1973 Collier J. gave leave to B.C. Marine and Straits to add Wire Rope as a defendant, and in their amended statement of claim they claimed negligence in the

contre Yorke est rejetée; et le pourvoi incident de B.C. Marine et Straits est rejeté.

*D. Brander Smith* et *N. Daugulis*, pour l'appelante.

*W. O'M. Forbes*, pour les intimées B.C. Marine Shipbuilders Ltd. et Straits Towing Ltd.

*J. R. Cunningham*, pour l'intimée F. M. Yorke & Son Limited.

Version française du jugement de la Cour rendu par

LE JUGE McINTYRE—Ces pourvois portent sur la responsabilité de la perte en mer d'un chaland de transport de billes de bois dont l'intimée B.C. Marine Shipbuilders Ltd. était propriétaire. Les propriétaires et les affréteurs du chaland ont poursuivi les propriétaires du remorqueur affrété pour le touer; des poursuites en dommages ont aussi été intentées contre une société qui a effectué des travaux pour le remorqueur; le pourvoi soulève en outre la compétence de la Cour fédérale du Canada d'entendre la poursuite en dommages de la tierce partie.

Les intimées B.C. Marine Shipbuilders Ltd. (B.C. Marine) et Straits Towing Ltd. (Straits) ont intenté ces procédures en Cour fédérale contre F. M. Yorke & Son Limited (Yorke) et réclament des dommages-intérêts pour inexécution du contrat de touage et pour négligence causant la perte de leur chaland, le *Westport Straits*. On reproche à Yorke de n'avoir pas fourni un remorqueur en bon état de navigabilité. En vertu d'une ordonnance du juge Sheppard en date du 7 janvier 1970, Yorke a mis en cause Wire Rope Industries of Canada (1966) Ltd. (Wire Rope) et a ensuite produit une demande en garantie de tous dommages qu'elle pouvait être appelée à payer aux intimées. Yorke allègue la négligence de Wire Rope dans l'opération de remboîtement d'un câble ayant servi à remorquer le *Westport Straits*, une opération à laquelle je reviendrai; elle allègue en outre l'inexécution d'un garantie implicite de bonne exécution des travaux. Le 5 janvier 1973, le juge Collier a autorisé B.C. Marine et Straits à poursuivre Wire Rope, et dans l'exposé de leur demande modifiée,

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resocketing process and resultant damages against Wire Rope.

Yorke denied negligence and denied breach of any implied term of seaworthiness of the tug and its towing gear. It asserted that it had exercised due diligence in furnishing a seaworthy vessel. In its statement of defence and counterclaim, Yorke said that if any negligence was involved in connection with the towing and loss of the *Westport Straits* it was attributable to the negligence of one Tobiasen, the mate of the tug, who was an employee of Straits and who had been placed as mate upon the tug by agreement with Yorke. Wire Rope denied negligence in the resocketing and also denied any implied or express warranty as to the quality of its work.

The plaintiff B.C. Marine owned the *Westport Straits*. By demise charter it chartered the barge to its co-plaintiff Straits. It was to be used to haul logs between Vancouver and a port, or ports, on the westerly coast of Vancouver Island. Straits, in turn, had chartered the tug *Lorne Yorke* from Yorke. It then engaged Yorke to tow the *Westport Straits* from Vancouver to a port on Kyuquot Sound on the west coast of Vancouver Island and there to pick up a load of logs and return them to Vancouver. Yorke picked up the barge at Vancouver and commenced to tow it to its destination.

The voyage involved passing through the Straits of Juan de Fuca and proceeding along the west coast of Vancouver Island to the entry to Kyuquot Channel where it was necessary to turn to starboard and pass into the channel and proceed to the destination which was known as Fair Harbour farther up the channel. The weather conditions were bad and on the night of January 31, 1968, while en route to Fair Harbour, the tug had been forced by weather to turn back from the westerly end of the Straits of Juan de Fuca and remain in the shelter of the straits for several hours. By the morning of February 1, the master of the *Lorne Yorke* elected to proceed with the voyage. He

elles invoquent la négligence de Wire Rope dans l'opération de remboîtement et lui réclament les dommages-intérêts qui en découlent.

Yorke a nié toute négligence et tout manquement à une condition implicite de navigabilité du remorqueur et de son équipement de touage. Elle a fait valoir qu'elle a exercé toute la diligence nécessaire en fournissant un navire en bon état de navigabilité. Dans sa défense et sa demande reconventionnelle, Yorke allègue que s'il y a eu négligence dans le remorquage et la perte du *Westport Straits*, elle est due à la négligence d'un certain Tobiasen, second à bord du remorqueur, qui était un employé de Straits et qui avait été nommé second à bord du remorqueur en vertu d'une entente intervenue avec Yorke. Wire Rope a nié toute négligence dans l'opération de remboîtement, et a aussi nié toute garantie, formelle ou tacite, quant à la qualité de ses travaux.

La demanderesse B.C. Marine était propriétaire du *Westport Straits*. Par affrètement coque-nue, elle a affrété le chaland à la codemanderesse Straits. Il devait servir au transport de billes de bois entre Vancouver et un ou plusieurs ports de la côte ouest de l'île Vancouver. Pour sa part, Straits avait affrété de Yorke le remorqueur *Lorne Yorke*. Elle a alors retenu les services de Yorke pour touer le *Westport Straits* de Vancouver à un port du goulet Kyuquot sur la côte ouest de l'île Vancouver, y prendre une cargaison de billes de bois et les rapporter à Vancouver. Yorke a pris le chaland à Vancouver et a commencé à le touer vers sa destination.

L'itinéraire prévoyait de passer par le détroit Juan de Fuca et de longer la côte ouest de l'île Vancouver jusqu'à l'entrée de la passe Kyuquot où il fallait virer à tribord, pénétrer dans la passe et poursuivre en remontant la passe jusqu'à destination au lieu dit Fair Harbour. Le temps était mauvais, et au cours de la nuit du 31 janvier 1968, naviguant vers Fair Harbour, le mauvais temps a obligé le remorqueur à faire demi-tour à l'extrémité ouest du détroit Juan de Fuca et à rester à l'abri dans le détroit pendant plusieurs heures. Le 1er février au matin, le commandant du *Lorne Yorke* a décidé de poursuivre sa route. Il a longé la côte ouest de l'île Vancouver en direction du goulet

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continued along the west coast of Vancouver Island towards Kyuquot Sound. At midnight on February 1 he turned over the watch to the mate Tobiasen, and went to bed. At about 0200 hours on February 2 Tobiasen reduced speed to cut down the 'surging' effect of the movement of tug and barge on the towline. This had the effect of allowing the towline to sink to the bottom and drag. At about 0245 hours while entering Kyuquot Channel the tug encountered a squall with sleet and snow and strong gusting winds from east-south-east. At this time the towline had been extended to about 2,000 feet. Tobiasen found that the tug was being moved to port, toward the northerly shore of the channel and, as he ordered a change of course to starboard, the towline became snagged on the bottom and the tug would no longer answer to its helm. In these conditions of weather and sea both tug and tow were placed in extreme hazard. The master was called after speed had been reduced to reduce pressure on the towline. The master came to the wheelhouse at once. He ordered the dropping of the towing pins—devices used to guide the towlines straight over the stern of the tug—for the purpose of making it possible to drive the tug hard to starboard, which he did, while at the same time going to full power in an attempt to jerk the towline free. The towline parted and, as a result, the barge *Westport Straits* was driven ashore and became a total loss.

The towline in use was in three connected sections. The principal section described as the main towline extended from the tug about 1,300 feet where it joined the second section or pennant which was some 350 to 400 feet in length and it, in turn, joined the third section which was of similar length and attached to the barge. The connections between the main towline and the first pennant, and between the two pennants, were effected by the use of sockets at the end of each section of cable, joined by links to the opposite sides of a steel tag plate. The sockets were made of steel. They were provided with an eye through which the link of the tag plate passed and were attached to the end of the towline by a process called socketing. Drawings illustrating the triple towing gear involved in this appeal appear below. Figure 'A' illustrates the linkage involved where three barges

Kyuquot. A minuit le 1er février, il a cédé le commandement au second Tobiasen et est allé se coucher. Le 2 février vers 2 h, Tobiasen a réduit la vitesse pour diminuer l'effet «houleux» du mouvement du remorqueur et du chaland sur le câble. Cette manœuvre a permis au câble de couler et de râcler le fond. En entrant dans la passe Kyuquot vers 2 h 45, le remorqueur a dû affronter un orage accompagné de neige et de neige fondante et de fortes bourrasques d'est-sud-est. A ce moment, le câble avait été allongé à environ 2,000 pieds. Tobiasen a constaté que le remorqueur déviait sur bâbord, vers la rive nord de la passe et, lorsqu'il a ordonné de changer le cap vers tribord, le câble a touché un écueil au fond et le remorqueur a cessé de répondre à la barre. Vu les conditions atmosphériques et l'état de la mer, le remorqueur et le chaland couraient un grave péril. Une fois la vitesse réduite pour diminuer la pression exercée sur le câble, le commandant fut appelé et il accourut à la timonerie. Il a ordonné d'enlever les cabillots de touage—des dispositifs utilisés pour guider les câbles de remorquage directement au-dessus de la poupe du remorqueur—afin de pouvoir virer à tribord toute, ce qu'il a fait tout en mettant toute la puissance dans un effort pour dégager le câble d'une secousse. Le câble s'est rompu, à la suite de quoi le chaland *Westport Straits* s'est échoué et a sombré.

Le câble de remorquage utilisé était en trois sections. La plus grande section, soit le câble principal, mesurait 1,300 pieds environ à partir du remorqueur et était reliée à la deuxième section ou rapporteur de 350 à 400 pieds de long, elle-même reliée à la troisième section de même longueur attachée au chaland. Le lien entre le câble principal et le premier rapporteur, et entre les deux rapporteurs, se faisait au moyen d'attaches à l'extrémité de chaque section de câble, liées par des maillons aux côtés opposés d'un ferret d'acier. Les attaches étaient en acier. Elles étaient munies d'un anneau dans lequel passait le maillon du ferret et étaient attachées à l'extrémité du câble de remorquage par une opération appelée emboîtement. Je reproduis ci-après des dessins illustrant l'appareil de touage en triple dont il est question en l'espèce. L'illustration «A» montre le système de chaînons

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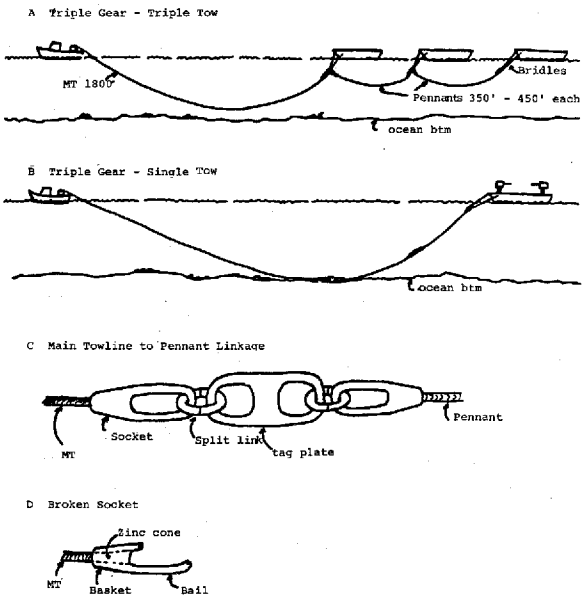
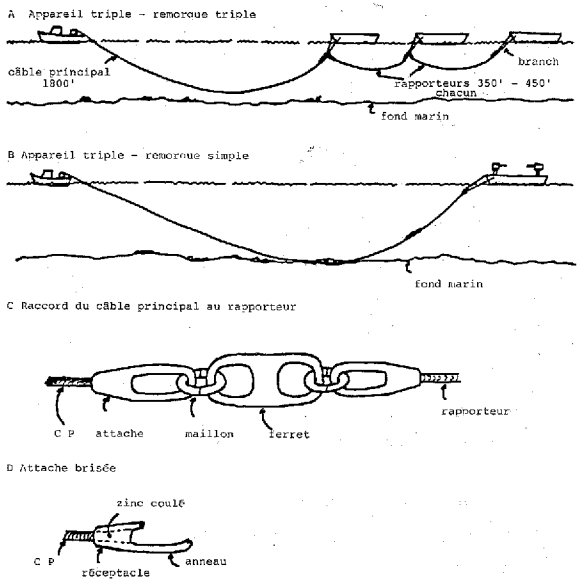
are towed at once. Figure 'B' illustrates the method of towing employed by Yorke on the date of the loss of the barge and, as well, gives an idea of the relative positions of tug, tow, and towline at the time the line failed. Figure 'C' shows the method of linkage from pennant to pennant, and figure 'D' provides a rough sketch showing the broken socket. It was the socketing of the main towline which brought Wire Rope into this action.

utilisé lorsque trois chalands sont remorqués à la fois. L'illustration «B» montre la méthode de remorquage que Yorke a utilisée le jour où le chaland a sombré et donne aussi une idée des positions relatives du remorqueur, de la remorque et du câble de remorquage au moment où le câble s'est rompu. L'illustration «C» montre le raccord d'un rapporteur à l'autre, et l'illustration «D» offre une esquisse de l'attache brisée. C'est l'emboîtement du câble principal dans son attache qui est la cause de ce que Wire Rope est partie à la présente action.




When the broken towline, or what remained of it, was taken aboard the *Lorne Yorke* it was observed that the break in the line had occurred at the main towline socket. The socket itself had broken and allowed the link to the adjoining pennant to escape. The line itself remained intact. Marks about fifty feet from the socket indicated where the towline had apparently been caught on the rocks. It was alleged against Wire Rope that the socket failed because it had been damaged and weakened by the negligence of Wire Rope in resocketing the towline. Wire Rope had performed this service for Yorke on October 13, 1967. Much

Après avoir remonté le câble de remorquage brisé, ou ce qui en restait, à bord du *Lorne Yorke*, on a remarqué que le câble s'était rompu à l'attache du câble principal. C'est l'attache elle-même qui s'était rompue, permettant au maillon du rapporteur voisin de se libérer. Le câble lui-même est resté intact. A environ cinquante pieds de l'attache, des marques indiquaient l'endroit où le câble de remorquage s'était apparemment coincé dans les rochers. On a prétendu contre Wire Rope que l'attache s'était brisée parce qu'elle avait été endommagée et affaiblie du fait de la négligence de Wire Rope dans l'opération de remboîtement

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of the evidence at trial was concerned with this issue. The process of socketing must be understood.

The sockets in use by Yorke at the time of the accident were made of manganese steel. This steel is particularly suited for this function, being very strong, ductile, and having great tensile strength. During the manufacturing process of manganese steel sockets the steel is heated to a temperature of some 1,950° F. and then quenched, or cooled very quickly, in cold water. The sudden cooling prevents the precipitation in the steel of undesirable carbides which, if present, would have the effect of making or tending to make the steel brittle, and thus subject to failure and unsuitable for use in this type of socket. After manufacture if it is necessary for any reason to heat the steel beyond 500° F. or 600° F. there is a danger that some embrittlement may result, depending upon the temperature reached and the time it is maintained, particularly if the heating is repeated frequently. To avoid this danger the steel should be reheated to 1,950° F. and quenched suddenly in cold water as above.

The type of socket in use in this case is used upon cable, commonly called wire rope. When put in use the socket is attached to the towline by running the end of the towline into the bottom of the socket so that it is enclosed by a collar or cylinder forming the base of the socket and called a basket. The wires of the cable end are loosened to give what is termed a 'brushing' effect and then molten zinc is poured into the base of the socket. When the zinc cools and hardens the end of the cable is securely retained in the socket.

From time to time for various reasons, including wear on the cable which frequently appears in the vicinity of the socket, it is necessary to remove the socket and to cut out any worn part of the line. If the socket is considered to be sound it can be resocketed and returned to use. The evidence indicated that re-use of sockets involving a consequent resocketing was common practice with York and other towing companies on the Pacific coast.

du câble. Wire Rope avait exécuté ce travail pour Yorke le 13 octobre 1967. En première instance, une grande partie de la preuve a porté sur cette question. Il faut bien comprendre l'opération d'emboîtement.

Les attaches dont Yorke se servait au moment de l'accident étaient en acier au manganèse. Cet acier est particulièrement bien adapté à cette fonction puisqu'il est très fort, ductile et qu'il a une grande résistance de tension. Pendant la fabrication des attaches d'acier au manganèse, l'acier est chauffé à une température de 1,950 °F et trempé, ou refroidi très rapidement, dans l'eau froide. Le refroidissement soudain empêche la précipitation, dans l'acier, de carbures indésirables qui auraient pour effet de rendre l'acier fragile, donc sujet à briser et inutilisable dans ce genre d'attaches. Si, après sa fabrication, il est nécessaire pour une raison quelconque de chauffer l'acier à plus de 500 °F ou 600 °F, il est possible qu'il devienne cassant, selon la température atteinte et la durée du chauffage, particulièrement si le chauffage est répété fréquemment. Pour éviter ce danger, l'acier devrait être chauffé de nouveau à 1,950 °F et trempé soudainement dans l'eau froide tel qu'indiqué ci-dessus.

Le type d'attache utilisé en l'espèce est fixé à un câble appelé communément câble métallique. Lorsqu'elle est utilisée, on fixe l'attache au câble de remorquage en insérant l'extrémité du câble dans la douille de l'attache de façon qu'il soit enfermé dans un collet ou un cylindre formant la base de l'attache et appelé réceptacle. Les fils à l'extrémité du câble sont desserrés pour lui donner un effet «de brosse», et du zinc fondu est alors coulé dans la base de l'attache. Lorsque le zinc refroidit et se durcit, l'extrémité du câble est maintenue solidement dans l'attache.

Pour des raisons diverses, y compris l'usure du câble qui apparaît souvent près de l'attache, il est nécessaire d'enlever à l'occasion l'attache et d'enlever la portion usée du câble. Si on estime que l'attache est en bonne condition, elle peut être remboîtée et servir de nouveau. La preuve indique que la réutilisation des attaches, y compris leur remboîtement, était pratique courante chez Yorke et les autres sociétés de remorquage de la côte du

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To remove the socket it is necessary to heat the zinc in the socket to its melting point which was, according to the evidence, between 700° F. and 800° F. The molten zinc is then allowed to escape and the cable may be removed. The remaining zinc may then be cleaned out of the socket and after worn portions of the cable are removed the socket may be replaced as described above. It should, however, be noted that the process of heating to 1,950° F. followed by a rapid quenching in cold water is done in the foundry where the socket is cast and could not be carried out, and was not carried out, in the circumstances of the resocketing in this case, which will be described later.

The trial judge found that the mate of the *Lorne Yorke*, although an employee of Straits, was at all relevant times under the control and direction of Captain McLean, the master of the *Lorne Yorke*. He therefore considered that, being in the actual control and employment of Yorke, his negligence, if found to exist, would be attributable to Yorke. In this I agree with him and this point was not argued later. It may be observed here that in view of the position taken in this Court on the question of negligence in seamanship and navigation by B.C. Marine and Straits it ceased to be of significance.

He went on to refer to the scientific evidence called by the parties regarding the treatment of the socket and its effect, and expressed his findings in these words:

> Having carefully considered all this evidence, I am of the view, using the usual test of more probable than not, in respect to both the expert and lay evidence, what Chapman and Babey of Wire Rope Industries of Canada (1966) Ltd., did at the material time in re-socketing, because of the manner in which they did it and the time involved, did not result in the subject socket (Exhibit 3) becoming embrittled to any significant extent.
>
> Whatever embrittlement there was in this subject socket, in my view, was caused by the indefinite number of re-socketing operations which were done to it prior to the occasion when Chapman and Babey did their work.
>
> In addition, at the material time when the subject socket broke, it was not subject to just a straight linear pull. Instead, it was subject to a large number of stresses

Pacifique. Pour enlever l'attache, il faut chauffer le zinc qui s'y trouve à sa température de fusion qui, suivant la preuve, se situe entre 700 °F et 800 °F. Le zinc fondu peut alors s'échapper et le câble peut être enlevé. Le zinc qui reste peut alors être écuré, et une fois que les parties usées du câble sont enlevées, l'attache peut être replacée de la façon indiquée ci-dessus. Il faut souligner cependant que l'opération de chauffage à 1,950 °F suivie d'un trempage rapide dans l'eau froide se fait à la fonderie où l'attache est coulée et ne peut être effectuée, et ne l'a pas été, au cours de l'opération de remboîtement en l'espèce qui sera décrite plus loin.

Le juge de première instance a conclu que le second du *Lorne Yorke*, même s'il était un employé de Straits, était en tout temps utile, sous le contrôle et la surveillance du capitaine McLean, commandant du *Lorne Yorke*. Il a donc décidé que, étant sous le contrôle effectif et au service de Yorke, la négligence de sa part, s'il y a lieu, serait imputable à Yorke. Je souscris à cet avis, et ce point n'a pas été soulevé par la suite. Il faut noter ici que ce point a perdu son importance compte tenu de la position adoptée en cette Cour sur la question de la négligence de B.C. Marine et Straits en matière de manœuvre et de navigation.

Le juge de première instance a poursuivi en se rapportant à la preuve de nature scientifique que les parties ont présentée concernant le traitement qu'a subi l'attache et à ses effets, et il a conclu en ces mots:

> Après avoir analysé soigneusement toutes les preuves et appliqué les critères ordinaires de probabilité aux témoignages des experts et à ceux des profanes, je suis d'avis que, vu la durée du traitement et la technique employée pour réparer l'attache, Chapman et Babey de la compagnie Wire Rope Industries of Canada (1966) Ltd. n'ont pas pu altérer, d'une manière sensible, la résistance de l'attache en question.
>
> A mon avis, toute altération de la résistance de l'attache en question provient des nombreuses réparations successives antérieurement au travail effectué par Chapman et Babey.
>
> En outre, au moment qui nous intéresse, celui de la rupture de l'attache, elle n'était pas uniquement soumise à une traction linéaire. Au contraire, elle était soumise à

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in various directions at the moment when it broke. As a consequence, it is difficult to say precisely how much strength and ductility it had lost.

Regarding the position in this matter of Yorke, he went on to say:

In coming to the conclusion I do, I am of the view, firstly either the Defendant, F. M. Yorke & Son Limited through its servants which includes in law the mate Tobiasen, may have caused the tug through improper seamanship to have got itself in the position it reached near the rocks at the southwesterly end of Kyuquot Channel so that even with proper seamanship, the tug could not have been extricated from its difficulty without breaking the towline; or second, it may be that the situation in which the Defendant, F. M. Yorke & Son Limited through its servants, got the tug into at the material time was a situation which it was not unreasonable under the circumstances of time and sea, to have got the tug into and that following that, the actions taken by Captain McLean were the correct actions and that the towline at the socket should not have broken and it broke only because it was a faulty socket which the Defendant, F. M. Yorke & Son Limited, knew or should have known was likely to occur or by contract impliedly warranted would not happen. (cf *McKenzie Barge & Derrick Co. Ltd.* v. *Rivtow Marine Ltd.* (1968), 2 D.L.R. 505.)

In either event, the Defendant, F. M. Yorke & Son Limited is liable to the Plaintiffs for the damages that resulted.

He held Wire Rope not liable in the matter and ordered judgment against Yorke in favour of Straits and B.C. Marine and directed a reference as to damages. The plaintiffs were given costs against Yorke and the actions against Wire Rope were dismissed with costs.

In the Court of Appeal, Pratte, Ryan and Smith JJ.A., Ryan J.A. speaking for the Court, allowed the appeal of Yorke against the judgment in favour of B.C. Marine and dismissed Yorke's appeal against the judgment in favour of Straits. It also ordered that Yorke should succeed in its third party claim against Wire Rope and allowed the appeal by B.C. Marine and Straits against Wire Rope. The effect of this judgment was to render Yorke liable to the plaintiff Straits for the loss of the barge and give Yorke a right of indemnity

l'action de nombreuses forces orientées dans diverses directions au moment de sa rupture. En conséquence, il est difficile de déterminer avec précision la diminution de sa résistance et de sa ductilité.

Concernant la position de Yorke dans cette affaire, il poursuit:

En arrivant à la conclusion à laquelle j'aboutis, j'estime que, ou bien d'une part la défenderesse F.M. Yorke & Son Limited, par l'intermédiaire de ses préposés dont juridiquement le second Tobiasen fait partie, peut avoir, par des manœuvres inappropriées, mis le remorqueur dans la situation où il se trouvait près des rochers à l'extrémité sud-ouest de la passe Kyuquot de sorte que, même avec d'habiles manœuvres, on n'aurait pu le sortir de cette situation difficile sans briser le câble; ou bien d'autre part, il se peut que la défenderesse F. M. Yorke & Son Limited, par l'intermédiaire de ses préposés, ait, au moment décisif, mis le remorqueur dans une position où, vu l'heure et l'état de la mer, il n'était pas déraisonnable de le placer et qu'après quoi, le capitaine McLean a pris les mesures qui s'imposaient, que le câble n'aurait pas dû se briser à l'attache et qu'il s'est brisé uniquement parce que l'attache était défectueuse; la défenderesse F.M. Yorke & Son Limited savait ou devait savoir que cet incident pouvait se produire ou bien elle avait implicitement promis par contrat que cela ne se produirait pas. (Voir *McKenzie Barge & Derrick Co. Ltd.* c. *Rivtow Marine Ltd.* (1968), 2 D.L.R. 505).

Dans les deux cas, la défenderesse F.M. Yorke & Son Limited est responsable des dommages occasionnés aux demanderesses.

Il a conclu que Wire Rope n'était pas responsable à cet égard, et il a rendu jugement contre Yorke en faveur de Straits et B.C. Marine et ordonné un renvoi pour l'évaluation des dommages. Il a ordonné à Yorke de payer les frais d'action aux demanderesses et il a rejeté les actions contre Wire Rope avec dépens.

En Cour d'appel formée des juges Pratte, Ryan et Smith, le juge Ryan s'exprimant au nom de la Cour a accueilli l'appel de Yorke contre le jugement rendu en faveur de B.C. Marine et rejeté l'appel de Yorke contre le jugement rendu en faveur de Straits. La Cour a en outre accueilli la demande d'indemnisation de Yorke contre la tierce partie Wire Rope et a accueilli l'appel de B.C. Marine et de Straits contre Wire Rope. Par cet arrêt, la Cour a tenu Yorke responsable envers la demanderesse Straits de la perte du chaland et a

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against Wire Rope. It also gave judgment against Wire Rope for the loss to the plaintiffs B.C. Marine and Straits.

These appeals were taken by leave granted on June 29, 1978. The appellant Wire Rope asks that both of its appeals be allowed with costs and that the judgment at trial be restored. B.C. Marine and Straits seek the dismissal of the appeals of Wire Rope and Yorke against the Federal Court of Appeal's judgment in their favour. B.C. Marine, as owner of the lost barge, also seeks a reversal of the Court of Appeal's dismissal of the action against Yorke. Yorke asks that its cross-appeal from the judgment against it in favour of Straits be allowed and that the action be dismissed. Alternatively, if the cross-appeal is not allowed Yorke seeks an order for indemnification against Wire Rope for any damages and costs for which it may be held liable.

The hearing of the appeals commenced in this Court on March 11, 1980. On March 12 during argument the Court raised the question of jurisdiction of the Federal Court Trial Division to entertain Yorke's action for indemnity against Wire Rope. This point had not been raised before. Counsel were referred to the judgment of this Court in *R. v. Thomas Fuller Construction Co. (1958) Limited and Foundation Company of Canada Limited*[2]. The hearing was adjourned to give time for counsel to consider the position in the light of the *Fuller* case and to submit new factums on the question of jurisdiction so that it could be argued in full. On April 23, 1980, counsel having filed new factums, argument resumed. The hearing was completed and judgment reserved. I will deal firstly with jurisdiction.

The question of jurisdiction of the Federal Court has been raised and considered in several recent cases, of which the most significant for our purpose is *Tropwood A.G. and the Owners of the*

[2] [1980] 1 S.C.R. 695.

accordé à Yorke le droit de recouvrer des dommages-intérêts contre Wire Rope. La Cour a en outre rendu jugement en faveur des demanderesses B.C. Marine et Straits contre Wire Rope pour la perte du chaland.

Ces pourvois ont été autorisés le 29 juin 1978. L'appelante Wire Rope demande à la Cour d'accueillir ses deux pourvois avec dépens et de rétablir le jugement de première instance. B.C. Marine et Straits demandent le rejet des pourvois de Wire Rope et de Yorke formés contre l'arrêt que la Cour d'appel fédérale a rendu en leur faveur. B.C. Marine, à titre de propriétaire du chaland perdu, demande d'infirmer le rejet, par la Cour d'appel, de l'action contre Yorke. Yorke demande d'accueillir son pourvoi incident formé contre l'arrêt prononcé contre elle en faveur de Straits, et de rejeter l'action. Advenant le rejet de son pourvoi incident, Yorke demande à la Cour d'ordonner à Wire Rope de la garantir de tous dommages-intérêts et frais qu'elle peut être tenue de payer.

L'audition de ces pourvois a débuté devant cette Cour le 11 mars 1980. Le 12 mars, au cours des plaidoiries, la Cour a soulevé la question de la compétence de la Division de première instance de la Cour fédérale d'entendre l'action de Yorke en garantie contre Wire Rope. Cette question n'avait pas été soulevée avant. La Cour a mentionné aux avocats son arrêt *R. c. Thomas Fuller Construction Co. (1958) Limited et Foundation Company of Canada Limited*[2]. L'audience a été ajournée pour donner aux avocats le temps d'étudier la situation à la lumière de l'arrêt *Fuller* et de produire de nouveaux mémoires sur la question de compétence de sorte qu'elle puisse être plaidée à fond. Le débat a repris le 23 avril 1980, après la production des mémoires. L'audition a été complétée et la décision prise en délibéré. Je vais d'abord traiter de la question de la compétence.

La question de la compétence de la Cour fédérale a été soulevée et examinée dans plusieurs arrêts récents, parmi lesquels le plus important pour nous est *Tropwood A.G. et les propriétaires*

[2] [1980] 1 R.C.S. 695.

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*Vessel Tropwood v. Sivaco Wire & Nail Company and Atlantic Lines & Navigation Company, Inc.*[3] At no time in these proceedings has it been contended that the Federal Court did not have jurisdiction to deal with the claims made by the plaintiffs B.C. Marine & Straits against Yorke. It is clear that these claims, arising out of a marine accident concerning rights and liabilities under a barge charter and a contract of towage and the exercise of due diligence in connection therewith, come within the ambit of Canadian maritime law as described in s. 2 of the *Federal Court Act*. The jurisdictional question arises, however, because of the claims against Wire Rope which allege a breach of contract and negligence in the resocketing of the main towing cable. The issue then is, do such claims fall within the jurisdiction of the Federal Court, or are they governed by provincial law and therefore come within the jurisdiction of the Supreme Court of British Columbia?

In *Tropwood* it was held, following earlier decisions in this Court in *Quebec North Shore Paper Company et al. v. Canadian Pacific Limited, et al.*[4] and *McNamara Construction (Western) Limited et al. v. The Queen*[5], that to give the Federal Court jurisdiction there must be a body of applicable federal law upon which that jurisdiction might operate. Such was not the case in *Quebec North Shore,* nor in *McNamara,* and accordingly jurisdiction in respect of the issues arising in those cases rested not in the Federal Court but in the Superior Courts of the provinces. However, in *Tropwood*, it was held that there exists a body of federal law described as Canadian maritime law in the *Federal Court Act* over which the Federal Court has jurisdiction, that it was within Parliament's legislative competence under s. 91.10 of the *British North America Act*, and that certain of the paragraphs of s. 22(2) of the *Federal Court Act* gave specific jurisdiction to the Federal Court. Laskin C.J.C., speaking for the Court, said at p. 163:

[3] [1979] 2 S.C.R. 157.
[4] [1977] 2 S.C.R. 1054.
[5] [1977] 2 S.C.R. 654.

*du navire Tropwood c. Sivaco Wire & Nail Company et Atlantic Lines & Navigation Company, Inc.*[3] On n'a jamais soutenu dans l'espèce que la Cour fédérale n'avait pas compétence pour entendre les réclamations des demanderesses B.C. Marine et Straits contre Yorke. Il est évident que ces réclamations, résultant d'un sinistre maritime, soulevant les droits et les obligations en vertu de l'affrètement d'un chaland et d'un contrat de touage et l'exercice de la diligence raisonnable dans les circonstances, relèvent du droit maritime canadien tel que le définit l'art. 2 de la *Loi sur la Cour fédérale.* La question de la compétence se pose cependant du fait que les réclamations contre Wire Rope invoquent l'inexécution d'un contrat et la négligence lors du remboîtement du câble de remorquage principal. Il s'agit donc de savoir si ces réclamations ressortissent à la Cour fédérale, ou si elles sont régies par le droit provincial et ressortissent par conséquent à la Cour suprême de la Colombie-Britannique.

Suivant ses arrêts antérieurs *Quebec North Shore Paper Company et autre c. Canadien Pacifique Limitée et autre*[4], et *McNamara Construction (Western) Limited et autre c. La Reine*[5], cette Cour a décidé dans l'arrêt *Tropwood* que pour attribuer la compétence à la Cour fédérale, il doit exister un droit fédéral applicable qui en permette l'exercice. Ce n'était pas le cas dans *Quebec North Shore*, ni dans *McNamara*, et par conséquent ce n'est pas la Cour fédérale mais les cours supérieures des provinces qui avaient compétence sur les questions soulevées dans ces affaires. Cependant, dans *Tropwood*, la Cour a conclu qu'il existe un droit fédéral, soit le droit maritime canadien décrit dans la *Loi sur la Cour fédérale*, sur lequel la Cour fédérale a compétence, que ce droit relève de la compétence législative du Parlement aux termes du par. 91.10 de l'*Acte de l'Amérique du Nord britannique* et que certains alinéas du par. 22(2) de la *Loi sur la Cour fédérale* attribuent une compétence particulière à la Cour fédérale. Au nom de la Cour, le juge en chef Laskin écrit à la p. 163:

[3] [1979] 2 R.C.S. 157.
[4] [1977] 2 R.C.S. 1054.
[5] [1977] 2 R.C.S. 654.

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I come, therefore, to the *Federal Court Act*. I have already quoted s. 22(1) and I refer to the words "Canadian maritime law" therein, words which are defined in s. 2 of the Act as follows:

> "Canadian maritime law" means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act* or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this or any other Act of the Parliament of Canada;

This definition is supplemented by s. 42 of the *Federal Court Act*, reading as follows:

> Canadian maritime law as it was immediately before the first day of June, 1971 continues subject to such changes therein as may be made by this or any other Act.

This definition of Canadian maritime law in s. 2 refers to the law that was administered by the Exchequer Court "by virtue of the *Admiralty Act* or any other statute". The reference to the *Admiralty Act* is undoubtedly to the Act of 1934, but the *Admiralty Act* of 1891, although it was repealed, may certainly be considered as "any other statute" by virtue of which law was administered by the Exchequer Court on its admiralty side. If therefore there was a deficient incorporation of admiralty law by the Act of 1934, the same cannot be said of the Act of 1891.

He went on to pose two further questions in these terms:

> Two questions, therefore, remain. The first is whether a claim of the kind made here was within the scope of admiralty law as it was incorporated into the law of Canada in 1891. If so, the second question is whether such a claim fell within the scope of federal power in relation to navigation and shipping.

He held that the claim made in *Tropwood*, "damage to incoming cargo", had been brought into the admiralty jurisdiction of the Exchequer Court of Canada by *The Admiralty Act, 1891*, 1891 (Can.), c. 29, and that as a result such a claim, pursuant to s. 2 of the *Federal Court Act*, would be subject to Canadian maritime law under the jurisdiction of the Federal Court of Canada pursuant to s. 22(1) and certain paragraphs of s. 22(2) of the said Act. He held as well that the claim

J'en viens donc à la *Loi sur la Cour fédérale*. J'ai déjà cité le par. 22(1) et je m'arrête à l'expression «droit maritime canadien» qu'on trouve ainsi définie à l'art. 2:

> «droit maritime canadien» désigne le droit dont l'application relevait de la Cour de l'Échiquier du Canada, en sa juridiction d'amirauté, en vertu de la *Loi sur l'Amirauté* ou de quelque autre loi, ou qui en aurait relevé si cette Cour avait eu, en sa juridiction d'amirauté, compétence illimitée en matière maritime et d'amirauté, compte tenu des modifications apportées à ce droit par la présente loi ou par toute autre loi du Parlement du Canada;

Cette définition est complétée par l'art. 42 de la *Loi sur la Cour fédérale*:

> Le droit maritime canadien existant immédiatement avant le 1er juin 1971 reste en vigueur sous réserve des modifications qui peuvent y être apportées par la présente loi ou toute autre loi.

Cette définition du droit maritime canadien à l'art. 2 renvoie au droit dont l'application relevait de la Cour de l'Échiquier «en vertu de la *Loi sur l'Amirauté* ou de quelque autre loi». Le renvoi à la *Loi sur l'Amirauté* vise manifestement la Loi de 1934, mais, malgré son abrogation, on peut certainement considérer l'*Acte de l'Amirauté* de 1891 comme «quelque autre loi» dont l'application relevait de la Cour de l'Échiquier, en sa juridiction d'amirauté. Donc, si la Loi de 1934 n'incorporait pas complètement le droit maritime, on ne peut en dire autant de la Loi de 1891.

Il poursuit en posant les deux autres questions suivantes:

> Il reste donc deux questions. La première est celle de savoir si une réclamation comme celle faite en l'espèce relève du droit maritime tel qu'il a été incorporé au droit du Canada en 1891. Dans l'affirmative, la deuxième question est de savoir si cette réclamation relève de la compétence fédérale en matière de navigation et d'expéditions par eau.

Il conclut que dans *Tropwood*, la réclamation pour «dommages causés à une cargaison reçue» est entrée dans la compétence de la Cour de l'Échiquier du Canada en matière de droit maritime en vertu de l'*Acte de l'Amirauté, 1891*, 1891 (Can.), chap. 29, et que par conséquent, cette réclamation, vu l'art. 2 de la *Loi sur la Cour fédérale*, relève du droit maritime canadien qui est du ressort de la Cour fédérale du Canada en application du par. 22(1) et de certains alinéas du par. 22(2) de cette

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would also fall under federal legislative competence under s. 91.10 of the *British North America Act*.

loi. Il conclut en outre que la réclamation relève également de la compétence législative fédérale en vertu du par. 91.10 de l'*Acte de l'Amérique du Nord britannique*.

Turning to the case at bar, the claim against Wire Rope by Yorke alleges negligence in the resocketing of the main towing cable pursuant to a contract made regarding such work, and claims an indemnity for loss caused by a breach of that contract. The claim by B.C. Marine and Straits involves negligence in the resocketing operation which resulted in their loss. It will be observed that the root of both claims lies in the work done by Wire Rope in resocketing the cable and that the cable was part of the equipment of the tug *Lorne Yorke*, a seagoing vessel which was involved in the marine accident that gave rise to this action. That such a claim formed part of admiralty law which was incorporated into Canadian law by the Canadian *Admiralty Act* of 1891 seems clear. That Act constituted the Exchequer Court of Canada a Colonial Court of Admiralty, conferring on it all the jurisdiction given in that Act pursuant to the British *Colonial Courts of Admiralty Act, 1890*, 1890 (U.K.), c. 27. The jurisdiction of the British High Court of Admiralty was therefore vested in the Exchequer Court of Canada. That jurisdiction was formed, in part, by another English Act, *An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England*, 1840 (U.K.), c. 65. Section 6 of that last-named Act provided:

En l'espèce, la réclamation de Yorke contre Wire Rope allègue la négligence au cours du remboîtement du câble principal en exécution d'un contrat intervenu à l'égard de ces travaux, et prétend à une indemnisation pour la perte résultant de l'inexécution de ce contrat. La réclamation de B.C. Marine et de Straits se fonde sur la négligence dans l'opération de remboîtement à l'origine de la perte qu'elles ont subie. Il faut signaler que les deux réclamations prennent leur fondement dans les travaux de remboîtement du câble par Wire Rope et que le câble est une pièce de l'équipement du remorqueur *Lorne Yorke*, un bâtiment de mer impliqué dans le sinistre maritime qui est à l'origine de cette action. Il paraît évident que cette réclamation entre dans le droit maritime que l'*Acte de l'Amirauté* canadien de 1891 a incorporé au droit canadien. Aux termes de cette loi la Cour de l'Échiquier du Canada est devenue une cour coloniale d'amirauté, exerçant toute la compétence prévue à cette loi conformément à l'*Acte des Cours coloniales d'Amirauté* anglais de 1890, 1890 (R.-U.), chap. 27. La Cour de l'Échiquier du Canada a donc été investie de la compétence de la Haute Cour d'Amirauté anglaise. Cette compétence vient, en partie, d'une autre loi anglaise intitulée *An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England*, 1840 (R.-U.), chap. 65. L'article 6 de cette loi se lisait comme suit:

VI. And be it enacted, That the High Court of Admiralty shall have Jurisdiction to decide all Claims and Demands whatsoever in the Nature of Salvage for Services rendered to or Damage received by any Ship or Sea-going Vessel, or in the Nature of Towage, or for Necessaries supplied to any Foreign Ship or Sea-going Vessel, and to enforce the Payment thereof, whether such Ship or Vessel may have been within the Body of a County, or upon the High Seas, at the Time when the Services were rendered or Damage received, or Necessaries furnished, in respect of which such Claim is made.

[TRADUCTION] VI. Et qu'il soit édicté, Que la Haute Cour d'Amirauté a compétence pour décider toute réclamation et toute demande quelle qu'elle soit ayant trait aux indemnités pour sauvetage, pour services rendus, ou pour dommages subis par tout navire ou bâtiment de mer, ou pour le touage, pour les biens fournis à tout navire étranger ou à tout bâtiment de mer, et pour en exécuter le paiement, que ce navire ou bâtiment se soit trouvé dans les eaux territoriales ou en haute-mer à l'époque où les services, les dommages ou les biens sur lesquels porte la réclamation ont été rendus, subis ou fournis.

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It is my opinion that this section is sufficiently broad to comprehend the claims made against Wire Rope in the case at bar.

The Canadian *Admiralty Act* of 1891 provided in sections 3 and 4:

**3.** In pursuance of the powers given by "*The Colonial Courts of Admiralty Act*, 1890", aforesaid, or otherwise in any manner vested in the Parliament of Canada, it is enacted and declared that the Exchequer Court of Canada is and shall be, within Canada, a Colonial Court of Admiralty, and as a Court of Admiralty shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the said Act and by this Act.

**4.** Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada, and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty court, as elsewhere therein, have all rights and remedies in all matters, (including cases of contract and tort and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty under "*The Colonial Courts of Admiralty Act*, 1890."

This jurisdiction was carried forward by *The Admiralty Act, 1934*, 1934 (Can.), c. 31, and passed into the purview of the Federal Court by the *Federal Court Act* in its definition of maritime law in s. 2 and by the terms of s. 42 of that Act.

**42.** Canadian maritime law as it was immediately before the 1st day of June 1971 continues subject to such changes therein as may be made by this or any other Act.

Section 22(1) gives a general statement of jurisdiction, and s. 22(2)(*m*) and (*n*) reproduced hereunder are apt to cover the claims in question here and in part are a restatement of the jurisdiction of the British Admiralty Courts contained in s. 6 of the 1840 Statute cited above:

(*m*) any claim in respect of goods, materials or services wherever supplied to a ship for her operation or maintenance including, without restricting the gener-

Je suis d'avis que cet article est suffisamment large pour inclure les réclamations contre Wire Rope en l'espèce.

Les articles 3 et 4 de l'*Acte de l'Amirauté*, canadien de 1891 se lisent comme suit:

**3.** En conformité des pouvoirs conférés par l'*Acte des Cours coloniales d'Amirauté*, 1890, susdit, ou de toute autre manière attribués au parlement du Canada, il est décrété et déclaré que la cour de l'Échiquier du Canada est et sera, dans les limites du Canada, une cour coloniale d'Amirauté, et, comme cour d'Amirauté, aura et exercera en Canada toute la juridiction, les pouvoirs et l'autorité conférés par le dit acte et le présent acte.

**4.** Cette juridiction, ces pouvoirs et cette autorité pourront être et seront exercés par la cour de l'Échiquier dans tout le Canada et sur toutes ses eaux, soit de marée ou non, et soit naturellement navigables ou rendues artificiellement navigables; et toutes personnes auront, tant dans les parties du Canada qui jusqu'ici ont été au delà de l'atteinte des mandats de toute cour de Vice-Amirauté, qu'ailleurs dans ses limites, tous les droits et recours en toutes choses (y compris les cas de contrat et de tort et de procédures *in rem* et *in personam*) provenant de la navigation, de la marine, du trafic ou du commerce, ou s'y rattachant, qui peuvent être exercés dans toute cour coloniale d'Amirauté en vertu de l'«*Acte des Cours coloniales d'Amirauté*, 1890.»

Cette compétence a été reportée par la *Loi d'amirauté, 1934*, 1934 (Can.), chap. 31 et est entrée dans le ressort de la Cour fédérale par la *Loi sur la Cour fédérale* dans la définition qu'elle donne du droit maritime à l'art. 2 et par l'art. 42 de cette loi.

**42.** Le droit maritime canadien existant immédiatement avant le 1er juin 1971 reste en vigueur sous réserve des modifications qui peuvent y être apportées par la présente loi ou toute autre loi.

Le paragraphe 22(1) donne un énoncé général de la compétence, et les al. 22(2)*m*) et *n*) ci-dessous suffisent à englober les réclamations dont il est question en l'espèce et sont, en partie, une reformulation de la compétence des cours d'amirauté anglaises prévue à l'art. 6 précité de la Loi de 1840:

*m*) toute demande relative à des marchandises, fournitures ou services fournis à un navire, où que ce soit, pour son exploitation ou son entretien, et notamment,

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ality of the foregoing, claims in respect of stevedoring and lighterage;

(*n*) any claim arising out of a contract relating to the construction, repair or equipping of a ship;

I am therefore of the view that the claims made against Wire Rope come within Canadian maritime law as defined in the *Federal Court Act*. There can be no doubt in my mind that the substantive law relating to these claims falls within federal legislative competence under s. 91.10 of the *British North America Act*, being in relation to navigation and shipping. There is therefore law of Canada relating to the issues arising in this case upon which the jurisdiction of the Federal Court may operate. In my opinion, it is of no significance that the claim made by Yorke is a claim for indemnity. Claims for indemnity and third party actions, generally, are not mere incidents to the principal action. They are independent actions which stand upon their own feet. On this point I refer to the *Fuller* case, *supra*, where Pigeon J. referred to *Bank of Montreal v. Royal Bank of Canada*[6], at pp. 315-6, where Duff C.J.C. said:

... The Supreme Court of Ontario has jurisdiction, by virtue of the statutes and rules by which it is governed, to entertain and dispose of claims in what are known as third party proceedings. Claims for indemnity, for example, from a third party, by a defendant in respect of the claim in the principal action against him, can be preferred and dealt with in the principal action. But there can be no doubt that the proceeding against the third party is a substantive proceeding and not a mere incident of the principal action.

The *Fuller* case, in my view, is distinguishable. In that case Foundation Company of Canada, Ltd., a building contractor, brought action against the Crown for a breach of contract relating to damage caused by blasting operations which had been performed by another contractor, Thomas Fuller Construction Co. (1958) Limited. There was no doubt that the Crown had been properly impleaded in the Federal Court which had full jurisdiction to hear the plaintiff's claim against the

[6] [1933] S.C.R. 311.

sans restreindre la portée générale de ce qui précède, les demandes relatives à l'aconage ou gabarage;

*n*) toute demande née d'un contrat relatif à la construction, à la réparation ou à l'équipement d'un navire;

Je suis par conséquent d'avis que les réclamations contre Wire Rope relèvent du droit maritime canadien défini à la *Loi sur la Cour fédérale*. Je suis convaincu que le droit positif concernant ces réclamations relève du pouvoir législatif fédéral aux termes du par. 91.10 de l'*Acte de l'Amérique du Nord britannique* puisqu'elles se rapportent à la navigation et aux bâtiments ou navires. Il existe par conséquent un droit canadien se rapportant aux questions soulevées en l'espèce sur lequel la Cour fédéral exerce sa compétence. A mon avis, il n'est pas important que la réclamation de Yorke soit un recours en garantie. En général, les recours en garantie et les actions contre un tiers ne sont pas de simples incidents de l'action principale. Ce sont des actions indépendantes et complètes en elles-mêmes. Sur ce point, je m'en rapporte à l'arrêt *Fuller* précité, où le juge Pigeon cite l'arrêt *Banque de Montréal c. Banque Royale du Canada*[6], aux pp. 315 et 316 où le juge en chef Duff affirme:

[TRADUCTION] ... La Cour suprême de l'Ontario est compétente, en vertu des lois et des règles qui la régissent, pour connaître et juger de demandes présentées au moyen de procédures dites de mise en cause. Les demandes d'indemnisation que, par exemple, un défendeur présente contre un tiers, relativement à la réclamation dont il fait l'objet dans l'action principale peuvent être présentées et jugées dans l'action principale. Mais il n'y a aucun doute que la procédure contre le tiers est une nouvelle instance et non un simple incident de l'action principale.

A mon avis, l'affaire *Fuller* se distingue de la présente. Dans cette affaire, Foundation Company of Canada, Ltd., un entrepreneur en construction, a intenté contre Sa Majesté une action pour inexécution de contrat concernant des dommages causés par des opérations de dynamitage exécutées par un autre entrepreneur, Thomas Fuller Construction Co. (1958) Limited. Il ne fait aucun doute que Sa Majesté a été régulièrement poursuivie en Cour fédérale qui avait toute compétence pour connaître

[6] [1933] R.C.S. 311.

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Crown. The Crown then issued a third party notice claiming indemnity against the Fuller company. In so doing, it relied specifically upon the law of Ontario to support a claim based on negligence. This Court held, as did the Federal Court of Appeal and the Trial Division, that there was no law of Canada to support the jurisdiction of the Court in respect of that particular third party claim. In this respect, the case differs from the case at bar, lacking the essential element of a law of Canada to feed the jurisdiction of the Federal Court. I am satisfied that the Federal Court had jurisdiction to entertain not only the claims made by B.C. Marine and Straits against Yorke, but also the third party claims made by Yorke against Wire Rope and the direct claims made by B.C. Marine and Straits.

I now turn to the question of the liability of Wire Rope in this matter. It will be seen at once that the only connection Wire Rope had with the matters raised in these proceedings resulted from the resocketing which was done for Yorke on October 13, 1967. Whether the claims against Wire Rope sound in contract or tort, and whether they are for direct relief or indemnity, the basis for any liability upon Wire Rope must remain the same. For success against Wire Rope it must be shown that its work on the socket caused or contributed to its failure, leading to the loss of the barge. For this reason the socketing operation must be examined.

On October 13, 1967 two workmen employed by Wire Rope came to the premises of Yorke to do some resocketing at the request of Yorke. Mr. J. C. Yahemech, marine superintendent for Yorke, gave them three or four socketed towlines, the precise number is not clear, and instructed them to remove the sockets and resocket the lines using the same sockets which were then on the lines. One of the lines involved was the line which failed in this accident. Mr. Yahemech left them to their task. He returned some hours later when the job was nearly completed. The whole operation took six hours. The cost to Yorke was in the neighbourhood

de la réclamation de la demanderesse contre Sa Majesté. Sa Majesté a alors produit un «avis à la tierce partie» réclamant une indemnisation de la société Fuller. Elle alléguait alors une loi de l'Ontario pour appuyer une réclamation fondée sur une négligence. Suivant la décision de la Cour d'appel fédérale et de la Division de première instance, cette Cour a décidé qu'aucune loi du Canada ne donnait compétence à la Cour pour connaître de cette demande à la tierce partie. A cet égard, cette affaire diffère de la présente espèce puisqu'il manquait un élément essentiel, soit une loi du Canada qui attribue compétence à la Cour fédérale. Je suis convaincu que la Cour fédérale a compétence pour connaître non seulement des réclamations de B.C. Marine et Straits contre Yorke, mais aussi des réclamations de Yorke contre la tierce partie Wire Rope et des réclamations directes de B.C. Marine et Straits.

J'en viens maintenant à la question de la responsabilité de Wire Rope dans cette affaire. On voit tout de suite que le seul lien qu'a Wire Rope avec les questions soulevées dans ces poursuites vient du remboîtement de l'attache qu'elle a effectué pour le compte de Yorke le 13 octobre 1967. Que les réclamations contre Wire Rope semblent découler d'un contrat ou d'un délit, ou qu'il s'agisse de redressement direct ou d'indemnisation, le fondement de la responsabilité de Wire Rope doit rester le même. Pour réussir contre Wire Rope, il faut établir que les travaux qu'elle a effectués sur l'attache ont causé sa rupture ou y ont contribué, d'où la perte du chaland. C'est pourquoi il faut examiner l'opération d'emboîtement.

Le 13 octobre 1967, deux employés de Wire Rope sont venus chez Yorke pour remboîter des câbles à la demande de Yorke. M. J. C. Yahemech, capitaine d'armement pour Yorke, leur a présenté trois ou quatre câbles munis d'attaches, le nombre précis n'est pas certain, et leur a ordonné d'enlever les attaches et de remboîter les câbles en utilisant les mêmes attaches. Parmi ces câbles se trouvait celui qui s'est rompu dans l'accident en cause. M. Yahemech a laissé les hommes à leur tâche et est revenu quelques heures plus tard alors que le travail était presque achevé. L'opération totale a duré six heures et a coûté à Yorke environ

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of ninety dollars. When it was completed the cables, including the one used to tow the *Westport Straits* on the occasion of its loss, were left in the possession of Yorke and Wire Rope had no further part in the matter.

It was alleged that Wire Rope, for a period of something in excess of three years, had done all the resocketing for Yorke. This was not denied and both the trial judge and the Court of Appeal accepted this fact and spoke of an indefinite number of resocketings. It may be observed at this point that the only negligent resocketing alleged against Wire Rope was that of October 13, 1967 and, whatever the evidence of previous resocketings may have been in general terms, there was no evidence of any indefinite number of resocketings of this particular socket. The significance of this fact will be dealt with later.

A review of the evidence of certain of the expert metallurgists who were called by the various parties must now be made. Mr. Ian Heslop, a consulting engineer called by B.C. Marine and Straits, who has specialized in metallurgical engineering, served as a senior metallurgical engineer in industry, and has been called as an expert witness on metallurgical matters in many courts, gave evidence of having examined the socket. He found it to have numerous casting defects (shrinkage cavities and blow-holes); a brittle microstructure, whereas properly treated material would be tough and ductile; and considerable wear. He gave his opinion that the brittleness was the most significant cause of the failure, making the socket likely to fail under "shock, impact or bending loads of relatively small magnitude". He felt that the socket had been heated above 650° F. and that this had rendered the metal weak and brittle and that this was the result of resocketing. He said that this particular metal should stretch before failing and it had not done so in this accident because of its brittleness. In his view, properly treated material would have a higher breaking point and cumulative damage would result from continued reheatings without proper reheat and quenching treatment.

Another expert, called by Wire Rope, James Pearce McCulloch, a professional engineer with

quatre-vingt dix dollars. Une fois l'opération achevée, Yorke a conservé les câbles, y compris celui qui a servi à remorquer le *Westport Straits* lorsqu'il s'est perdu, et Wire Rope n'a plus joué aucun rôle dans cette affaire.

On a affirmé que, depuis plus de trois ans, Wire Rope avait fait tous les travaux de remboîtement pour Yorke. Cela n'a pas été nié, et le juge de première instance et la Cour d'appel ont admis ce fait et ont parlé d'un nombre indéfini de remboîtements. Il faut remarquer ici que la seule opération de remboîtement négligente alléguée contre Wire Rope est celle du 13 octobre 1967 et, quelle que soit la preuve générale des remboîtements antérieurs, il n'y a aucune preuve d'un nombre indéfini de remboîtements de cette attache précise. Je reviendrai plus loin sur l'importance de ce fait.

Il faut maintenant examiner le témoignage de certains des métallurgistes experts que les diverses parties ont cités. M. Ian Heslop, un ingénieur-conseil cité par B.C. Marine et Straits, spécialiste en génie métallurgique, qui a été au service de sociétés industrielles à titre d'ingénieur métallurgiste principal et qui a été cité comme témoin expert en matière de métallurgie devant plusieurs tribunaux, a affirmé avoir examiné l'attache. Il y a trouvé de nombreux défauts de coulage (grumelures et soufflures), une microstructure fragile, alors qu'un métal traité convenablement serait résistant et ductile, et beaucoup d'usure. A son avis, la fragilité était la principale cause de sa rupture, puisqu'elle rendait l'attache susceptible de se briser [TRADUCTION] «sous une secousse, un impact ou une charge de flexion relativement faible». Il estime que l'attache a été chauffée à 650 °F, ce qui a rendu le métal faible et cassant, et que cela résulte du remboîtement. Il affirme que ce métal particulier doit s'étirer avant de se rompre et que, à cause de sa fragilité, il ne l'a pas fait lors de l'accident. A son avis, un métal traité convenablement aurait une plus grande résistance, et le fait de chauffer le métal de façon soutenue sans le chauffer et le tremper comme il faut produit des dommages cumulatifs.

Wire Rope a cité un autre expert, James Pearce McCulloch, un ingénieur de carrière expert en

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high qualifications in metallurgical engineering and with broad experience in that field, gave evidence of various tests which he had made and experiments he had performed on manganese steel in an effort to determine the cause of the failure of the socket in question.

génie métallurgique et possédant une vaste expérience du domaine, qui a témoigné des divers tests qu'il a effectués et des expériences qu'il a faites sur l'acier au manganèse afin d'établir la cause de la rupture de l'attache en question.

In one experiment Mr. McCulloch fractured a manganese steel socket which had been resocketed numerous times and found a smoother fracture, with only minor porosity, than that found in the failed socket. He then heated the test socket to 900° F. and maintained it at that temperature for one and one-half hours. He had already performed tests from which he concluded that a resocketing operation would take about sixteen minutes—other evidence put the time at twenty to twenty-five minutes. The time and temperature exposure of the socket in this test was therefore substantially greater than in a resocketing. He found again a smoother fracture than that found in the failed socket and concluded that even severe heating would not produce the rough, porous, surface found in the failed socket which, he considered, had been the cause of the failure.

Dans une expérience, M. McCulloch a brisé une attache d'acier au manganèse qui avait été remboîtée à plusieurs reprises et il a trouvé une fracture plus lisse que celle qu'il a trouvée sur l'attache qui s'est rompue, et n'ayant qu'une faible porosité. Il a alors chauffé l'attache témoin à 900 °F, température qu'il a maintenue pendant une heure et demie. Il avait déjà effectué des tests d'où il avait conclu qu'une opération de remboîtement prend environ seize minutes—d'autres témoignages indiquent vingt à vingt-cinq minutes. Dans ce test, la température et la durée d'exposition étaient par conséquent considérablement plus grandes qu'au cours d'une opération de remboîtement. Il a encore une fois constaté une fracture plus lisse que celle trouvée dans l'attache rompue et il a conclu que même un chauffage à haute température ne pouvait produire la surface rugueuse, poreuse, constatée dans l'attache rompue qui, à son avis, était la cause de la rupture.

In yet a further test, he heated a manganese steel socket to 1,950° F. for one-half hour with water quenching, leading to the production of a sample of manganese steel of as high a quality as commercially possible. He heated one sample of this steel to 800° F. for an hour, another to 900° F. for one and one-half hours, and another to 1,000° F. for one and one-half hours. He then took micro-photographs of each. He found the more severe the heating the more carbide precipitation appeared, but it was of a different type than that found in the failed socket. Finally, he took another sample of steel and heated it to 1,550° F. for two hours. This temperature was too low for proper heat treating in the production of manganese steel. This steel, on cooling, produced a micro-structure similar to that in the failed socket. From this and other tests, Mr. McCulloch concluded that the embrittlement found in the failed socket was the result not of resocketing but of improper heat treatment at the time of manufacture. Other expert witnesses were called, among them one T.

Dans un autre essai, il a chauffé une attache d'acier au manganèse à 1,950 °F pendant une demi-heure et l'a trempée dans l'eau, produisant un échantillon d'acier au manganèse dont la qualité se rapprochait autant que possible de celui trouvé dans le commerce. Il a chauffé un échantillon de cet acier à 800 °F pendant une heure, un autre à 900 °F pendant une heure et demie et un autre à 1,000 °F pendant une heure et demie. Il a alors pris des microphotographies de chaque échantillon. Il a constaté que plus la température de chauffage était élevée, plus il y avait de précipitation de carbures, mais d'un type différent de celle trouvée dans l'attache rompue. Finalement, il a chauffé un autre échantillon d'acier à 1,550 °F pendant deux heures. Cette température était plus faible que celle nécessaire à la production d'acier au manganèse. Cet acier, en se refroidissant, a donné une microstructure similaire à celle trouvée dans l'attache rompue. A partir de cet essai et d'autres essais, M. McCullloch a conclu que la fragilité de l'attache rompue ne provenait pas du

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H. Williams who generally reached conclusions similar to that of McCulloch. The most helpful evidence, in my view, was that of Heslop and McCulloch.

Upon this and other evidence the trial judge seems to have concluded that the socket had become embrittled and that the embrittlement caused it to fail. He concluded as well that the socketing operation of October 13, 1967 had not caused the defect. His words on this point have been reproduced above.

In the Court of Appeal Ryan J., speaking for the Court and holding that Wire Rope was liable, said:

> I am satisfied that the loss of the barge was caused by the breaking of the defective socket, and that the break was caused by the brittleness of the socket. I also accept the trial judge's finding that the brittleness, to the extent there was brittleness, was caused by the various re-socketings to which the socket had been subjected. He also found that there had been an indefinite number of resocketings.

and later:

> I am of opinion that Wire Rope was in breach of its contract with F. M. Yorke. The trial judge found, and I, of course, accept his finding, that Wire Rope, through its servants, did not, by the re-socketing on October 13, 1967, cause the socket to become embrittled to any significant extent.

As is evident from a review of the expert evidence very briefly summarized above, there was evidence upon which the trial judge could find, as he did, that the resocketing on October 13, 1967 did not significantly embrittle the socket and cause its failure. The Court of Appeal accepted this finding and I am of the opinion that it should remain undisturbed. Both the trial judge and the Court of Appeal, however, seem to have been of the opinion that the socket failed because it had been rendered defective as a result of an indefinite number of past resocketings. Leaving aside the fact that the only occasion of resocketing pleaded against Wire Rope was that of October 13, 1967, I am of the opinion that any finding of fact that the defect in the socket was the result of an indefinite number of past resocketings cannot be sustained

remboîtement mais d'un chauffage inadéquat au moment de la fabrication. D'autres témoins experts ont été cités, dont M. T. H. Williams, qui est parvenu à des conclusions en général similaires à celles de M. McCulloch. Les témoignages les plus utiles, à mon avis, sont ceux de M. Heslop et de M. McCulloch.

A partir de ces témoignages, le juge de première instance semble avoir conclu que l'attache est devenue cassante et que cette fragilité a causé sa rupture. Il a conclu en outre que ce défaut n'est pas dû à l'opération d'emboîtement du 13 octobre 1967. J'ai déjà cité son avis à ce sujet.

En Cour d'appel, le juge Ryan, qui a rendu l'arrêt au nom de la Cour et qui a retenu la responsabilité de Wire Rope, affirme:

> Je suis convaincu que la perte du chaland a été causée par la rupture de l'attache défectueuse, rupture causée par la fragilité de ladite attache. Je suis d'accord également avec le juge de première instance lorsqu'il conclut que cette fragilité, si fragilité il y avait, était causée par les diverses réparations subies par l'attache. Je conclus aussi que le nombre de réparations effectuées est indéterminé.

et plus loin:

> A mon avis, Wire Rope a manqué aux obligations du contrat conclu avec F. M. Yorke. Le juge de première instance a conclu, et je souscris certes à sa conclusion, que Wire Rope, en la personne de ses préposés, n'avait pas, par la réparation du 13 octobre 1967, augmenté la fragilité de l'attache de façon appréciable.

Comme l'indique clairement l'examen des témoignages d'experts résumés brièvement ci-dessus, la preuve permettait au juge de première instance de conclure, comme il l'a fait, que le remboîtement effectué le 13 octobre 1967 n'a pas affaibli l'attache de manière sensible ni causé sa rupture. La Cour d'appel a accepté cette conclusion, et je suis d'avis de ne pas la modifier. Cependant, le juge de première instance et la Cour d'appel semblent d'avis que l'attache s'est rompue parce qu'elle est devenue défectueuse du fait d'un nombre indéfini d'opérations antérieures de remboîtement. Mis à part le fait que la seule opération de remboîtement invoquée contre Wire Rope est celle du 13 octobre 1967, je suis d'avis qu'une constatation de fait portant que le défaut inhérent à l'attache découle d'un nombre indéfini d'opéra-

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for the reason that there was no evidence adduced of any such "indefinite number of past resocketings" relating to this socket. A trial judge's finding based on evidence should not be rejected by an appellate court unless he has applied some incorrect principle, or made a palpable error. A finding made without evidence, however, cannot be sustained. Yahemech, who gave the instructions for the resocketing, produced such records as he had and said a new socket had been put on the line on September 20, 1966. He said that 'new' could mean new from the factory or a used socket from the company's stock. He did not know which. If the socket had been new from the factory on September 20, 1966, then it had been socketed on that occasion and resocketed on October 13, 1967. There was no evidence of any intervening resocketing and the records produced by Mr. Yahemech, while sparse, indicated that no more had occurred. If it were new only in the sense that it came from the stock of used sockets belonging to the company, then it would have been socketed on September 20, 1966 and resocketed on October 13, 1967. Doubtless—if it had been used before—it would have been socketed at least on one previous occasion. Yorke bore the burden of proof on this issue. Put at its highest, and accepting the evidence of Yahemech, the socket was socketed once and resocketed once. It may have been socketed once and resocketed twice; and it may, as well, have been resocketed more often. The only affirmative evidence, however, discloses no more than one socketing and one resocketing. All other possible operations remain in the realm of pure speculation and provide no evidence to support such a significant finding. It should also be observed that the expert evidence indicated that damage of the sort alleged here would be cumulative as a result of repeated heating and cooling and would require more of such operations than are revealed in the evidence. The totality of the evidence on this point came from Yahemech and extracts from his evidence at trial appear below:

tions antérieures de remboîtement ne peut être retenue pour le motif que l'on n'a pas fait la preuve d'un «nombre indéfini d'opérations antérieures de remboîtement» pratiquées sur cette attache. Une cour d'appel ne doit pas rejeter une conclusion du juge de première instance appuyée sur la preuve à moins qu'il ait appliqué un principe erroné ou qu'il ait commis une erreur manifeste. Cependant, une conclusion qui ne s'appuie sur aucune preuve ne peut être retenue. Yahemech, qui a donné les directives pour le remboîtement, a produit les dossiers qu'il avait et a affirmé qu'une nouvelle attache avait été emboîtée au câble le 20 septembre 1966. Il affirme que «nouvelle» peut signifier une nouvelle attache provenant de l'usine ou une attache usagée provenant des stocks de la société. Il n'en connaît pas la provenance exacte. S'il s'agissait d'une attache neuve provenant de l'usine le 20 septembre 1966, elle avait été emboîtée à cette date et remboîtée le 13 octobre 1967. Il n'y a pas de preuve de remboîtement dans l'intervalle, et les dossiers que M. Yahemech a produits, bien que vagues, indiquent qu'il n'y en a pas eu d'autres. S'il s'agissait d'une attache neuve au sens qu'elle provenait des stocks d'attaches usagées appartenant à la société, elle aurait été emboîtée le 20 septembre 1966 et remboîtée le 13 octobre 1967. Si elle avait déjà été utilisée auparavant, elle aurait certes été emboîtée au moins une fois auparavant. Sur ce point, le fardeau de la preuve incombait à Yorke. Tout au plus, si l'on accepte le témoignage de Yahemech, l'attache a été emboîtée une fois et remboîtée deux fois. Elle peut avoir été emboîtée une fois et remboîtée deux fois; et elle peut très bien avoir été remboîtée plus souvent. Cependant, la seule preuve positive ne relève qu'un seul emboîtement et un seul remboîtement. Toutes les autres opérations possibles restent dans le domaine de la spéculation pure et n'apportent aucune preuve qui appuie une conclusion si importante. Il faut remarquer en outre que les témoignages des experts indiquent que le dommage invoqué ici s'accumulerait suite à des chauffages et des refroidissements répétés et exigerait que ces opérations soient plus nombreuses que celles que la preuve indique. Yahemech a fourni toute la preuve sur ce point, et les extraits qui suivent sont tirés de son témoignage:

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THE COURT: Let's confine it to Exhibit 13 because that is what is relevant. Can you tell from that where the sockets came from?

A. No, I can't tell.

MR. MERRITT: Q. You can't say, however, that you didn't supply the sockets on every occasion?

A. No, I can't.

THE COURT: Just on this point, does that indicate how many times this particular socket, Exhibit 3, had been resocketed?

A. No, your honour.

Q. Well, it says resocketing on two or three occasions but maybe I am not reading it correctly. It says resocketed October the 19th, '65, resocketed 1st June of 1966. Resocketed September 26th, '67. Inspection tags, is that it—September the 1st, '67. Resocketed October the 13th, '67. What do all those notations mean in that?

A. They would be times that that particular socket would have been taken off and reinstalled. There was no way of knowing whether that socket after it had been cut off that portion of the line would have been put directly on that portion of the line. If they cut three sockets out and cleaned them out and then went to put them back they wouldn't necessarily go back on—I have no way of knowing that they went back on—

THE COURT: This was referring to a socket, a particular socket on Exhibit 13, is it not?

A. It refers that that is the location of the socket but whether the socketing crew cut the socket off of say the one next to the towline and then reinstalled it on the end of the pennant, I would have no way of knowing. They were done as a group.

THE COURT: What good is a record if it isn't referring to a particular socket. Isn't that the purpose of that?

A. The record was basically referring to the resocketing, that it had been resocketed on the line in that location.

Q. But there is no record of whether, Exhibit 3, let's talk about it, was resocketed three or four—four times during the period October the 19th to the 13th of October, 1967?

A. No, the sockets as such were not—

Q. Is there any way you can tell on any of your records whether Exhibit 3 was resocketed before?

[TRADUCTION] LA COUR: Tenons nous-en à la pièce 13 qui est pertinente ici. Pouvez-vous dire à partir de ce document d'où provenaient les attaches?

R. Non, je ne pourrais pas dire.

Me MERRITT: Q. Vous ne pouvez pas dire, cependant, que vous n'avez pas fourni les attaches à chaque occasion?

R. Je ne peux pas le dire.

LA COUR: Sur ce point, est-ce que ce dossier indique combien de fois cette attache précise, la pièce 3, a été remboîtée?

R. Non, Votre Seigneurie.

Q. Bien, le dossier dit remboîtement à deux ou trois occasions mais peut-être que je ne lis pas bien. On lit remboîté le 19 octobre '65, remboîté le 1er juin 1966. Remboîté le 26 septembre '67. Papillon d'inspection, c'est bien ça—le 1er septembre '67. Remboîté le 13 octobre '67. Que signifient toutes ces indications?

R. A certains moments cette attache particulière a pu être enlevée et replacée. Il était impossible de savoir si cette attache, une fois enlevée de cette partie du câble, aurait pu y être replacée directement. S'ils enlèvent trois attaches, les vident et les remettent en place, ils ne les remettraient pas nécessairement sur—je ne peux absolument pas savoir qu'elles sont remises sur—

LA COUR: Ceci indiquait une attache, une attache précise sur la pièce 13 n'est-ce pas?

R. Ca indique que c'est l'endroit de l'attache, mais est-ce que l'équipe d'emboîtement a enlevé l'attache, disons, du câble voisin du câble de remorquage et l'a remis en place à l'extrémité du rapporteur, je n'ai aucun moyen de le savoir. Elles étaient faites en groupe.

LA COUR: En quoi un dossier peut-il être utile s'il ne mentionne pas une attache précise? N'est-ce pas son but?

R. Le dossier se rapportait d'abord au remboîtement, qu'elle avait été remboîtée au câble à cet endroit.

Q. Mais il n'y a aucune indication à savoir si la pièce 3, prenons celle-là, a été remboîtée trois ou quatre—quatre fois au cours de la période du 19 octobre au 13 octobre 1967?

R. Non, les attaches elles-mêmes n'ont pas été—

Q. Pouvez-vous dire d'après vos dossiers si la pièce 3 a été remboîtée avant?

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A. No, there is no way I can tell for certain.

Q. Do you know how many times it had been resocketed?

A. No, I do not.

Q. Do you know how old it is?

A. No, I do not.

Q. Does it look old to you?

A. It looks the way all sockets look when they are placed in use for a short time.

Q. From your experience would you say it had been resocketed a number of times prior to the 13th of October 1967?

A. I could only guess, I would assume it had.

Q. Well, from your experience, you are not an amateur like the rest of us.

A. I couldn't say, my lord, how many times it had been resocketed.

Q. But it was done more than once?

A. I would say yes, more than once.

Q. You have no record to tell you how many times?

A. No.

MR. MERRITT: My lord, may I just follow up on that a bit.

Q. So that Exhibit 13 indicates when an operation of resocketing or inspection was done but it gives no indication at all as to the history of any particular socket, right?

A. Yes.

Q. The answer is it gives no such indication?

A. Yes.

Q. Now, in fact in answer to his lordship you said you thought that it had been resocketed before but I think you don't hold yourself out as an expert in that field, do you?

A. Resocketing, no.

Q. Or in identifying the results of resocketing?

A. No.

Q. It may only have been resocketed once before for all you know.

A. Yes.

and later:

THE COURT: I thought you said before you didn't know whether that had been done by you, been

R. Non, je ne peux pas le dire avec certitude.

Q. Savez-vous combien de fois elle a été remboîtée?

R. Je ne le sais pas.

Q. Savez-vous si elle est bien vieille?

R. Je ne le sais pas.

Q. Est-ce qu'elle vous semble vieille?

R. Elle ressemble à toutes les attaches qui sont utilisées pendant une courte période.

Q. D'après votre expérience personnelle, diriez-vous qu'elle a été remboîtée plusieurs fois avant le 13 octobre 1967?

R. Je pourrais seulement essayer de deviner, je dirais que oui.

Q. Bien, d'après votre expérience, vous n'êtes pas un amateur comme nous tous.

R. Je ne saurais dire, Votre Seigneurie, combien de fois elle a été remboîtée.

Q. Mais elle l'a été plus d'une fois?

R. Je dirais que oui, plus d'une fois.

Q. Vous n'avez aucun document qui vous indique combien de fois?

R. Non.

Me MERRITT: Votre Seigneurie, est-ce que je peux poursuivre un peu là-dessus?

Q. Ainsi, cette pièce 13 indique quand a été faite une opération de remboîtement ou une inspection, mais elle n'indique pas du tout les usages qu'il a été fait dans le passé d'une attache précise, c'est bien cela?

R. Oui.

Q. Vous répondez qu'elle ne l'indique pas?

R. Oui.

Q. Maintenant, en fait, en réponse à la Cour, vous avez dit que vous pensiez qu'elle avait été remboîtée avant, mais je crois que vous ne vous présentez pas comme un expert dans ce domaine, est-ce exact?

R. En remboîtement, non.

Q. Ou en identifiant les résultats du remboîtement?

R. Non.

Q. Pour autant que vous sachiez, elle peut n'avoir été remboîtée qu'une seule fois auparavant?

R. Oui.

plus loin:

LA COUR: Je croyais que vous aviez dit avant que vous ne saviez pas si cela a été fait par vous, fait par

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done by Wire Rope before or at all, resocketed before by Wire Rope or at all. I think Mr. Merritt finally asked you a question, you weren't sure whether it had been done once or more than once or at all.

A. I thought I had said that it looked as though it had been done more than once. I couldn't say for certain.

THE COURT: Or by whom? What is the correct answer anyway? Do you know whether Exhibit 3 first of all had been resocketed before the 13th of October 1967?

A. I can't say for a certainty.

Q. And it follows that you don't know whether Wire Rope socketed it, that is the end of the answer.

MR. FORBES: Well, in fact though didn't Wire Rope, that is Wire Rope Industries of Canada (1966) Ltd. do all your resocketing of the towlines while you were there?

A. Yes.

THE COURT: Well, the answer he had given just a minute ago was that Wire Rope had resocketed these same sockets before. Now he says "I don't know whether this Exhibit 3 had been resocketed before, at all or not." Now, two answers can't hang together, can they?

MR. FORBES: He is not my witness, my lord.

THE COURT: No, I know. I just want to know what the correct answer is, or do you know? The correct answer is you don't know whether it has been resocketed before or not?

A. There is no identifying marks on it, my lord, so I can't say for certainty.

THE COURT: The only thing you know is that at the time Wire Rope did your resocketing work in the main, is that a fair statement?

A. Yes. Perhaps I could clarify to the court some of the procedure involved. The reason I am uncertain is that we would take a socket to Wire Rope Industries and say, when we order a new line, would you put this socket on the towline. I would not be present when the towline was resocketed. I would assume that they would have taken the same socket. I would have no way of knowing whether they had used the socket we had actually given them or not.

Wire Rope avant ou si cela a déjà été fait, remboîté avant par Wire Rope ou déjà remboîté. Je pense que Me Merritt à la fin vous a posé une question, vous n'étiez pas certain si cela a été fait une fois ou plus d'une fois ou si cela a déjà été fait.

R. Je croyais avoir dit que cela semblait avoir été fait plus d'une fois, je ne pourrais en être sûr.

LA COUR: Ou par qui? De toute façon, quelle est la bonne réponse? Savez-vous d'abord si la pièce 3 avait été remboîtée avant le 13 octobre 1967?

R. Je ne peux l'affirmer avec certitude.

Q. Et il s'ensuit que vous ne savez pas si Wire Rope l'a emboîtée, c'est toute la réponse.

Me FORBES: Mais en fait, est-ce que Wire Rope, c'est-à-dire Wire Rope Industries of Canada (1966) Ltd., n'a pas fait tous vos travaux de remboîtement de câble pendant que vous étiez là?

R. Oui.

LA COUR: Mais il vient juste de répondre il y a une minute que Wire Rope avait remboîté ces mêmes attaches auparavant. Maintenant il dit «Je ne sais pas si cette pièce 3 avait déjà été remboîtée avant.» Or, il ne peut y avoir deux réponses, n'est-ce pas?

Me FORBES: Il n'est pas mon témoin, Votre Seigneurie.

LA COUR: Non, je sais. Je veux seulement savoir quelle est la bonne réponse, à moins que vous le sachiez. La bonne réponse est que vous ne savez pas si elle a été remboîtée auparavant?

R. Elle ne porte aucune marque d'identification, Votre Seigneurie, alors je ne peux en être sûr.

LA COUR: Tout ce que vous savez, c'est qu'à cette époque, Wire Rope faisait en substance vos travaux de remboîtement, est-ce exact?

R. Oui. Je peux peut-être éclairer la cour sur une partie de la procédure en jeu. Je ne suis pas certain parce que nous apportons une attache chez Wire Rope Industries et disons, lorsque nous commandons un nouveau câble, leur demandons d'emboîter cette attache au câble. Le câble a été remboîté en mon absence. Je prends pour acquis qu'ils ont utilisé la même attache. Je n'ai aucune façon de savoir s'ils ont ou non utilisé l'attache que nous leur avons remise.

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Q. Well, let's just confine it to Exhibit 3. The answer is you don't know whether that has been resocketed before or not?

A. No.

Accepting, as I have done, that the resocketing operation of October 13, 1967 did not cause the failure of the socket and that no indefinite number of past resocketings has been shown, the question arises: What then did cause the failure? While it is not necessary to consider this question in order to dispose of the issue of Wire Rope's liability, an answer is required in considering the position of Yorke vis-à-vis B.C. Marine and Straits in order to determine whether or not Yorke exercised due diligence in furnishing a seaworthy tug in accordance with its contract of towage.

The conclusion that the socket was defective is, in my opinion, inescapable. The mere failure in use would not necessarily establish that fact, but it must be observed here that a sound manganese steel socket is the strongest part of a towline of this nature and therefore should not be the first part to fail. The line itself, when subjected to excessive strain, is expected to fail before the socket. It may well be that in this case unusual and heavy strains were imposed on the socket, but it failed before the line, which remained intact. Such failure is strong evidence of a defect, particularly when the evidence also indicated that it was not the socket itself which was snagged on the bottom, but a part of the line in the vicinity of the socket.

A review of the evidence of Mr. McCulloch indicates that the socket was defective because of improper heating and cooling in its original manufacture. This evidence received some support in the evidence of Mr. Heslop, who found and described casting defects in the socket which would also be attributable to its original manufacture. Mr. Heslop mentioned that on examination the socket showed signs of substantial wear, but he did not consider that such wear was a significant factor in its failure. I am of the opinion that this socket failed in use because it was defective from the time of its manufacture due to improper treatment in

Q. Tenons-nous en à la pièce 3. Vous répondez que vous ne savez pas si celle-ci a été remboîtée auparavant?

R. Non.

Si l'on accepte, comme je l'ai fait, que l'opération de remboîtement du 13 octobre 1967 n'a pas causé la rupture de l'attache et qu'un nombre indéfini d'opérations antérieures de remboîtement n'est pas établi, la question se pose: qu'est-ce qui a alors causé la rupture? Même s'il n'est pas nécessaire d'examiner cette question pour résoudre la question de la responsabilité de Wire Rope, il faut y répondre pour examiner la position de Yorke vis-à-vis de B.C. Marine et Straits afin d'établir si Yorke a exercé la diligence raisonnable pour fournir un remorqueur en bon état de navigabilité conformément à son contrat de remorquage.

A mon avis, il faut nécessairement conclure que l'attache était défectueuse. La simple rupture en cours d'usage ne devrait pas établir nécessairement ce fait, mais il faut remarquer ici qu'une attache d'acier au manganèse en bon état est la partie la plus résistante d'un câble de ce genre et, par conséquent, ne devrait pas être la première partie à se rompre. On s'attend à ce que le câble lui-même, lorsque soumis à une tension trop forte, se rompe avant l'attache. Il se peut que dans le présent cas, l'attache ait été soumise à des tensions fortes et inhabituelles, mais elle s'est rompue avant le câble qui est resté intact. Cette rupture est la preuve tangible d'un défaut, surtout lorsque la preuve indique aussi que ce n'est pas l'attache elle-même qui s'est coincée au fond, mais une partie du câble près de l'attache.

Un examen du témoignage de M. McCulloch indique que l'attache était défectueuse à cause d'un chauffage et d'un refroidissement inadéquats au cours de sa fabrication. Ce témoignage a reçu l'appui du témoignage de M. Heslop qui a trouvé dans l'attache et décrit des défauts de coulage qui seraient également imputables à sa fabrication originale. M. Heslop a mentionné qu'à l'examen, l'attache montrait des signes d'usure considérable, mais il n'estime pas que cette usure soit un facteur déterminant de sa rupture. Je suis d'avis que cette attache s'est rompue en cours d'utilisation parce qu'elle était défectueuse depuis l'époque de sa

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the manufacturing process. In this, I am accepting the evidence of Mr. McCulloch supported to some extent by Mr. Heslop. In my view, the fair conclusion on the evidence is that the most probable cause of porosity and embrittlement which caused the failure was improper heat treating in manufacture. The appeals of Wire Rope, therefore, must be allowed.

It now falls to consider the liability of Yorke in the main action brought by B.C. Marine and Straits. Yorke had entered into a contract of towage with Straits. This contract was evidenced in writing in the form of a letter from Yorke to Straits, which provided:

January 24th, 1968.

Mr. Nick Malysh,
Straits Towing Limited,
2215 Commissioner Street,
Vancouver 6, B.C.

Dear Nick:

Confirming our recent telephone conversation we are pleased to charter you our "Lorne Yorke" for barge towing under the following conditions:

1. The rate to be $684.00 per day.
2. Your firm to supply, employ, and pay for the Mate on the vessel.
3. That Yorke be held harmless by Straits in connection with any claim or damage arising out of any advice or instructions received from your Mate.
4. The Standard Towing Conditions of the B.C. Tugboat Owners' Association to apply.
5. The Home Trade Class III certificate shall govern her area of charter.
6. Charges by crew personnel because of performing Duties other than an Officer or Unlicensed Personnel are for the account of Straits.
7. Navigation overtime is for the account of Yorke unless such amount is excessive and inevitable on the type of towing that is being performed.

fabrication à cause d'un traitement inadéquat au cours de sa fabrication. J'accepte donc le témoignage de M. McCulloch que M. Heslop appuie dans une certaine mesure. A mon avis, la conclusion qui s'impose de la preuve est que le traitement de chaleur inadéquat à l'usine est la cause la plus probable de la porosité et de la fragilité à l'origine de la rupture. Par conséquent, je suis d'avis d'accueillir les pourvois de Wire Rope.

Il convient maintenant d'examiner la responsabilité de Yorke dans l'action principale intentée par B.C. Marine et Straits. Yorke a conclu un contrat de touage avec Straits. Ce contrat a été reconnu par écrit dans une lettre de Yorke à Straits qui se lit comme suit:

[TRADUCTION] Le 24 janvier 1968

M. Nick Malysh
Straits Towing Limited
2215, rue Commissioner
Vancouver 6 (C.-B.)

Cher Nick,

Conformément à notre récente conversation téléphonique, nous avons le plaisir de vous faire savoir que nous consentons à l'affrètement par vous de notre «Lorne Yorke» pour remorquer le chaland, et ce sous réserve des modalités suivantes:

1. Le taux journalier de location sera de $684.00.
2. Votre compagnie fournira, engagera et rétribuera le second du navire.
3. Straits tiendra Yorke à couvert de toute responsabilité à l'égard de toute action ou de tout préjudice découlant des conseils et instructions reçus du second engagé par vous.
4. Les normes de remorquage de la «B.C. Towboat Owners' Association» (Association des propriétaires de remorquages de la Colombie-Britannique) s'appliqueront.
5. Le certificat de catégorie 3 du commerce intérieur régira le secteur d'affrètement.
6. Les frais d'équipage occasionnés par l'accomplissement des tâches, autres que ceux relatifs à un officier ou aux employés non brevetés, seront à la charge de Straits.
7. Le temps supplémentaire de navigation sera à la charge de Yorke, sauf si le montant en est excessif et cependant inévitable vu la sorte de remorquage à effectuer.

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Yours very truly,

F. M. YORKE & SON LIMITED
"Walter Nezil"

Walter Nezil
Chief Despatcher

Sincèrement vôtre,

F. M. YORKE & SON LIMITED
(signé) Walter Nezil,

«Walter Nezil»
Répartiteur en chef

The standard towing conditions of the B.C. Tugboat Owners' Association made applicable to this contract by paragraph 4 of the contractual letter were contained in Exhibit 23, a rate book of the Association. For the purposes of this case the significant term is expressed in these words:

It is a term of all towing contracts, written or verbal, that (providing the tugboat owner uses due diligence to make and keep the tugboat seaworthy) the towboat owner, its servants or agents are not to be liable for loss or damage to the tow or its contents, howsoever caused.

Yorke will be liable then to B.C. Marine or Straits only if the *Lorne Yorke*, because of a failure by Yorke to exercise due diligence, was not seaworthy when it set out upon the voyage which led to the accident and if the loss was caused by the lack of seaworthiness.

This proposition was accepted by B.C. Marine and Straits as the following extract from their factum in this Court shows. Paragraph 1 on page 18 of the factum provides:

1. The Federal Court of Appeal and the learned Trial Judge did not err in finding that the Appellant F. M. Yorke & Son Limited was liable to the Respondent Straits Towing Ltd. for breach of its contract with the Respondent Straits, by failing to exercise due diligence to make and keep the tug "LORNE YORKE" seaworthy.

and on page 19, in paragraph 3, the following appears:

3. The liability of F. M. Yorke & Son Limited to Straits Towing Ltd. for breach of its contractual obligations with respect to the seaworthiness of the tug "LORNE YORKE" and its towing gear is for damages in the amount of the value of the lost barge "WESTPORT STRAITS", and any supposed ambiguity in the judgments below on this point should be resolved.

Les normes de remorquage de la B.C. Tugboat Owners' Association, que les parties ont convenu d'appliquer au contrat aux termes du paragraphe 4 de la lettre, se retrouvent à la pièce 23, un cahier des tarifs de l'Association. La clause qui s'applique en l'espèce se lit comme suit:

[TRADUCTION] Tous les contrats de remorquage qu'ils soient écrits ou verbaux, comporteront une clause exonératoire mettant le propriétaire du remorqueur, ses préposés ou représentants à couvert de toute responsabilité pour toute perte ou tout dommage relatifs au bâtiment remorqué et à sa cargaison, pourvu que le propriétaire du remorqueur exerce toute la diligence nécessaire pour mettre et maintenir ce dernier en état de navigabilité.

Yorke ne sera alors responsable envers B.C. Marine ou Straits que si le *Lorne Yorke*, faute par Yorke d'avoir exercé toute la diligence raisonnable, n'était pas en bon état de navigabilité lorsqu'il a entrepris le voyage qui a conduit à l'accident, et si la perte est imputable au mauvais état de navigabilité.

B.C. Marine et Straits ont admis cette proposition, comme l'indique l'extrait suivant de leur mémoire devant cette Cour. Le paragraphe 1 à la page 18 du mémoire se lit comme suit:

[TRADUCTION] 1. La Cour d'appel fédérale et le savant juge de première instance ont conclu à bon droit que l'appelante F.M. Yorke & Son Limited était responsable envers l'intimée Straits Towing Ltd. pour inexécution de son contrat avec l'intimée Straits, parce qu'elle n'a pas exercé toute la diligence raisonnable pour mettre et maintenir le remorqueur «LORNE YORKE» en bon état de navigabilité.

et en page 19, le paragraphe 3 se lit comme suit:

[TRADUCTION] 3. La responsabilité de F. M. Yorke & Son Limited à l'égard de Straits Towing Ltd. pour inexécution de ses obligations contractuelles relativement au bon état de navigabilité du remorqueur «LORNE YORKE» et de son équipement de remorquage s'étend aux dommages-intérêts d'un montant égal à la valeur du chaland perdu «WESTPORT STRAITS», et il y a lieu de dissiper toute ambiguïté possible dans les jugements des cours d'instance inférieure sur ce point.

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It should also be noted that before this Court counsel for B.C. Marine and Straits disclaimed any assertion of negligence in seamanship and navigation and placed its whole case against Yorke on an alleged failure to use due diligence in providing a seaworthy tug.

The failure alleged against Yorke is that it suffered Wire Rope to mistreat the manganese steel socket in the resocketing procedure on October 13, 1967. This, it is said, weakened the socket and rendered the tug unseaworthy and finally caused the loss. The burden of proving due diligence rested upon Yorke. This burden could not be discharged by merely showing that it contracted out certain necessary work to an independent contractor, however reliable and skilled it may have been. Yorke, it was argued, instructed or permitted Wire Rope, on October 13, 1967 when the resocketing was done, to put back upon the towline a used socket. In doing so, it knew or ought to have known that the socket had been used and was worn, that it had been resocketed in the past, and that because of alleged repeated heating the socket had become, or might well have become, damaged. The exercise of due diligence would have required more in this matter, including the use of a new socket which, according to the evidence, would have cost sixteen dollars.

As I have already indicated, the case against Wire Rope has failed, Yorke not having shown that Wire Rope rendered the socket defective in the resocketing operation. This fact, however, is not decisive in favour of Yorke in its defence against the claims of B.C. Marine and Straits. Against Wire Rope, Yorke bore the burden of proving negligence. This it failed to do. As against B.C. Marine and Straits, however, it must show due diligence in making the tugboat seaworthy and the fact that Wire Rope has been exonerated does not by itself relieve Yorke, for the evidence shows that whatever may have been the cause the socket was defective and, in the circumstances of this case, its use rendered the *Lorne Yorke* unseaworthy.

Il faut souligner en outre que devant cette Cour, l'avocat de B.C. Marine et Straits s'est désisté des allégations de négligence dans la manœuvre et la navigation pour ne plus invoquer contre Yorke que l'omission d'exercer toute la diligence raisonnable pour fournir un remorqueur en bon état de navigabilité.

La négligence invoquée contre Yorke est d'avoir permis que Wire Rope endommage l'attache d'acier au manganèse au cours de l'opération de remboîtement le 13 octobre 1976. On dit que cela a affaibli l'attache, a rendu le remorqueur en mauvais état de navigabilité et, finalement, a causé la perte. Yorke a le fardeau d'établir qu'elle a exercé diligence raisonnable. Elle ne peut se dégager de ce fardeau simplement en démontrant qu'elle a confié l'exécution de certains travaux nécessaires à un entrepreneur indépendant, si digne de confiance et si habile soit-il. On plaide que Yorke a ordonné à Wire Rope ou lui a permis, lorsque le remboîtement a été fait le 13 octobre 1967, de remettre une attache usagée sur le câble. Ce faisant, elle savait ou aurait dû savoir que l'attache avait déjà servi et qu'elle était usée, qu'elle avait été remboîtée auparavant et que, du fait de présumés chauffages répétés, l'attache était endommagée ou pouvait bien l'être. L'exercice d'une diligence raisonnable exigeait de faire plus à cet égard, y compris l'utilisation d'une nouvelle attache qui, suivant la preuve, aurait coûté seize dollars.

Comme je l'ai déjà indiqué, l'action contre Wire Rope est rejetée, puisque Yorke n'a pas établi que Wire Rope a rendu l'attache défectueuse au cours de l'opération de remboîtement. Ce fait, cependant, ne permet pas d'accueillir la défense de Yorke contre les réclamations de B. C. Marine et Straits. Contre Wire Rope, Yorke avait le fardeau d'établir la négligence. Elle n'a pas réussi à le faire. Contre B. C. Marine et Straits, cependant, elle doit établir qu'elle a exercé une diligence raisonnable pour fournir un remorqueur en bon état de navigabilité, et, en soi, le fait que Wire Rope ait été exonérée ne dégage pas Yorke, puisque la preuve indique que, quelle qu'en ait été la cause, l'attache était défectueuse et, dans les circonstances de l'espèce, son utilisation a fait que le *Lorne Yorke* n'était pas en bon état de navigabilité.

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The *Carriage of Goods by Water Act,* R.S.C. 1970, c. C-15, and the *Hague Rules* do not apply to this case. However, the principles enunciated in the many cases decided under the Act and the Rules dealing with the obligation of a shipowner to exercise due diligence to make his vessel seaworthy and the consequences of a failure to do so are clearly applicable to the case at bar because of the contractual provision referred to above. The similarity in the obligations assumed by Yorke and those set out in the *Carriage of Goods by Water Act* and the *Hague Rules* may be shown by a reference to Article III of the Schedule to the Act, which is virtually identical to the provisions of the *Hague Rules:*

La *Loi sur le transport des marchandises par eau*, S.R.C. 1970, chap. C-15, et les *Règles de La Haye* ne s'appliquent pas en l'espèce. Cependant, les principes énoncés dans les nombreuses décisions rendues en vertu de la Loi et des Règles traitent de l'obligation du propriétaire d'un navire d'exercer une diligence raisonnabe pour mettre le navire en état de navigabilité et des conséquences de son omission de le faire, s'appliquent clairement à l'espèce étant donné les dispositions contractuelles mentionnées ci-dessus. On peut montrer la similitude des obligations que Yorke a assumées avec celles prévues à la *Loi sur le transport des marchandises par eau* et aux *Règles de La Haye* en se référant à l'Article III de l'Annexe à la Loi, qui est pratiquement identique aux dispositions des *Règles de La Haye*:

*Article III*

*Responsibilities and Liabilities*

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(*a*) make the ship seaworthy;

*Article III*

*Responsabilités et obligations*

1. Le transporteur sera tenu avant et au début du voyage d'exercer une diligence raisonnable pour:

*a*) mettre le navire en état de navigabilité;

Generally, the obligation of a tugboat owner upon entering into a contract of towage is expressed in Halsbury's *Laws of England*, 3rd ed., vol. 35, at p. 589, para. 869:

In an ordinary contract of towage the owner of the tug contracts that the tug shall be efficient for the purpose for which she is employed, and that her crew, tackle and equipment shall be equal to the work to be accomplished, in the weather and under the circumstances reasonably to be expected. There is a warranty implied in such a contract that at the outset the crew, tackle and equipment are equal to the work to be accomplished in circumstances reasonably to be expected, and there is an implied obligation that thereafter competence skill and best endeavours shall be used in doing the work.

Généralement, l'obligation du propriétaire d'un remorqueur qui conclut un contrat de touage est énoncée comme suit à l'ouvrage de Halsbury, *Laws of England*, 3e éd., t. 35, à la p. 589, par. 869:

[TRADUCTION] Dans un contrat ordinaire de touage, le propriétaire du remorqueur s'engage à ce que le remorqueur soit capable d'accomplir la tâche pour laquelle il est affrété, et que son équipage et son équipement soient à la hauteur de la tâche à accomplir, dans les conditions atmosphériques et les circonstances qu'on peut raisonnablement prévoir. Ce contrat comporte une garantie implicite qu'au départ, l'équipage et l'équipement sont à la hauteur de la tâche à exécuter dans les circonstances raisonnablement prévisibles; il comporte en outre l'obligation implicite que par la suite, la compétence, l'adresse et les meilleurs efforts seront utilisés pour accomplir cette tâche.

In the case at bar, however, the inclusion in the towage contract of the provisions excerpted above replaced any implied warranty in this respect and protects Yorke from failures in this regard and from liability for damage, however caused, where

En l'espèce, cependant, l'inclusion, dans le contrat de touage, des dispositions précitées a remplacé toute garantie implicite sur ce point et protège Yorke des manquements à cet égard et de la responsabilité des dommages, quelle qu'en soit la

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it can show that it has exercised due diligence to make the tugboat seaworthy.

The concepts of due diligence and seaworthiness have been discussed in many cases. The leading case on the subject in this Court is *Charles Goodfellow Lumber Sales Limited v. Borromée Verreault, Captain Fernand Hovington and Verreault Navigation Inc.*[7] While this was a case in which the *Carriage of Goods by Water Act* applied, the reasoning employed by Ritchie J., who wrote the judgment of the Court, is applicable to the construction of the contractual provision in issue here. At pp. 535-6, he said:

> In this regard the first question to be determined is whether or not the evidence discloses that the *Claudette V* was unseaworthy.
>
> The test of seaworthiness most frequently adopted is to be found in the judgment of Lord Herschell in *Gilroy Sons & Co.* v. *Price & Co.*, where he said:
>
> > That the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic, or in performing whatever is the voyage to be performed.

He found the ship in that case was unseaworthy and then went on to consider, at pp. 540-1, the question of due diligence. He said:

> Where the ship is found to have been unseaworthy the ship owner is seized with the burden of proving that he exercised due diligence to make her so, if he is to escape liability. When the *Maxine Footwear* case, *supra*, was heard in this Court, a dissenting judgment was delivered by Mr. Justice Cartwright (as he then was). The dissenting reasons for judgment were affirmed in the Privy Council and in the course of them Mr. Justice Cartwright adopted the following definition of the due diligence required by art. III, Rule 1:
>
> > 'Due diligence' seems to be equivalent to reasonable diligence, having regard to the circumstances known, or fairly to be expected, and to the nature of the voyage, and the cargo to be carried. It will suffice to satisfy the condition if such diligence has been exercised down to the sailing from the loading port. But

[7] [1971] S.C.R. 522.

cause, si elle peut établir qu'elle a exercé la diligence raisonnable pour mettre le remorqueur en état de navigabilité.

Les concepts de la diligence raisonnable et du bon état de navigabilité ont été analysés dans plusieurs décisions. Le principal arrêt de cette Cour à ce sujet est *Charles Goodfellow Lumber Sales Limited c. Borromée Verreault, Capitaine Fernand Hovington et Verreault Navigation Inc.*[7] Même si la *Loi sur le transport des marchandises par eau* s'appliquait dans cette affaire, les motifs du juge Ritchie, qui a rendu l'arrêt de la Cour, s'appliquent à l'interprétation de la disposition contractuelle à l'étude en l'espèce. Il affirme, aux pp. 535 et 536:

> Sur ce point, il faut d'abord déterminer si oui ou non la preuve révèle que le *Claudette V* n'était pas en bon état de navigabilité.
>
> Le critère de la navigabilité le plus fréquemment adopté est énoncé par Lord Herschell dans le jugement qu'il a rendu dans *Gilroy Sons & Co.* v. *Price & Co.*, où il dit:
>
> > [TRADUCTION] Il faut que le navire soit en état d'affronter tous les périls de la mer qu'un navire de ce genre, ainsi chargé, peut raisonnablement être susceptible de rencontrer en traversant l'Atlantique ou en effectuant tout autre voyage.

Il a conclu que le navire en l'espèce n'était pas en bon état de navigabilité et il a ensuite examiné la question de la diligence raisonnable. Aux pp. 540 et 541, il affirme:

> Si l'on conclut que le navire n'était pas en bon état de navigabilité, il incombe au propriétaire du navire de prouver qu'il a exercé une diligence raisonnable à cet égard s'il veut se libérer. Quand cette Cour a entendu l'affaire *Maxime Footwear* [*sic*] (précitée), M. le Juge Cartwright (alors juge puîné) a prononcé un jugement dissident. Dans ses motifs, que le Conseil privé a confirmés, M. le Juge Cartwright a adopté la définition suivante de la diligence raisonnable requise par la règle 1 de l'art. III:
>
> > [TRADUCTION] La «diligence raisonnable» semble être l'équivalent d'une diligence normale, compte tenu des circonstances connues ou raisonnablement prévisibles, de la nature du voyage et de la cargaison. Il suffit que cette diligence ait été exercée jusqu'au départ du port de chargement. Toutefois, l'état du navire à ce

[7] [1971] R.C.S. 522.

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the fitness of the ship at that time must be considered with reference to the cargo, and to the intended course of the voyage, and the burden is upon the shipowner to establish that there has been diligence to make her fit.

It is not enough to satisfy the condition that the shipowner has been personally diligent, as by employing competent men to do the work. The condition requires that diligence to make her fit shall, in fact, have been exercised, by the shipowner himself, or by those whom he employs for the purpose. The shipowner 'is responsible for any shortcoming of his agents or subordinates in making the steamer seaworthy at commencement of the voyage for the transportation of the particular cargo.' (*Per* Brown Dist. J. in *The Frey* (1899), 92 F. 667).

'The obligation to make a ship seaworthy is personal to the owners, whether or not they entrust the performance of that obligation to experts, servants or agents.' (*Per* Lord Wright in *Northumbrian Shipping Company Limited v. E. Timm and Son, Limited,* [1939] A.C. 397 at 403, [1939] 2 All E.R. 648). If such experts, servants or agents fail to exercise due diligence to make her seaworthy the owners are liable under Art. III, r. 1 of the Rules.

The burden of proving the exercise of due diligence which is placed upon the carrier under the provisions of art. IV(1) can only be discharged by affirmative proof that due diligence was exercised to make the ship seaworthy.

The *Goodfellow* case and the authorities cited in it conveniently state the law upon this question and, in addition, several other cases of high authority have declared and illustrated the principles involved. They include *Maxine Footwear Company Ltd. et al. v. Canadian Government Merchant Marine Ltd.*[8], in which see particularly dissenting reasons of Cartwright J. later affirmed in the Privy Council; *Western Canada Steamship Company Limited v. Canadian Commercial Corporation and Others*[9]; *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd.*, ("*Muncaster*

[8] [1957] S.C.R. 801.
[9] [1960] S.C.R. 632.

moment-là doit être considéré en fonction de la cargaison et de l'itinéraire du voyage projeté et il incombe au propriétaire du navire de montrer qu'il a exercé une diligence raisonnable pour mettre son bâtiment en bon état.

Il ne suffit pas que le propriétaire du navire ait été personnellement diligent, par exemple en engageant des hommes compétents pour faire le travail. Il faut que la diligence pour mettre le navire en bon état ait été exercée, en fait, par le propriétaire du navire lui-même ou par ceux qu'il a engagés à cette fin. Le propriétaire du navire est «responsable de tout manquement de la part de ses agents ou subalternes dans la mise en état de navigabilité du navire au commencement du voyage pour le transport de la cargaison particulière». (Le Juge de district Brown dans *The Frey* (1899), 92 F. 667).

«L'obligation de mettre le navire en bon état de navigabilité revient personnellement aux propriétaires, qu'ils en confient ou non l'exécution à des experts, des employés ou des agents.» (Lord Wright dans *Northumbrian Shipping Company Limited v. E. Timm and Son, Limited*, [1939] A.C. 397, à la page 403, [1939] 2 All E.R. 648). Si ces experts, employés ou agents n'exercent pas une diligence raisonnable pour mettre le navire en bon état de navigabilité, les propriétaires sont responsables aux termes de la règle 1 de l'Article III des Règles.

Le voiturier à qui incombe le fardeau de prouver l'exercice d'une diligence raisonnable, en vertu des dispositions de l'art. IV(1), ne peut s'acquitter de cette obligation qu'en prouvant affirmativement qu'une diligence raisonnable a été exercée pour mettre le navire en bon état de navigabilité.

L'arrêt *Goodfellow* et les décisions qui y sont citées énoncent de façon commode le droit applicable à cette question et, en outre, plusieurs autres arrêts de grande portée ont dégagé et illustré les principes en jeu. Parmi ceux-ci, l'arrêt *Maxine Footwear Company Ltd. et autre c. Canadian Government Merchant Marine Ltd.*[8], dont en particulier les motifs dissidents du juge Cartwright que le Conseil privé a confirmés par la suite; *Western Canada Steamship Company Limited c. Canadian Commercial Corporation et autres*[9], *Riverstone Meat Co. Pty. Ltd. v. Lancashire Ship-*

[8] [1957] R.C.S. 801.
[9] [1960] R.C.S. 632.

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*Castle")*[10]; *Toronto Elevators Limited v. Colonial Steamship Limited*[11]; *Robin Hood Flour Mills Limited v. N.M. Paterson & Sons Limited*[12].

The rules which may be derived from these and other cases dealing with this point may be summarized in this manner in so far as they relate to the case at bar. Yorke, as the tugboat owner, was bound both at common law and by the terms of the contract to put the tugboat in seaworthy condition at the commencement of the voyage. In the event of damage being caused to the tow or its contents during the voyage by reason of the unseaworthiness of the tug, Yorke could escape liability only by proving that it had exercised due diligence to make the tug seaworthy. In the facts of this case the exercise of due diligence could not be proved by reference to the fact that Yorke had contracted out work, in connection with the towing line which failed, to a reputable and experienced contractor. The burden upon Yorke in the case at bar would extend to showing in the facts of this case that the failure of the socket was caused by a latent defect, that is a defect which would not be discernible upon reasonable examination.

As Ritchie J. said in the first passage from the *Goodfellow* case quoted above, the first question to be resolved is whether on the occasion in question the *Lorne Yorke* was unseaworthy. Was she in a condition to encounter whatever perils of the sea a tugboat with a tow such as she had could be fairly expected to encounter in the voyage that she had embarked upon? It would appear from the totality of the evidence that on the disastrous voyage the *Lorne Yorke* did not encounter in the waters on the outer coast of Vancouver Island any perils or hazards which were beyond normal and reasonable expectation. Bad weather is common, particularly at that time of the year, and the weather on the occasion of the accident, while bad, was not abnormally so and evidence was given of safe passages

[10] [1961] A.C. 807.
[11] [1950] Ex. C.R. 371.
[12] [1967] 1 Ex. C.R. 431, aff'd [1968] 1 Ex. C.R. 175.

*ping Co. Ltd., («Muncaster Castle»)*[10]; *Toronto Elevators Limited c. Colonial Steamship Limited*[11]; *Robin Hood Flour Mills Limited c. N.M. Paterson & Sons Limited*[12].

Les règles qui émanent de ces arrêts et d'autres arrêts portant sur ce point peuvent se résumer de la façon suivante en autant qu'ils se rapportent à cette affaire. Yorke, à titre de propriétaire du remorqueur, était tenue, tant en vertu de la *common law* qu'en vertu des termes du contrat, de mettre le remorqueur en bon état de navigabilité au début du voyage. Dans le cas où des dommages sont causés à la remorque ou à son contenu au cours du voyage du fait du mauvais état de navigabilité du remorqueur, Yorke ne peut dégager sa responsabilité qu'en établissant qu'elle a exercé une diligence raisonnable pour mettre le remorqueur en bon état de navigabilité. En l'espèce, l'exercice de la diligence raisonnable ne peut être établi par mention du fait que Yorke a confié par contrat l'exécution de travaux, relativement au câble de remorquage qui s'est rompu, à un entrepreneur réputé et expérimenté. En l'espèce, Yorke a le fardeau d'établir en fait que la rupture de l'attache est imputable à un défaut caché, c'est-à-dire un défaut qu'on ne peut discerner lors d'un examen attentif.

Comme le juge Ritchie le dit dans le premier passage de l'arrêt *Goodfellow*, précité, la première question à résoudre est de savoir si, dans les circonstances, le *Lorne Yorke* était en mauvais état de navigabilité. Etait-il en état d'affronter tous les périls de la mer qu'un remorqueur avec une remorque de ce genre peut raisonnablement être susceptible de rencontrer au cours du voyage qu'il avait entrepris? Il ressort de l'ensemble de la preuve qu'au cours de ce voyage désastreux, le *Lorne Yorke* n'a pas rencontré dans les eaux de la côte extérieure de l'île Vancouver de périls ou de risques plus grands que ceux auxquels il pouvait raisonnablement s'attendre. Le mauvais temps est normal, particulièrement à cette époque de l'année, et le temps au moment de l'accident, bien que

[10] [1961] A.C. 807.
[11] [1950] R.C. de l'É. 371.
[12] [1967] 1 R.C. de l'É. 431, confirmé à [1968] 1 R.C. de l'É. 175.

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being made without loss in like conditions through the entrance to Kyuquot Channel. The dragging of towlines, intentional or accidental, is not a rare occurrence in these waters and the snagging of towlines on obstructions on the bottom is a hazard which must be expected and encountered in Kyuquot Channel. Despite these facts the socket failed, and as a direct consequence the *Westport Straits* was lost. There was evidence that in such a situation the socket would be subjected to a variety of stresses and strains but no evidence as to their actual nature, force, or effect. There was no evidence of the maximum strain which the socket could have resisted, or should have been capable of resisting, save for the unquestioned evidence that the normal expectation when a towline is put under excessive strain is that the line itself will fail before the socket. In this case then the failure of the socket while the line remained intact would lead to the conclusion that the socket was the weaker part of the gear, rather than the stronger as it ought to have been. There was evidence that the tugboat master in his efforts to free the line imposed the strain of full power on the line, and evidence that could be said to provide some suggestion of negligence in the manner of entry by the tug into the mouth of the channel. This evidence however, in my view, could not indicate that faulty navigation or seamanship was causative of the loss. It is impossible for us to speculate as to what might have occurred if the socket had not failed and the line had been freed. What did occur was the failure of the socket when it ought to have withstood the strain, as did the other parts of the cable, enabling the cable to be freed and the voyage continued. In my view, the failure of the socket in these circumstances was due to a fault or defect. This accords with the finding, both in the Trial Court and the Court of Appeal, and leads to the conclusion that the towing gear, and hence the tugboat, at the commencement of the voyage were not seaworthy. I part company with the judges at trial and appeal only as to the cause of the defect.

mauvais, n'était pas anormal et on a fourni la preuve de traversées réussies dans la passe Kyuquot dans des conditions semblables. Les câbles de remorquage qui traînent, intentionnellement ou par accident, ne sont pas rares dans ces eaux, et le fait que des câbles s'accrochent à des obstacles au fond de la mer est un risque qu'on doit s'attendre à rencontrer dans la passe Kyuquot. En dépit de ces faits, l'attache s'est rompue, ce qui a eu comme conséquence directe la perte du *Westport Straits*. Il a été établi que dans une telle situation, l'attache est soumise à diverses contraintes et tensions, mais on n'a pas établi la nature, la force ou l'effet réel de ces contraintes et tensions. On n'a pas établi la tension maximale que l'attache pouvait supporter, ou qu'elle aurait dû supporter, si ce n'est qu'on a fait la preuve non contestée que, lorsque le câble de remorquage est soumis à une tension excessive, on s'attend normalement à ce que le câble lui-même se rompe avant l'attache. En l'espèce, la rupture de l'attache alors que le câble est resté intact amène à conclure que l'attache était la partie la plus faible de l'équipement, et non la plus forte comme elle aurait dû l'être. La preuve a été faite que le commandant du remorqueur, en s'efforçant de libérer le câble, lui a imposé toute la puissance du navire, et on a fourni des preuves visant à laisser croire à la négligence dans la façon d'engager le remorqueur dans l'entrée de la passe. A mon avis, cependant, la preuve n'indique pas que des fautes de navigation ou de manœuvre soient à l'origine de la perte. Il ne nous est pas possible d'élaborer des théories sur ce qui aurait pu se produire si l'attache ne s'était pas rompue et si le câble avait été dégagé. Ce qui s'est effectivement produit, c'est que l'attache s'est rompue alors qu'elle aurait dû soutenir la tension, comme l'ont fait les autres parties du câble, permettant au câble de se dégager et au voyage de se poursuivre. A mon avis, la rupture de l'attache dans ces circonstances est imputable à une faute ou un défaut. Cette conclusion concorde avec celle du tribunal de première instance et de la Cour d'appel et mène à la conclusion que l'équipement de remorquage, et par conséquent le remorqueur, n'étaient pas en bon état de navigabilité au début du voyage. Je ne diffère d'opinion avec les juges de première instance et d'appel que sur la cause du défaut.

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It follows from the foregoing that Yorke, as owner of the tug, would be liable for the damage suffered by the owners of the *Westport Straits* unless it is shown, the burden of proof being upon Yorke, that it exercised due diligence to make the *Lorne Yorke* seaworthy at the commencement of the voyage. The question then is—can it be shown that the exercise of due diligence would not have revealed the defect in the socket which caused the loss?

It was clear from the evidence of the experts that the defect, however caused, was not apparent on ordinary visual examination. To discover the defect the expert witnesses required complicated testing and photographic procedures beyond the capacity of those ordinarily concerned with the use of such equipment. By the standard of even careful visual examination then the defect was latent. While as a general rule it may be said that a latent defect is one not ascertainable on adequate examination, it is not in every case that a defect, which is not apparent, will be considered latent. Cases differ and there may be circumstances from time to time which would dictate more than mere superficial investigation before one would be enabled to set up the plea of latent defect. Such a case was *Scottish Metropolitan Assurance Company, Limited v. Canada Steamship Lines, Limited*[13], where Anglin C.J.C., speaking for the majority of the Court, dealt with a case where a threaded iron bolt which had been in a bent condition, to the knowledge of the shipowner's servants and employees for several months, broke and caused damage. He said, at pp. 277-8:

There is a mass of testimony not, it is true, uncontradicted, but in our view of great weight and cogency, that the presence of the bend or curve in the bolt afforded a distinct and obvious warning of its weakened condition, which should not have been neglected. We, therefore, find it impossible to assent to the conclusion that the defendant's employees "exercised due diligence" to make the *Hamilton* seaworthy. Either their inspection of the steering gear was of such a casual and perfunctory character that they failed to discover the bend or curve, or, having noticed it, they failed to

[13] [1930] S.C.R. 262.

Il résulte de ce qui précède que Yorke, à titre de propriétaire du remorqueur, est responsable des dommages subis par les propriétaires du *Westport Straits* à moins qu'il soit établi, et c'est à Yorke que ce fardeau incombe, qu'elle a exercé la diligence raisonnable pour mettre le *Lorne Yorke* en bon état de navigabilité au début du voyage. La question est donc: peut-il être établi que l'exercice de la diligence raisonnable n'ait pu mettre à jour le défaut dans l'attache qui a causé la perte?

Les témoignages des experts montrent clairement que le défaut, quelle qu'en soit la cause, n'était pas apparent à l'examen visuel normal. Afin de trouver le défaut, les témoins experts ont eu recours à des essais compliqués et à des procédés photographiques auxquels n'ont pas accès les personnes qui utilisent habituellement cet équipement. Suivant les normes d'examens visuels même attentifs, le défaut était alors caché. Même si, en général, on peut dire qu'un défaut caché est un défaut qu'on ne peut constater lors d'un examen approprié, ce n'est pas dans tous les cas qu'un défaut qui n'est pas apparent sera considéré comme caché. Chaque cas est un cas d'espèce, et il peut se trouver à l'occasion des circonstances qui exigent plus qu'un simple examen superficiel pour permettre d'invoquer le plaidoyer de défaut caché. C'était le cas dans *Scottish Metropolitan Assurance Company, Limited c. Canada Steamship Lines, Limited*[13], où le juge en chef Anglin, s'exprimant pour la majorité de la Cour, a examiné une affaire dans laquelle un boulon fileté en fer, qui était gauchi depuis plusieurs mois à la connaissance des préposés et des employés du propriétaire du navire, s'est cassé et a occasionné des dommages. Il dit, aux pp. 277 et 278:

[TRADUCTION] Un grand nombre de témoignages, contredits il est vrai, mais à notre avis d'une grande portée et bien fondés, portent que la présence de l'arc ou de la courbe dans le boulon était un avertissement distinct et évident de sa faiblesse qui n'aurait pas dû être négligé. Par conséquent, nous estimons impossible d'acquiescer à la conclusion que les employés de la défenderesse «ont exercé une diligence raisonnable» pour mettre le *Hamilton* en bon état de navigabilité. Ou bien leur inspection de l'appareil à gouverner était si négligente et superficielle qu'ils n'ont pas décelé l'arc ou la courbe, ou

[13] [1930] R.C.S. 262.

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discharge the plain duty of either replacing the defective bolt or of making it fit for use, if that were possible. That the bolt broke is only what must sooner or later have occurred, and what should have been expected. The power of resistance of the metal having been much reduced was eventually overcome, it may be by having some slight additional stress or strain put upon it. To speak of such a defect as "latent" seems to involve a misuse of that term. We do not find it necessary for the present further to define "latent defect". "Not discernible by adequate inspection" seems not an inapt paraphrase.

In somewhat similar vein are the words of Atkin L.J. in *The "Dimitrios N. Rallias"*[14] at pp. 366-7 where excessive rusting had cracked rivets in a ship's hull thereby admitting water which damaged a cargo:

> Under these circumstances it appears to me perfectly impossible to say that the defect was a latent defect. The Judge has so found; and it is necessary to inquire shortly what is the meaning of a latent defect. I suppose normally speaking it means some defect that lies hid as opposed to a defect that lies open. But it is suggested that it is not every defect that cannot be perceived by touch or sight or hearing exercised with the most minute examination or observation that is latent; and I can believe that when the word is used with reference to defects in a ship's hull and machinery it may not be capable of the very extreme meaning that they cannot be perceived by the most accurate and refined perception. It was suggested to us that the definition contained in a work of authority, Carver, gathered from American decisions, is a better statement of what is meant by latent defect. That definition is:—
>
> A defect which could not be discovered by a person of competent skill and using ordinary care.
>
> In this case I do not think it necessary to say whether that is the true and precise definition of latent defect which would meet every case. But I am prepared to say this, that a defect which does not comply at any rate with these words could not be a latent defect; and I think it is important in bearing in mind the effect of these words, to remember that the phrase is, "which could not be discovered," not which would not be discovered or which might not be discovered. If these words were used it would appear that there would be no difference between the test of what was a latent defect

[14] (1922), 13 Ll. L. R. 363.

bien l'ayant décelé, ils ont omis de s'acquitter du simple devoir de remplacer le boulon défectueux ou de le réparer, si cela était possible. La rupture du boulon devait se produire tôt ou tard, et il fallait s'y attendre. La force de résistance du métal étant diminuée de beaucoup, il a fini par céder, peut-être une tension un peu plus forte. Dire qu'un tel défaut est «caché» laisse croire à un mauvais emploi de ce terme. Nous ne croyons pas qu'il soit nécessaire de définir le «défaut caché». «Qu'on ne peut discerner lors d'une inspection appropriée» ne semble pas une paraphrase inappropriée.

Dans une veine un peu semblable, le lord juge Atkin affirme dans *The «Dimitrios N. Rallias»*[14] aux pp. 366 et 367, une affaire dans laquelle la rouille excessive avait fait sauter les rivets de la coque d'un navire, laissant ainsi pénétrer l'eau qui a endommagé une cargaison:

> [TRADUCTION] Dans les circonstances, il m'apparaît absolument impossible de dire que le défaut était un défaut caché. Le juge en a décidé ainsi; et il faut chercher brièvement le sens de défaut caché. Je suppose qu'en général, il s'agit d'un défaut qui se trouve caché, par opposition à un défaut apparent. Mais il faut entendre que ce n'est pas chaque défaut imperceptible par les sens de la vue, du toucher ou de l'ouie appliqués à l'examen ou à l'observation le plus minutieux qui est caché; et je peux croire que, lorsque ce mot est employé par rapport aux défauts de la coque ou des appareils d'un navire, on ne peut en pousser le sens à l'extrême et dire qu'il s'agit de défauts imperceptibles à l'examen le plus attentif et le plus raffiné. On nous a proposé que la définition que donne un ouvrage qui fait autorité, Carver, tiré de décisions américaines, est un meilleur énoncé de ce qu'on entend par défaut caché. Cette définition est la suivante:
>
> Un défaut que ne pourrait découvrir une personne experte utilisant des précautions normales.
>
> En l'espèce, je n'estime pas nécessaire de dire si c'est là la définition exacte et précise du défaut caché qui s'appliquerait à chaque cas. Mais je suis prêt à dire qu'un défaut qui ne répond en aucune façon à ces mots ne peut être un défaut caché; et j'estime important, en retenant la portée de ces mots, de se rappeler que la formule dit «que ne pourrait découvrir», et non pas qui ne serait pas découvert ni qui pourrait ne pas être découvert. Si on avait employé ces mots, il apparaîtrait qu'il n'y a pas de différence entre le critère de ce qui est un défaut caché et le critère applicable pour savoir si les

[14] (1922), 13 Ll. L. R. 363.

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and the test of whether the persons responsible had been negligent or not; and I am quite clear that negligence is not a test of latency.

In this case it is impossible to say this defect could not have been discovered by persons of ordinary skill. One has only to visualise what is meant by a degree of rust of 5-16 in. existing by the side of the opening between the flange of the frame and the side plate, an interstice into which a man could place his finger, to make it impossible to suggest that this defect was a latent defect. It seems to me to have been a latent defect to anyone looking out for rust.

In the case at bar, at least to a stranger, the defect causing the failure was clearly 'latent'. It is argued, however, that Yorke was not a stranger in these matters. Yorke was a company which used sockets regularly and according to the evidence knew, or ought to have known, through their marine superintendent, Yahemech, his predecessor, and from literature in their possession, that there was a potential for danger in the resocketing of manganese steel sockets. Further, it was said, that a failure to heed that danger by continuing the re-use of sockets was not consistent with the exercise of due diligence, and the knowledge so possessed by Yorke should have served to warn that the practice of resocketing used sockets ought to have been abandoned. Yahemech admitted that he did not know if the socket was new or used when put on the cable on September 20, 1966. Can it be said that, armed with knowledge of the potential dangers involved in resocketing manganese steel sockets, such apparent indifference, both in selecting a socket and keeping records regarding its use, amounted to the exercise of due diligence? Can it be said that this defect was latent, or is this a case where the knowledge attributable to Yorke of the properties of manganese steel played the role of the 'bent bolt' in the *Scottish Metropolitan Assurance Company* case, or the role of the 'deposits of rust' in the case of *The "Dimitrios N. Rallias"*, indicating a problem and robbing the defect of its latent character?

In my opinion, after considering all the evidence I conclude that the claim by Yorke that the defect was latent is well-founded. There was evidence that manganese steel sockets could be safely

personnes responsables ont été négligentes; et je suis certain que la négligence n'est pas un critère pour établir qu'un défaut est caché.

En l'espèce, il n'est pas possible d'affirmer que ce défaut n'aurait pu être découvert par des personnes compétentes. Il suffit de se faire une image de ce que signifie un degré de corrosion de 5/16 de pouce près de l'ouverture entre la membrure du couple et la plaque de bord, un interstice dans lequel un homme peut mettre son doigt, pour qu'il soit impossible de dire que ce défaut est un défaut caché. Ca me semble un défaut caché pour quiconque cherche la corrosion.

En l'espèce, au moins pour un profane, le défaut qui a engendré la rupture était de toute évidence «caché». On allègue cependant que Yorke n'était pas un profane sur cette question. Yorke est une société qui utilisait des attaches régulièrement et, suivant la preuve, elle savait ou aurait dû savoir par son capitaine d'armement, Yahemech, son prédécesseur et par la documentation en sa possession qu'il y avait un danger possible à remboîter des attaches d'acier au manganèse. On allègue en outre qu'une omission de prendre garde au danger de poursuivre la réutilisation des attaches n'était pas compatible avec l'exercice de la diligence raisonnable, et que la connaissance qu'en avait Yorke aurait dû l'inciter à cesser la pratique de remboîter les attaches usagées. Yahemech a admis qu'il ne savait pas si l'attache était neuve ou usagée lorsqu'elle a été emboîtée au câble le 20 septembre 1966. Peut-on dire que, connaissant le danger possible qu'il y avait à remboîter les attaches d'acier au manganèse, une indifférence aussi évidente dans le choix d'une attache et la tenue de dossiers relatifs à son utilisation équivalait à exercer une diligence raisonnable? Peut-on dire que ce défaut était caché, ou est-ce un cas où la connaissance, de la part de Yorke, des propriétés de l'acier au manganèse a joué le rôle du «boulon gauchi» dans l'affaire *Scottish Metropolitan Assurance Company*, ou le rôle du «dépôt de corrosion» dans l'affaire *The «Dimitrios N. Rallias»*, indiquant un problème et enlevant au défaut son caractère caché?

A mon avis, après avoir examiné toute la preuve, j'en viens à la conclusion que Yorke invoque avec raison que le défaut est un défaut caché. La preuve révèle que les attaches d'acier au manganèse peu-

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resocketed and the practice of the re-use of sockets after resocketing had been followed regularly by Yorke and other towing companies with no apparent ill effects. Furthermore, the weight of the evidence, as I have indicated, is that the failure did not occur because of any recent resocketing, but as a result of a defect existing in the socket from its manufacture, and there is no affirmative evidence to indicate that anything Yorke did or authorized in connection with the socket and its resocketing operation caused or contributed to that defect. In my view, bearing in mind the words of Anglin, C.J.C. and Atkin L.J. quoted above and approaching the question with the considerations they expressed in mind, the defect was a latent defect and no amount of diligence on the part of Yorke could have detected it. The evidence demonstrates, in my view, that the failure and the resulting loss of the *Westport Straits* were not caused by any failure on the part of Yorke to exercise due diligence in furnishing the tug in a seaworthy condition.

In the final result I would order that the appeals of Wire Rope against the judgments in favour of B.C. Marine, Straits, and Yorke be allowed, and that part of the judgment at trial dismissing the actions against Wire Rope be restored with costs throughout; that the cross-appeal by Yorke be allowed; and the action by B.C. Marine and Straits against Yorke be dismissed with costs throughout; and that the cross-appeal of B.C. Marine and Straits be dismissed with costs.

*Appeals by Wire Rope against judgments in favour of B.C. Marine, Straits, and Yorke allowed, and that part of the judgments at trial dismissing the actions against Wire Rope restored, with costs; cross-appeal by Yorke allowed; the action by B.C. Marine and Straits against Yorke dismissed with costs; and the cross-appeal of B.C. Marine and Straits dismissed with costs.*

*Solicitors for the (third party) appellant: Bull, Housser & Tupper, Vancouver.*

*Solicitors for the (plaintiffs) respondents: Owen, Bird, Vancouver.*

*Solicitors for the (defendant) respondent: MacRae, Montgomery, Spring & Cunningham, Vancouver.*

vent être remboîtées sans risque, et Yorke et d'autres entreprises de remorquage ont suivi régulièrement la pratique de réutiliser des attaches remboîtées sans mauvais résultats apparents. En outre, comme je l'ai mentionné, la preuve indique que la rupture ne s'est pas produite du fait d'une opération de remboîtement récente, mais qu'elle résulte d'un défaut inhérent à l'attache depuis sa fabrication, et aucune preuve positive n'indique qu'une chose que Yorke a faite ou permise relativement à l'attache et à son remboîtement ait causé ce défaut ou y ait contribué. A mon avis, si on garde à l'esprit les mots du juge en chef Anglin et du lord juge Atkin précités et si on aborde la question suivant les critères qu'ils ont exprimés, le défaut était un défaut caché que Yorke ne pouvait détecter en exerçant toute la diligence possible. La preuve démontre, à mon avis, que la rupture, et la perte du *Westport Straits* qui en découle, ne sont pas imputables à l'omission, par Yorke, d'exercer une diligence raisonnable pour fournir un remorqueur en bon état de navigabilité.

En conclusion, je suis d'avis d'accueillir les pourvois de Wire Rope contre les décisions rendues en faveur de B. C. Marine, Straits et Yorke; de rétablir la partie du jugement de première instance rejetant les actions contre Wire Rope, avec dépens dans toutes les cours; d'accueillir le pourvoi incident de Yorke: de rejeter l'action de B.C. Marine et de Straits contre Yorke avec dépens dans toutes les cours; et de rejeter avec dépens l'appel incident de B.C. Marine et de Straits.

*Pourvois de Wire Rope à l'encontre des arrêts rendus en faveur de B.C. Marine, Straits et Yorke accueillis, et la partie du jugement de première instance rejetant les actions contre Wire Rope rétablie, avec dépens; pourvoi incident de Yorke accueilli; action de B.C. Marine et Straits contre Yorke rejetée avec dépens; et pourvoi incident de B.C. Marine et Straits rejeté avec dépens.*

*Procureurs de la (tierce partie) appelante: Bull, Housser & Tupper, Vancouver.*

*Procureurs des (demanderesses) intimées: Owen, Bird, Vancouver.*

*Procureurs de la (défenderesse) intimée: MacRae, Montgomery, Spring & Cunningham, Vancouver.*

1981 CanLII 182 (SCC)

Federal Court Cour fédérale

**Date: 20131219**

**Docket: T-1226-10**

**Citation: 2013 FC 1266**

2013 FC 1266 (CanLII)

**Ottawa, Ontario, December 19, 2013**

**PRESENT: The Honourable Madam Justice Strickland**

**ADMIRALTY ACTION IN *REM* AGAINST THE VESSEL "QE014226C010" AND *IN PERSONAM***

**BETWEEN:**

**OFFSHORE INTERIORS INC.**

**Plaintiff**

**and**

**WORLDSPAN MARINE INC.,
CRESCENT CUSTOM YACHTS INC.,
THE OWNERS AND ALL OTHERS
INTERESTED IN THE VESSEL "QE014226C010"
AND THE VESSEL "QE014226C010"**

**Defendants**

**and**

**WOLRIGE MAHON LIMITED IN ITS
CAPACITY AS APPOINTED VESSEL
CONSTRUCTION OFFICER OF THE
DEFENDANT VESSEL "QE014226C010" AND
HARRY SARGEANT III,
MOHAMMED ANWAR FARID AL-SALEH,
COMERICA BANK**

**Interveners**

**<u>REASONS FOR ORDER AND ORDER</u>**

[1] This decision concerns the appeals by Harry Sargeant III (Sargeant) and Comerica Bank (Comerica), pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 (Rules), of the Order of Prothonotary Lafrenière dated March 5, 2013 (*Offshore Interiors Inc v Worldspan Marine Inc*, 2013 FC 221) declaring that the builder's mortgage held by Sargeant against the defendant vessel QE014226C010 (Vessel) does not create a lien or charge in the Vessel other than to secure delivery.

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**Background**

[2] The background facts in this matter are not in dispute. Sargeant and Worldspan Marine Inc. (Worldspan) entered into a Vessel Construction Agreement (VCA) dated February 29, 2008 whereby Worldspan agreed to design, construct, outfit, launch, complete, sell and deliver the Vessel, a 142 foot custom built luxury yacht, to Sargeant.

[3] Construction of the Vessel began in March 2008. A Builder's Mortgage in favour of Sargeant as against the Vessel was filed in the Vancouver Ship Registry on May 14, 2008 (Builder's Mortgage).

[4] By August 2009 payments made by or on behalf of Sargeant to Worldspan totalled USD$11,064,525.38. On August 14, 2009, Sargeant entered into a Construction Loan Agreement (CLA) with Comerica and others for USD$9,400,000.00 to finance the completion of the construction of the Vessel. Sargeant's interests in the VCA, the Vessel, and the Builder's Mortgage were assigned to Comerica by way of an Assignment of Security Agreement and Mortgage of same date.

[5] From August 2009 to March 2010, Comerica paid to Worldspan, on Sargeant's behalf, the sum of USD$9,387,398.67. By April 2010 the total amount paid to Worldspan by or on behalf of Sargeant in connection with the construction of the Vessel was USD$20,651,924.05.

[6] A dispute arose between Sargeant and Worldspan concerning project costs. Construction of the Vessel ceased in April or May 2010. Offshore commenced the underlying action on July 20, 2010 against Worldspan, Crescent Custom Yachts Inc., the Owners and all others interested in the Vessel, and the Vessel itself for unpaid invoices for services and materials rendered in connection with construction of the Vessel. The Vessel was arrested on July 28, 2010 and remains under arrest.

[7] On May 27, 2011, Worldspan and related entities filed a Petition in the British Columbia Supreme Court seeking relief under the *Companies Creditors' Arrangement Act*, RSC 1985, c C-36 (CCAA Proceedings). On July 22, 2011, Justice Pearlman of the British Columbia Supreme Court issued a claims process order in the CCAA Proceedings (CCAA Claims Process Order). This required all creditors to deliver proofs of claim on or before the claims bar date, September 9, 2011, failing which the creditor would be forever barred from making or enforcing any claim. It also provided that any creditor that filed a proof of claim in the CCAA Proceedings asserting an *in rem* claim against the Vessel could pursue that claim, outside the CCAA Proceeding, in this Court.

[8] By order dated August 29, 2011, the Prothonotary, as case management judge, established a claims process for all creditors with *in rem* claims against the Vessel (Federal Court Claims Process Order). That order provided that notice be given to all creditors of the requirement to file an affidavit containing particulars in support of the claim against the Vessel, specifying the nature of

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the claim to enable the Court to determine if such a claim constituted an *in rem* claim and, if so, its priority. It also required all such affidavits to be filed 21 days after the *in rem* creditor received the required notice and provided that all questions relating to the right of any *in rem* claimant be determined by the Federal Court upon application.

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[9] On February 9, 2012, Offshore filed a motion seeking an order of this Court declaring that the Builder's Mortgage does not create a lien or charge in the Vessel other than to secure its delivery. The order was granted by the Prothonotary, sitting as Case Management Judge, on March 5, 2013, with costs as set out. That order is the subject of this appeal.

**Decision Under Appeal**

[10] The Prothonotary set out the context of the motion before him being that, as a condition of participating in a priorities distribution following judicial sale of the Vessel, each claimant must have an existing, valid and enforceable *in rem* claim against the Vessel. Claimants could present their own claims and could also attack others, including their ranking in terms of priority. The relief sought by Offshore in its motion was not intended to preclude Sargeant or Comerica from participating in the priorities hearing, but rather to limit their claim by excluding from it the repayment of the funds advanced by or on behalf of Sergeant for the construction of the Vessel.

[11] The Prothonotary set out the positions of the parties. Offshore submitted that the Builder's Mortgage did not create a lien or charge in the Vessel, but only secured delivery. Mohammed Anwar Farid Al-Saleh (Al-Saleh) adopted this position.

[12] Sargeant and Comerica opposed Offshore's motion, arguing that the Builder's Mortgage, expressly or impliedly, allows them to secure repayment of the amounts advanced to Worldspan by or on behalf of Sargeant. The VCA expressly provides that advances made by Sargeant to Worldspan are not earned until a future date, being the delivery of the Vessel. As it was never delivered, the advances are recoverable as money lent. Alternatively, Sargeant has an equitable mortgage or a claim against the Vessel pursuant to subsection 22(2)(n) of the *Federal Courts Act*, RSC 1985, c F-7 for the amounts advanced for the construction of the Vessel.

[13] The Prothonotary adopted Offshore's supplementary written submissions on the subsection 22(2)(n) claim and concluded that the claim was "of no moment".

[14] The Prothonotary noted that the question of whether Worldspan had an obligation under the Builder's Mortgage or the VCA to repay the funds advanced by Sargeant turned on the interpretation of those documents. In that regard, he referenced the principles of contract interpretation found in *Salah v Timothy's Coffees of the World Inc*, 2010 ONCA 673 [*Salah*]. Considering the factors and circumstances, he was not persuaded that the evidence supported any indebtedness.

[15] He noted that the Builder's Mortgage is in the form prescribed by the *Canada Shipping Act*, 2001, SC 2001, c 26 (*Canada Shipping Act, 2001*) (Form 16) which permits only a principal sum and fixed rate of interest, or, an "account current." The Builder's Mortgage stated only that there was an account pursuant to, and the obligations secured by, the VCA. However, while the form

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required specifics of the transaction so as to determine the amount owing and the "time of payment", neither the Builder's Mortgage nor the VCA contained such specifics.

[16] Further, while the VCA set out the rights and obligations of the parties in the event of breach, termination or upon completion, it contained no explicit provision for repayment for the funds provided for construction of the Vessel.

[17] The Prothonotary also found that whether a mortgage implies a loan is dependant on the circumstances of the specific situation. Here, regardless of the wording of the Builder's Mortgage, there was no evidence of an account current being created pursuant to the VCA. The VCA clearly permitted Worldspan to retain all advances for the purpose of paying for labour and material used to construct the Vessel and "would not exist as a fund" (*FC Yachts Ltd, PR Yacht Builders Ltd and New World Expedition Yachts* (31 August, 2010) arbitration decision of Mr. John J McIntyre [*FC Yachts*]).

[18] The Prothonotary found that the parties must have contemplated that, following a breach, Worldspan would have no ability to repay the substantial amounts advanced to construct the Vessel leaving Sargeant and Comerica with the obvious remedy of taking the Vessel from the yard and completing it elsewhere or selling it. The VCA contained no provision for repayment and a contractual term will not be implied merely because, in hindsight, it would have been reasonable to do so. The Prothonotary adopted para 57 of Offshore's supplementary written representations to the effect that the VCA is not a loan agreement and that if the advanced finds were intended as a loan and were to be repaid then the VCA would have said so.

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[19] The Prothonotary concluded that, for these reasons, there were no financial obligations of Worldspan to Sargeant under the VCA. If Worldspan was in breach, Sargeant's remedies were limited to possession and ownership of the Vessel and an *in personam* action against Worldspan.

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**Issues**

[20] The issues on this appeal are:

(1) What is the standard of review?

(2) Did the Prothonotary err in finding that the Builder's Mortgage does not create a lien or a charge in the Vessel other than to secure its delivery?

(3) Did the Prothonotary err by not considering Sargeant's alternate claim under subsection 22(2)(n) *Federal Courts Act*?

**(1) What is the Standard of Review?**

[21] The modified test in *Merck & Co v Apotex Inc*, 2003 FCA 488, [2004] 2 FCR 459 at para 19 describes the standard of review for discretionary orders made by a prothonotary. Here the Prothonotary was called upon to interpret and apply the Builder's Mortgage and the VCA in determining whether the Builder's Mortgage created a lien or charge in the Vessel other than to secure its delivery. This did not involve an exercise of discretion, but rather, concerned the task of gleaning the parties' intentions by interpreting the relevant facts and contract provisions. Therefore, the normal appellate standards of review apply (*Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at para 8 [*Housen*]; *Giroux v Canada*, 2001 FCT 531 at para 32; *Douze v Canada (Citizenship and Immigration)*, 2010 FC 1086 at para 24).

[22] Sargeant, Comerica and Offshore all rely on *General Motors of Canada Ltd v R*, 2008 FCA 142 [*General Motors*] for their standard of review analysis, although they come to different conclusions as to its application. Sargeant and Comerica assert that it supports the correctness standard while Offshore submits that it supports the palpable or overriding error standard. The relevant portions of that decision are as follows:

> [29] In MacDougall v. MacDougall (2005), 262 (4th) 120, the appeal before the Ontario Court of Appeal pertained to the proper interpretation of a spousal support section of a marriage contract, i.e. the interpretation of a variation provision in a domestic contract. Thus, the Court of Appeal had to determine on what standard it would review the Trial Judge's interpretation. The appellant contended that the question before the Court raised a question of law and was thus reviewable on a standard of correctness because it related to the legal effect to be given to the words of the contract. The respondent argued that the question before the Court was a mixed question of fact and law which should be reviewed on a standard of palpable and overriding error.
>
> [30] After reviewing a number of Ontario Court decisions in the light of Housen v. Nikolaisen, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, Lang J.A. wrote at paragraphs 30 to 33 of her Reasons for the Court:
>
>> 30 <u>To begin with, the trial judge must apply the proper principles of contract interpretation, including consideration of the clause in the context of the entirety of the contract. A failure to follow the proper principles, including a failure to apply a fundamental principle of interpretation, would be an error of law attracting review on the standard of correctness.</u>
>>
>> 31 <u>To the extent that this task of interpretation includes consideration of extrinsic evidence, or a determination of the factual matrix, the trial judge is involved in making a finding of fact, or drawing inferences from a finding of fact</u>. Further, the trial judge's "interpretation of the evidence as a whole" is one involving factual or inferential determinations. See Amertek Inc. v. Canadian Commercial Corp.

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> 2005 CanLII 23220 (ON CA), (2005), 200 O.A.C. 38 at para. 68. Such questions of fact are entitled to deference and are not to be overturned except in the case of palpable or overriding error, or its "functional equivalents": "clearly wrong", "unreasonable", and "not reasonably supported by the evidence". See H.L. v. Canada, 2005 SCC 25 (CanLII), [2005] 1 S.C.R. 401 at para. 110.
>
> 32 In interpreting the contract, the trial judge also applies the legal principles to the language of the contract in the context of the relevant facts and inferences. This requires the application of law to fact. This has been said to be a question of mixed fact and law. See Algoma Steel Inc. v. Union Gas Ltd. 2003 CanLII 30833 (ON CA), (2003), 63 O.R. (3d) 78 at paras. 19-21 (C.A.); Amertek, supra, at para. 68.
>
> 33 <u>Accordingly, in reviewing the trial judge's interpretation of a contract, the appellate court must first classify the question as one of fact, law, or mixed fact and law. If the question is an inextricable intertwining of both fact and law, the question can be said to be one of mixed fact and law.</u> […]
>
> [Emphasis added]

[23] Sargeant submits that the Prothonotary failed to apply the appropriate principles of contractual interpretation on the motion before him. This was error of law which led him to incorrectly conclude that the Builder's Mortgage does not secure repayment of the amounts advanced by Sargeant pursuant to the VCA. Further, that the Prothonotary erred in law by failing to consider or apply the applicable legal principles to his alternate claim against the Vessel pursuant to subsection 22(2)(n) of the *Federal Courts Act*. Both errors of law are reviewable on the standard of correctness.

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[24] Sargeant submits that the Prothonotary did not apply the principles of contractual interpretation that required the VCA and Builder's Mortgage to be interpreted in accordance with sound commercial principles and business sense; to avoid a commercial absurdity; and, to extract meaning from the parties expression of their contractual intention in accordance with the language used. Instead of interpreting the language and grappling with the principles, the Prothonotary applied an overly formalistic and literal approach basing his decisions on the perceived absence of explicit provisions and evidence.

[25] Comerica submits that interpreting an agreement involves referring to the context, or factual matrix, in which it was made. The factual matrix in this case was that Sargeant was to provide the working capital needed by Worldspan to construct the Vessel, Worldspan would remain the owner until delivery, and, Sargeant's advances were to be secured by the Builder's Mortgage. It was within that context that the Prothonotary was required to interpret the VCA. Further, that the Prothonotary erred in law in failing to apply the proper principles of contract interpretation and erred in fact as regards to the existence of an account current.

[26] Offshore submits that the standard of review is that of palpable or overriding error as interpreting the VCA within the factual matrix is a mixed question of fact and law (*General Motors*, above, at paras 29-33). Here, there was no palpable or overriding error and, in any event, the Prothonotary's decision would also survive review on a correctness standard.

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[27] The applicable standard of review for a question involving contractual interpretation was well described in Geoff R. Hall, Canadian Contractual Interpretation Law, 2nd ed (Markhan: LexisNexis Canada Inc, 2012), at 125:

> …The new approach holds that different standards of review apply depending upon the precise nature of the question. This is because contractual interpretation involves questions of law (what are the applicable principles of interpretation?), questions of fact (what is the factual matrix?), and questions of mixed fact and law (what is the meaning of a particular contract in light of the legal principles and the factual matrix?). The standard of review for each of these questions is defined by the Supreme Court of Canada's leading case on standards of appellate review, Housen v. Nikolisen: correctness in the case of a question of law, palpable and over riding error in the case of a question of fact and (in general) palpable and overriding error for questions of mixed fact and law.

[28] Here, at the outset of his decision, the Prothonotary correctly identifies the applicable principles of contract interpretation. Thus, there is no error of law in this regard. However, he does not state how those principles are applied to the matter before him or how his conclusion is related to those principles. In my view, with the exception of the alleged failure to address the alternate subsection 22(2)(n) submission which was an error in law reviewable on the correctness standard, the remaining issues are all linked to factual inquiries. Thus, they are mixed questions of fact and law, making the appropriate standard of review that of a palpable and overriding error.

[29] In that regard, I would note that although Sargeant and Comerica both submit that the correctness standard applies, they also make submissions disputing the Prothonotary's assessment of the underlying factual matrix relevant to interpreting the VCA.

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Relevant Provisions of the VCA and Builder's Mortgage

[30] Prior to considering the second issue, it is useful to set out the relevant provisions of the VCA and Builder's Mortgage.

[31] Worldspan, as the builder, undertook to design, construct, outfit, launch, complete and sell and deliver the Vessel to Sargeant subject to the provisions of the VCA (section 1.1). Worldspan also agreed to deliver the Vessel to Sargeant upon completion (section 2.1).

[32] Section 2.3 provides that:

> Upon Delivery, the Vessel, including any equipment, materials, supplies, parts or other components…shall be free and clear of all liens, mortgages, and encumbrances (except liens and encumbrances approved by Owner in favour of Owner's construction finance lender, if any)…which arise or attach prior to the delivery of the Vessel to Owner, against the Vessel or against the materials, labour, supplies or equipment furnished by Builder in performance of this Agreement.

[33] Worldspan also agreed to provide a bill of sale warranting that the Vessel is free and clear of any and all claims, debts, liabilities, liens, charges, mortgages and encumbrances of any nature whatsoever (subsection 2.5(b)) and an affidavit confirming that materials, equipment, parts, components and supplies furnished by Worldspan and all persons who provided labour or material to the Vessel have been paid in full (subsection 2.5(d)).

[34] Section 4.1 addresses payments on account made by Sargeant to Worldspan during construction which are in the nature of advances:

> The cost of the Vessel and the final purchase price payable by Owner (the "Final Purchase Price") will be finally determined on a time-

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> and-materials basis subject to reasonable verification/audit ... During the course of construction of the Vessel Owner will make payments on account of the Final Purchase Price as hereinafter provided but these payments will be in the nature of advances to Builder and the Final Purchase Price will not be earned by Builder until delivery and acceptance of the Vessel in accordance with this Agreement.

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[35] The estimated price of the Vessel was US $15.0 million subject to any agreed changes (section 4.2). During construction of the Vessel, Sargeant was required to make monthly payments in arrears to cover Worldspan's expenditures for the previous month (subsection 4.3(a)). In the event that the final purchase price would be more than 10% greater that the estimated price plus agreed changes, then Sargeant had the option of terminating the VCA with the consequences set out in section 13. Each month Worldspan was to submit to Sargeant, for verification and approval, a Claim Certificate setting out that month's expenditures (subsection 4.3(c)). These arrangements were acknowledged as intended to maintain positive cash flow (subsection 4.3(e)).

[36] Risk remained with Worldspan during construction (section 5). Total loss was addressed in section 5.3:

> In the event Builder is unable or otherwise fails to deliver the Vessel to Owner as required hereunder due to total loss of the Vessel during construction, Owner shall be entitled to recover all amounts paid to Builder hereunder, whether by insurance or otherwise (the "Refund"). The Refund shall be without prejudice to any other rights of owner under the law, this Agreement or otherwise.

[37] Pursuant to section 8.1, Sargeant was permitted to assign the benefit of the VCA by way of security to any bank or financial institution providing financing in connection with the construction of the Vessel.

[38] By section 12.1, Worldspan retained title to the Vessel until delivery and granted Sargeant a continuing first priority security interest to secure the sums advanced to Worldspan:

> Builder will retain title to the Vessel until delivery to the Owner. Builder grants to Owner a continuing first priority security interest in the Vessel, including all work, materials, machinery, and equipment relating to the Vessel, to secure any sums advanced or paid to Builder under this Agreement; provided however, that such security interest shall be subordinate to Owner's obligations under the Contract Documents including Builder's right to receive payments pursuant to this Agreement. In support of Owner's security interest in the Vessel Builder agrees to register a Ship's Mortgage in favour of Owner or Owner's construction lender (the form of the mortgage document is to be agreed upon between the parties acting reasonably) if Owner requests that this be done for any purpose.

[39] Section 13.1 gives Sargeant the "right and power, without prejudice to any other remedy," to terminate the VCA in certain events of default, including if Worldspan suspended payment of its debts or ceased to carry on business or made any arrangement or compromise with its creditors. By section 13.2, should Sargeant terminate the VCA then he was entitled to take over and complete the Vessel elsewhere in which event Worldspan's liabilities are set out, including:

> (a) to deliver up the Vessel and/or such parts as have been constructed and all materials, engines, machinery, outfit and equipment from time to time appropriated to the Vessel and/or pertaining to this Agreement…free and clear of all mortgages, maritime liens and debts and claims whatsoever for removal from Builder's shipyard;
>
> (b) to do and execute all acts, matters, things and documents necessary or reasonably required by owner to transfer and convey all right, title and interest to and in the Vessel to owner and protect the same against claims by other persons (including suppliers, subcontractors and creditors of the Builder…)
>
> 13.3 As an alternative to its rights under the preceding provisions of this SECTION13 Owner will be entitled by notice in writing given

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> at anytime within thirty (30) days after termination of this Agreement to require Builder to cooperate in the prompt sale of the vessel on such terms and in such manner as owner may decide and Builder may approve….and following such sale the provisions of SECTION 24 will apply.

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[40] Section 24 of the VCA sets out a formula that applies in the event of a sale of the Vessel by Sargeant pursuant to which Worldspan is obligated to pay Sargeant a calculated sum in the event that the sale proceeds are less than the advances made by Sargeant to Worldspan; similarly, if the sale proceeds exceed the advances made by Sargeant to Worldspan, Sargeant is to pay a portion of the profit to Worldspan.

[41] Section 13.5 of the VCA deals with default by Sargeant providing that Worldspan has a right to terminate in the event that Sargeant fails to make payments pursuant to the VCA, in which case Worldspan may offer the Vessel for sale. Worldspan's "property in the Vessel will revert or pass to Builder and Owner will promptly do and exercise all acts, matters, things and documents necessary or reasonably required by Builder to perfect Builder's property therein." Further, if Worldspan resells the Vessel for an amount less than the Capped Purchase Price, it shall refund to Sargeant all instalment payments less Worldspan's direct out-of-pocket costs and expenses for storage and resale. If Worldspan resells the Vessel for an amount equal to or in excess of the Capped Purchase Price, then it shall refund to Sargeant any instalment payments less Worldspan's costs and expenses for storage and resale.

Builder's Mortgage

[42] The Builder's Mortgage is in statutory form (Form 16) in favour of Sargeant, as mortgagee, by Worldspan, as mortgagor. The form includes the wording "Whereas (State that there is an

account current between mortgagor and mortgagee (describing both), and describe the nature of the transaction so as to show how the amount of principle and interest due at any given time is to be ascertained and the manner and time of payment)". In response was entered:

> There is an account current pursuant to that certain Vessel Construction Agreement dated February 29, 2008 among mortgagor and mortgagee which Agreement specifies the obligations hereby secured.

[43] The form then states:

> I/We, the mortgagor(s) in consideration of the above now covenant with the mortgagee(s) to pay to the mortgagee(s) the sums for the time being due on this security, whether by way of principal or interest, at the times and in the manner set out. For the purposes of better securing payment to the mortgagee(s), the mortgagor(s) hereby mortgage to the mortgagee(s) _64__ shares…of which the mortgagor(s) are the owner(s) in the vessel described above…

**(2) Did the Prothonotary err in finding that the Builder's Mortgage does not create a lien or a charge in the Vessel other than to secure its delivery?**

[44] The Prothonotary correctly recognized at the outset of his analysis that the aim of contract interpretation is to determine the intent of the parties based on the language of the contract documents and having regard to the context in which the contract was executed. He also acknowledged the principles of contract interpretation as set out in *Salah*, above at para 16. Thus, the issue is whether the Prothonotary properly applied those principles in his analysis.

[45] For the reasons outlined below, I am not satisfied that the Prothonotary's analysis, while considering individual aspects of the VCA, employed an overall view of the factual matrix and consideration of the VCA and the Builder's Mortgage as a whole so as to garner the true intent of

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the parties. This impacted his analysis of the nature of the advances and the scope of Sargeant's security interest.

Scope of Security

[46] The starting point of the analysis is, as the Prothonotary determined, clause 12.1 of the VCA:

> 12.1 Builder will retain title to the Vessel until delivery to the Owner. Builder grants to Owner a continuing first priority security interest in the Vessel, including all work, materials, machinery, and equipment relating to the Vessel, to secure any sums advanced or paid to Builder under this Agreement; provided, however, that such security interest shall be subordinate to Owner's obligations under the Contract Documents including Builder's right to receive payments pursuant to this Agreement. In support of Owner's security interest in the Vessel Builder agrees to register a Ship's Mortgage in favour of Owner or Owner's construction lender…
>
> [Emphasis added]

[47] The parties agreed that the Builder would retain title to the Vessel during construction, this necessarily puts the Owner at risk as regards to the advances. Therefore, the broad question on this appeal is how did the parties intend for that risk to be managed? Put otherwise, what was the intended scope of the security interest?

[48] The management of this type of risk during the construction of a vessel is not unique or outside usual commercial practice. This is often dealt with in one of two ways, as described in Simon Curtis, *The Law of Shipbuilding Contracts*, 4th ed (London: Informa Law, 2012) at 135:

> The time at which title to the vessel passes to the buyer is for two reasons an issue of central importance to the entire shipbuilding project. First, whoever owns the vessel during her construction

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> period enjoys a measure of security against the risk of the other party's financial default; in such event his rights of ownership should (at least in theory) prevail against the other's creditors and permit him to sell the vessel in order to recoup his investment. Secondly, depending on local law and practice, ownership of the vessel may afford to the builder the right to mortgage or charge her for the purpose of securing the finance needed for her construction.
>
> The overwhelming majority of international shipbuilding contracts confer title to the vessel upon the builder throughout the construction period on the basis that the buyer's pre-delivery credit risk will be secured by a refund guarantee; this will typically be provided to the buyer as a condition of payment of the first instalment of the contract price. Title to the vessel will be transferred to the buyer concurrently with execution of the Protocol of Delivery and Acceptance…
>
> If, however, the builder is not in a position to provide a satisfactory refund guarantee, it may be agreed that the vessel itself should stand as security for the buyer's pre-delivery instalments. In such circumstances the contract will provide that title to the vessel, together with all equipment and materials intended for her, should pass to the buyer during the course of construction. The title vested in the buyer will, however, usually be conditional, rather than absolute, in nature and will in particular not preclude him from exercising his rights to reject the vessel and rescind the contract. In such circumstances title will normally revert to the builder following the buyer's notice of termination and upon the builder's refundment to him of the pre-delivery instalments of the contract price paid at that time, together with interest thereon.

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[49] These situations are not representative of the title and risk provisions contained in the VCA, and it must also be recalled that, in the United Kingdom, there is no right to place a builder's mortgage during construction. In that regard, Curtis, above states the following at 42:

> Secondly, in certain European shipbuilding jurisdictions, it is possible for the builder to create and register a mortgage over the partly-built vessel to secure construction financing; such mortgage will obviously be redeemed prior to delivery in order to permit the buyer to take the vessel free of all encumbrances. During the construction period, however, the existence of the mortgage will usually ensure that it is the mortgagee, rather than the liquidator of

> the builder, who will be entitled to dispose of the vessel in the event of the builder's insolvency. Where the vessel's construction is financed on a mortgage basis, the buyer may therefore wish at the outset to reach a separate agreement with the mortgagee permitting him an option to purchase the vessel should the builder default and the mortgagee enter legal possession.

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[50] Here, of course the factual situation differs as the mortgagor was Worldspan and the mortgagee was the purchaser, Sargeant, whose advances were utilized to construct the Vessel. However, these provisions demonstrate that title, the risk of financial default and of third party claims, and, the securing against same, are inter-related.

[51] Pursuant to section 13.1 of the VCA, in the event of default by Worldspan, Sargeant, had the right to terminate the VCA, without prejudice to any other right or remedy. In that event, Sargeant was entitled to take over and complete the Vessel free and clear of all claims (section 13.2), alternatively, to cause the sale of the Vessel (section 13.3) and to recover the funds he expended by way of the advances pursuant to the formula set out in section 24. Of note is that those remedies are as between Worldspan and Sargeant, and, that Sargeant's remedies in the event of default were not limited to termination of the VCA and the exercise of his section 13 rights as contended by Offshore in its submissions.

[52] Thus, while the VCA included provisions to contend with default by either party or total loss during construction, the Builder's Mortgage had a different purpose. That purpose was explicitly stated by the parties as serving to provide a continuing first priority security interest in the Vessel to secure the unearned advances (sections 12.1 and 4.1). As such, it can reasonably be implied that it was intended to be effective against third parties and was not limited in effect as between

Worldspan and Sargeant. In short, it served to manage the risk to Sargeant which arose by making the advances while not holding title to the Vessel. Based on the foregoing, in my view, the scope of the Builder's Mortgage security was not limited to securing the delivery of the Vessel, rather, it was intended that the Vessel itself was to stand as security for Sargeant's pre-delivery instalments.

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Obligation to Repay

[53] I agree with Comerica that the factual matrix in this matter, supported by sections 12.1 and 4.3 of the VCA, is that Sergeant was to provide the working capital needed by Worldspan to construct the Vessel, Worldspan was to remain the owner until delivery, and, the advances made by Sargeant were to be secured by the Builder's Mortgage. As to the question of whether the advances secured by the Builder's Mortgage constituted a loan with an obligation to repay the funds advanced for the construction of the Vessel, the VCA does not explicitly state that the advances are provided by way of a "loan". Nor is there an underlying loan document such as a promissory note or deed of covenants made collateral to the Builder's Mortgage, a schedule of principal and interest payments or a specified interest rate. Accordingly, the VCA and Builder's Mortgage did not comprise a "loan" in the conventional sense. However, section 4.1 states that the payments would be made "on account" of the purchase price but would be in the nature of advances and that the purchase price would not be earned by Worldspan until delivery and acceptance of the Vessel in accordance with the VCA. This at least implies the existence of an extended credit, and resultant potential debt, until the advances were earned.

[54] In that regard Comerica submits that a number of the VCA provisions, specifically sections 4.1, 5.3, 13.3, 13.5 and 24.8, require repayment of the advances and that the Prothonotary therefore erred in finding that an obligation to repay could not be implied.

[55] As to section 4.1, Comerica submits that the advances made by Sargeant pursuant to section 4.1 could be satisfied by Worldspan by delivery of the Vessel. Offshore submits that while this provision does not mention repayment, it agrees that delivery would be sufficient to deem the advances earned.

[56] While section 4.1 does not explicitly mention repayment, it does state that: i) Sargeant is making payments "on account"; ii) the payments are in the nature of advances; and iii) the advances are not earned until delivery. On a plain reading, this suggests that Worldspan is not entitled to retain and not disgorge the advances if the Vessel was not delivered.

[57] Section 5.3 provides that in the event that Worldspan fails to deliver the Vessel due to total loss during construction, Sargeant "shall be entitled to recover all amounts paid to Builder hereunder, whether by insurance or otherwise (the "Refund")". This provision clearly contemplates a refund in the event of non-delivery. However, Offshore submits this provision would only result in payment of funds recovered from an insurer and that it does not refer to the advances.

[58] In my view, as the amounts Sargeant paid to Worldspan were paid by the advances, it can reasonably be inferred that it is the advances that are to be refunded by way of any insurance proceeds paid to Worldspan. Further, as to the submission that the provision does not require

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Worldspan itself to provide the payments, the provision states that Sargeant "shall be entitled to recover all amounts paid to Builder hereunder, whether by insurance or otherwise…" Thus, while it clearly envisions the Refund being paid by Worldspan to Sargeant from insurance proceeds following a total loss, it is not limited to such payments. As the advances are paid pursuant to the VCA, they could also be recovered under this provision. This would permit, for example, recovery directly from Worldspan in the event of a denial of coverage by Worldspan's insurer.

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[59] Sections 13.3 and 24.8 provide that as an alternative to its other rights under section 13 in the event of default by Worldspan, Sargeant may require the sale of the Vessel upon termination of the VCA (section 13.3) in accordance with the provisions of section 24 which, in essence, stipulates that if the Vessel is sold at a loss that Worldspan is to pay a portion of the loss to Sargeant and, conversely, if it is sold at a profit, Sargeant is to pay a portion of the profit to Worldspan. While, neither section expressly refers to a refund or repayment, Comerica points out that one element of the formula contained in section 24.2 refers to "the Final Purchase Price taking into account all sums contributed by the Owner and the Builder." As Sargeant contributed to the Final Purchase Price by way of the advances, these sections therefore require Worldspan to repay the advances on default. Offshore argues that the advances are only used in this scenario to calculate how proceeds of a sale would be distributed and that sale proceeds and the advances are two separate things.

[60] It seems to me that the primary purpose of stipulating in the VCA that the Vessel may be sold in the event of default by Worldspan is so that Sargeant can recover that which he had contributed to the cost of construction. The formula serves to determine the liabilities as between the parties in that event, depending on the sale price. One element of the formula refers to the

"Final Purchase Price" which is defined in section 4.1 and provides that during construction, the Owner will make payments on account of the Final Purchase and those payments will be in the nature of advances to the Builder and the Final Purchase Price will not be earned by the Builder until delivery and acceptance of the Vessel. Accordingly, in my view, it cannot reasonably be argued that the proceeds from the sale of the Vessel payable to Sargeant are anything other than repayment of the advances under this provision.

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[61] Section 13.5 concerns default by Sargeant and, in that event, Worldspan's right to terminate the VCA and sell the Vessel. In that case the "property in the Vessel…will revert or pass to Builder and Owner will promptly do and exercise all acts, matters, things and documents necessary...to perfect Builder's property therein." Further:

> If Builder resells the Vessel for an amount less than the Capped Purchase Price, Builder shall refund to Owner all instalment payments made to the Builder less Builder's direct out-of-pocket costs and expenses for storage and resale…If Builder resells the Vessel for an amount equal to or in excess of the Capped Purchase price, Builder shall refund to Owner any instalment payments made to the Builder less Builders costs and expenses for storage and resale…in an amount equal to or in excess of the Capped Purchase Price...

[62] Comerica submits that this illustrates that the instalment payments, less adjustments, were intended to be repaid from the sale proceeds. Worldspan submits that this provision is to be interpreted such that it is the Builder's Mortgage interest which would revert to Worldspan and that it cannot secure payment under section 13.5 as that section expressly cancels the property interests created by the Builder's Mortgage which is therefore not secured.

[63] Section 13.5 does not expressly refer to the Builder's Mortgage or its cancellation. That said, in the event of default by Sargeant, in order to effect sale of the Vessel with clear title, the Builder's Mortgage would ultimately have to be discharged. However, this would not impact the requirement to refund the instalments as otherwise set out in section 13.5 prior to that occurring. In my view, this provision does suggest a circumstance where the advances would have to be refunded.

[64] The Prothonotary correctly stated that the parties must have contemplated that upon total loss or breach of the VCA, Worldspan would not have cash at hand to enable it to repay the construction costs. However, in my view, the VCA provisions indicate that the parties also contemplated and intended, in that event, that the Vessel would be sold to repay the advances made to fund its construction. As the Vessel has been arrested and is subject to claims by third parties, these provisions have no application in the present circumstance. However, they are relevant with respect to the intent of the parties and the interpretation of the provisions of the VCA in whole in the context of the factual matrix. In my view, given the above, while the Prothonotary was correct that there was no explicit provision for the repayment of the advances, in view of the VCA and Builder's Mortgage as a whole, there was an implied obligation to repay.

[65] The Prothonotary relied on *FC Yachts*, above, an arbitral decision, in support of his finding that the Builder's Mortgage did not secure a loan and, therefore, there was no obligation to repay. It is not binding on this Court (*Desputeaux v Éditions Chouette (1987) Inc*, 2003 SCC 17, [2003] 1 SCR 178 at para 62) nor was it subject to appeal. In any event, that decision is also distinguished from the present case.

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[66] There, pursuant to a yacht construction agreement, the purchaser, NWEY, deposited $500,000 in a labour and materials account to fund ongoing labour and materials charges. The builder, PRYB, was to invoice NWEY bi-weekly for labour and material charges incurred to be deducted from the labour and materials account which would then be replenished to its original level by NWEY. To secure the builder's obligations under the yacht construction agreement, the builder granted NWEY a first position security interest and mortgage on the vessel under construction. The security interest and mortgage were to be perfected and evidenced by a security agreement.

[67] Schedule B of the security agreement stated that in order to secure the payment and performance of the builder's obligations under the yacht construction agreement, the builder granted a builder's mortgage in favour of NWEY in the principal amount of $4,340,000 for the purpose of providing NWEY with a first ranking security interest in all of the builder's right, title and interest in the Vessel.

[68] The standard form builder's mortgage did not state a principal amount. It referred to an account current between PRYB, as mortgagor, and NWEY, as mortgagee, in support of PRYB's obligations under the yacht construction agreement for which the amount of principal and interest due at any time could be ascertained by reference to PRYB's records and books.

[69] The arbitrator found that there were no financial obligations of PRYB to NWEY under the yacht construction agreement. There were no payments for principal or interest due from PRYB to

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NWEY. The financial obligations were the reverse, NWEY was to advance funds to PRYB via the labour and materials account to construct the vessel. There was nothing in the wording of the yacht construction agreement to characterize the payments by NWEY to the labour and materials account as a loan.

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[70] The arbitrator rejected the submission that the builder's mortgage secured the cash advances made for the construction of the vessel and that the use of the word "account" in the standard form suggested that the builder's mortgage was to secure a sum of money and not just the builder's obligations under the yacht construction agreement. The arbitrator found that the form of the builder's mortgage dictates a certain format to be followed, but that there was no evidence that the accounts of PRYB recorded any amount owing by them to NWEY and that the evidence of the yacht construction agreement did not support any such indebtedness. The arbitrator stated that he was not satisfied that the builder's mortgage was to secure amounts advanced to PRYB by NWEY. While PRYB and NWEY "may have intended" to give NWEY a first ranking security interest in the vessel they did not accomplish this by way of a standard form builder's mortgage. "The requirement of a debt obligation from PRYB to NWEY in order to give some validity to the use of such a form is completely missing from the record."

[71] Unlike *FC Yachts*, the VCA did not contemplate a separate security agreement meant to perfect and evidence the mortgage. In that case, both the yacht construction agreement and Recital B of Schedule B of the security agreement stated that in order to secure the payment and performance of the builder's obligations under the yacht construction agreement, the builder granted a builder's mortgage. This is not the case at hand where the VCA states that the security interest

was to secure sums advanced to Worldspan, the buyer, which were not earned until delivery of the Vessel. There was nothing in the wording of the yacht construction agreement to characterise the payments by NWEY as advances not earned until delivery of the vessel. This is, in my view, sufficient to differentiate *FC Yachts*, above, from the matter before me. That wording in the VCA can be interpreted to characterize the advances as being in the nature of a loan. And, as I have addressed below, the mere fact that the Builder's Mortgage itself does not state the particulars of the account current is not fatal.

[72] Even if I had not found this I would have concluded that, interpreting the transaction as a whole to determine the intent of the parties and within the relevant factual matrix, the Builder's Mortgage and VCA implied an obligation to repay the unearned advances which created a potential debt that would, in effect, crystallize upon failure to deliver the Vessel in these circumstances. Although there was no actual "loan" there was a potential debt created by the provisions of the VCA and Sargeant secured the satisfaction of the potential debt by way of the Builder's Mortgage.

[73] This is conceptually similar to *S Funtig & Associates v Windsor (City)*(2008), 46 CBR (5th) 238, *(sub nom Capitol Theatre and Arts Centre (Windsor) (Trustee of) v Windsor (City))* [2008] OJ No 3038 (QL) (Sup Ct) [*S Funtig*] where a municipality approved a grant of $1,830,000 for the acquisition and renovation of a theatre by a not for profit organization. The not-for-profit organization gave a mortgage to the municipality stating the principal amount and, as to payment date and period, referred to an attached schedule. The schedule stated that the mortgage was given as collateral security to an operating agreement which, in turn, stipulated that default under it was also default under the mortgage in which event the mortgaged property would revert to the

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municipality. Although there was no actual loan, the court found that there was a debt which was "…created by the condition imposed by the grant" and that the "City secured the satisfaction of the debt by the Mortgage in its favour and the financial monitoring provisions outlined in the Operating Agreement" (para 60). Further, in *Webster et al v Garnet Lane Developments Ltd et al* (1989), 70 OR (2d) 65 (HC), mortgaged property secured both the payment of money, performance of a transfer of a building lot and the construction of a dwelling on it.

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[74] Here, the potential debt was created by the advances that would not be earned until delivery. The satisfaction of that debt would have occurred by delivery of the Vessel. As that did not occur, and the VCA contractual terms that would have otherwise governed the parties upon default have no application in these circumstances, the debt crystallized and satisfaction would be achieved by repaying the advances, accounts of which were kept by both parties.

[75] I would also note Graeme Bowtle & Kevin McGuinness, *The Law of Ship Mortgages* (Great Britain: Informa Law, 2001 at 37) which defines a mortgage as:

> It must now be considered to be a form of security created by or under a contract that confers an interest in the property subject to it…. That is annulled upon the performance of some agreed obligation – usually, but not necessarily, the payment of a debt…

[76] Thus, in these circumstances, the Builder's Mortgage would be annulled upon Worldspan meeting its VCA obligation to deliver the Vessel or, failing that, upon repayment of the advances.

Advances as a Fund

[77] A further reason given by the Prothonotary for determining that the advances did not comprise a loan was that the parties clearly contemplated that all monies provided for construction of the Vessel would be utilized in its construction and would not exist as a fund.

[78] As Comerica and Sargeant submit, the purpose of a loan is to permit the borrower to spend the monies lent. It may also be to allow the borrower to advance them to a third party to achieve the purpose of the loan. A ship's mortgage may serve to finance its construction (Gold, above, at 242) which is not unique or outside of the usual commercial practice. As stated in Curtis, above, at 40-41:

> In most shipbuilding projects, the primary source of financing for the builder lies in the pre-delivery instalments of the contract price payable by the buyer. In addition to assisting the builder in meeting the costs of construction, the practice of requiring the buyer to pay the contract price by instalments involves him in making a gradually increasing financial commitment to the project…

[79] Upon execution of the VCA, a $1,000,000.00 deposit was required and the Builder was under no obligation to commence construction until it was received. Thereafter, monthly payments were required. Each monthly payment was to cover the Builder's expenditure for the previous month and all such payments claimed by the Builder were the Owner subject to Owner audit and verification (subsection 4.3(a)). By the tenth working day after each month, the Builder was required to submit for verification and approval of the Owner, a Claim Certificate setting out that month's expenditures accompanied by all relevant invoices and other documentation to substantiate same.

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[80] The Builder was also required to provide such additional information and documentation as the Owner required for the purpose of verifying the payment claimed in the Claim Certificate (subsection 4.2(c)). Amounts properly claimed were payable by the last day of the month in which the Claim Certificate was received by the Owner. The intended use of those payments was clearly stated as, "It is acknowledged that the foregoing arrangements are intended to maintain positive cash flow and expedite payments to the Builder…." (Subsection 4.3(e)).

[81] A commercial absurdity (*Toronto (City) v WH Hotel Ltd*, [1966] SCR 434 [*WH Hotel*]; *Salah*, above, at para 16) would result if advanced funds could not be used for the intended purpose of the construction of a ship, and instead had to be set aside to repay the advances. Therefore, the Prothonotary erred in finding that advances did not comprise a loan because monies provided for the construction of the Vessel would be utilized in its construction and would not exist as a fund.

Evidence of Account Current

[82] The Prothonotary also found that there was no evidence of an account current being created pursuant to the VCA, but rather, that the VCA permitted Worldspan to use the advances to pay its construction costs. This too indicated that the advanced funds were not intended by the parties to be a loan.

[83] Comerica submits that the advances referred to in section 4.1 of the VCA to be secured under section 12.1 are clearly the monies that comprise the account current referenced in the Builder's Mortgage and that there was evidence before the Prothonotary that the parties had kept an account of Sargeant's advances. Further, that an account current must be broadly interpreted.

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Offshore submits that keeping track of such amounts does not create or infer an obligation to repay such monies. Tracking Sargeant's payments was for the purpose of determining what Sargeant owed, not what was owed to him.

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[84] The terms of the VCA clearly contemplated that the monthly payments claimed by Worldspan to cover the construction costs, and paid by Sargeant's advances, would be subject to verification and audit, that Worldspan was required to keep appropriate records in this regard (subsection 4.3(a)) and to submit to Sargeant for verification and approval a Claim Certificate setting out and supporting the claimed monthly expenditures (subsections 4.3(c) and (d)). This verified what was spent by Worldspan each month and, therefore, what Sargeant owed. It also ensured that the amounts claimed by Worldspan were valid. Further, it enabled both parties to determine, each month, the total cost of the construction to date which was significant in the context of any exceedence of the Estimated Purchase Price and associated termination rights (section 4.1 and 4.2).

[85] Comerica refers to the Affidavit of Cynthia Jones, dated October 7, 2011, which was before the Prothonotary as evidence of the existence of an account current. Attached to that affidavit is the Builder's Acknowledgement and Consent whereby Worldspan acknowledged and consented to the Assignment of Vessel Construction Agreement and whereby Sargeant assigned "all of its beneficial interests and all of its benefits, rights and titles (but not its obligations) in and under the Vessel Construction Agreement". Therein, Worldspan confirmed that as of that date, Sargeant had paid "…$11,131,192.04 representing the Deposit and all payments presently due towards the Final Purchase Price under the terms of Section 4 of the Vessel Construction Agreement" and that

"the amounts currently due" to Worldspan with respect to invoices issued but not yet paid was $1,884,187.88 and that the estimated cost of completion was $6,516,374.08.

[86] Comerica also submits that the Prothonotary had evidence of an account current before him by way of two other affidavits. The first was that of Michel Nesbitt, a chartered accountant, retained by Worldspan who set out the amounts paid and unpaid pursuant to the Claim Certificates. The second affidavit was that of Sargeant. Exhibit E of Sargeant's affidavit is a spreadsheet summarizing the Claims Certificates issued by Worldspan and payments totalling $20,651,924.05 that were made to Worldspan between March 2007 and April 2010. Comerica points out that in each of the above examples, the amounts assigned or claimed and paid by way of the Claims Certificates, were the unearned advances.

[87] Comerica also submits that an account current in a ship's mortgage is to be given a broad interpretation and allows for future advances (Edgar Gold, Aldo Chircop & Hugh Kindred, *Essentials of Canadian Maritime Law* (Toronto: Irwin Law, 2003) at 246 [Gold]). Further, that the Prothonotary failed to recognize its submission that security documentation consisting merely of a ship's mortgage in statutory form will be interpreted and enforced pursuant to the common law bearing on mortgages of ships and any relevant underlying legislation (*Royal Bank of Scotland plc v "Golden Trinity" (The)*, 2004 FC 795 at para 20 [*Royal Bank of Scotland*]) or that an account current form of mortgage can be all encompassing, including money used in advances (*Governor and Company of the Bank of Scotland v "Nel" (The)*, [2001] 1 FC 408 at para 20-22 [*The Nel*]). Offshore submits that an account current mortgage secures an obligation which is not created by the mortgage and cannot secure advances.

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[88] In my view, *The Nel*, above, is helpful in understanding account current mortgages. In that case, Prothonotary Hargrave provided the following description:

> [20] I will touch upon further pertinent terms of the Bank's security against the Nel and the other vessels providing security under the Bank of Scotland's fleet mortgage where appropriate. Here I will, however, observe that the mortgage is in account current form, a document which can form all encompassing security. In the view of the Bank of Scotland, the mortgage secures the initial loan, the running account kept between the Bank of Scotland and the owner of the fleet which included the Nel, and interest. As to the running account, the account current mortgage of the Nel, on its face, covers a broad range of amounts owing, including advances made to or on behalf of the owner, by the Bank of Scotland, from time to time. The second paragraph of the Bank of Scotland's mortgage sets out that it secures payment of:
>
> > …all sums for the time being owing to the Mortgagee on the account current, including all sums due or to become due to the Mortgagee under and by virtue of the Loan Agreement and Deed of Covenants whether by way of principle, interest or otherwise and all costs, charges, expenses and other monies connected with or incurred for the purpose of creating, preserving, maintaining, protecting, enforcing or attempting to enforce this security…
>
> [21] This broad view of the scope of security provided by an account current mortgage is not only in keeping with the practice of marine solicitors and within the intent of the parties, viewing the transactions between the Bank of Scotland and the owners of the mortgaged fleet as a whole, but it also corresponds with the view of the Nova Scotia Court of Appeal in Cleveland v. Boak et al. (1906), 39 N.S.R. 39, two pertinent passages from which are as follows [at pages 43-45]:
>
> > The plaintiff's contention is that by the terms of the recital the mortgage was given as security for "money advanced and to be advanced for purposes connected with shipping and trade," and was not for, and does not cover supplies for defendant, or obtained by defendant from other merchants, and supplied to him. However inapt the language used in the mortgage

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> may have been, it is selfevident, viewing the whole transaction between the parties, that the real intention of the plaintiff was to give the defendant security on his vessel for his current account, including moneys and supplies of every kind.
>
> [...]
>
> It cannot be contended the "account current" meant money advanced only. As used it clearly meant money used in advances, and such articles as were, and had been charged in accounts current from year to year, all of which was to be settled up and ascertained on 31st December in each year. The nature and course of dealings between the parties must be taken into consideration in interpreting such an instrument as this.

> [22] Taking into account the general nature of an account current mortgage, together with the specific circumstances in this instance, I have concluded that proper portions of the loan account, the running account, including the distress payments made to keep the vessels in the fleet operating and interest are secured by the account current fleet mortgage over the various vessels, including the Nel. There were suggestions, and I would not give those propositions any higher standing, that the mortgage security was, in itself, invalid or improperly registered. All of the factors and circumstances considered, there are no real reasons to doubt the validity and effectiveness of the mortgage security. I now turn to the sums said to be secured, a more involved aspect.

[89] The applicable principle of contract interpretation is that the intention of the parties is to be determined, on the whole of the relevant documents (*WH Hotel*, above). Here the intention was, as stated in section 4.1, that the payments made by Sargeant would be "on account of" the Final Purchase Price but would be in the nature of advances and would not be earned by Worldspan until delivery and acceptance of the Vessel. Section 12 of the VCA states that Worldspan granted to Sargeant a continuing first priority security interest in the Vessel to secure any sums advanced or paid to the Builder under the VCA. The sums "advanced" were the monthly payments.

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Accordingly, it follows that they comprised the account current secured by the Builder's Mortgage, even in the absence of an explicit reference in the VCA to an account current, as there is no other reasonable explanation but that the intent of the parties was that the account current was comprised of the advances. As was the case in *Cleveland v Boak* cited in *The Nel*, above, in my view, Worldspan intended to give Sargeant security in the Vessel for the advances by way of the Builder's Mortgage. It also cannot reasonably be argued that an account current does not capture future advances (see also Gold, above, at 246).

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[90] Offshore submits that there is a commercial explanation for why the money advanced was not earned, other than an implied obligation to repay. That is, title to the Vessel, which was destined for export, was retained by Worldspan because if the payments were earned prior to delivery then Sargeant would be assessed sales tax (*Excise Tax Act*, RSC, 1985, c E-15 subsection 168(9)). While that may be the case, there was no affidavit or other evidence before the Prothonotary to support the submission.

Particulars of Builder's Mortgage

[91] A further part of the Prothonotary's reasoning was based on his view that the standard form of mortgage required the specifics of the transaction to determine the amount owing and the "time of payment" and that neither the Builder's Mortgage nor the VCA contains such specifics.

[92] In *Hoban Construction v Alexander*, 2012 BBCA 75 at para 47, the Court held that contractual interpretation requires determining whether the contract discloses the parties' intentions as to the "substance of their agreement". There, the Court found that the trial judge, in interpreting

the contractual documents, did not employ the applicable principles and instead pointed to matters of form to undermine the enforceability of the documents rather than trying to ascertain meaning. The court found that the defects such as an inaccurate reference to the type of shares and the absence of a completion date, were irrelevant a consideration of the enforceability of the contracts unless they rendered the essential terms of the contracts so vague and uncertain as to be incapable of interpretation. It did not matter that the shares were not properly described so long as the subject matter of the contract was clear.

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[93] The Court further stated the following:

> [55] The trial judge did not make every effort to give effect to the parties' intentions by looking at substance and not mere form. Rather than attempting to extract meaning from the parties' expression of their contractual intention as the authorities require, the trial judge applied an overly formalistic and literal approach to interpreting the document…

[94] Here, the Builder's Mortgage is in standard form, and includes instructions requiring the user to state that there is an account current between the mortgagor and mortgagee and describing the nature of the transaction including how the amount of principle and interest due at any given time is to be ascertained and the manner and time of payment. In response was entered that there is an account current pursuant to the VCA, dated February 29, 2008, among mortgagor and mortgagee which agreement specified the obligations thereby secured. The form then provides the covenant to pay the sums due on that security at the time and in the manner set out and pledges the shares in the Vessel to better secure that payment.

[95] In my view, the Builder's Mortgage did not require any further detail than was provided, being that an account current existed and that the VCA specified the obligations secured by the Builder's Mortgage. It was not necessary to specify the amount owing or the "time of payment" as found by the Prothonotary, rather, this could be accomplished by a reference to an underlying document. In that regard, there was sufficient detail in the VCA, by way of the Claim Certificate and prescribed verification and audit process, to delineate the amount potentially owing at any given time, being the balance of the advances. As noted above, applying the principles of contract interpretation, the intent of the parties was to give Sargeant a security interest in the Vessel, by way of the Builder's Mortgage, for the unearned advances.

[96] Further, in *Neves v Kristina Logos* (2001), 220 FTR 15 (TD), var'd on a different ground, 2002 FCA 502, no interest rate was included on the statutory mortgage form, however, to avoid unjust enrichment resulting from the determination of priorities, one was applied by the Court. In this situation in the overall context of the transaction and the interpretation of the VCA and the Builder's Mortgage, any absence of details, was an issue of form over substance.

[97] It is also difficult to see how the Builder's Mortgage in this case could be intended for only the purpose of securing delivery of the Vessel as submitted by Offshore. The VCA explicitly states that a first priority security interest in the Vessel, as supported by the Builder's Mortgage, was "to secure any sums advanced or paid to the Builder under this Agreement." It does not state that it was to secure delivery of the Vessel. Further, Worldspan was obliged by the terms of the VCA to deliver the Vessel. If it failed to do so due to default or total loss then those events were addressed by the terms of the VCA. It is hard to imagine that Worldspan would simply decide, in breach of its

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VCA obligations, to keep the Vessel upon completion, or sell it to a third party, and that the Builder's Mortgage was intended to prevent such a circumstance and instead somehow "secure delivery". And, even if the logic of Worldspan were accepted, if that was the intent, then it would not succeed because, if the Builder's Mortgage does not secure a debt, then it is essentially of no force or effect either to secure delivery or otherwise. While the VCA and Builder's Mortgage language may have been inept (*The Nel*, above), I am not prepared to find that the latter was of no force and effect.

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[98] As to the submission that the *Canada Shipping Act, 2001* permits a mortgagor only to sell a vessel upon default of the mortgage and that there is no statutory requirement of repayment, it seems clear that the purpose of selling the vessel in such a circumstance is to repay the mortgage debt, however it may have been advanced. Further, the parties could and typically would provide for repayment implicitly or explicitly in a contract between them. I see no merit in this submission.

[99] Given the factual matrix, Comerica's explanation is the most plausible one being that the Builder's Mortgage was intended to secure Sargeant's first priority rights in the Vessel as against third parties in circumstances, such as these, where the terms of the VCA do not govern the disposition of the Vessel as between Worldspan and Sargeant as it has been arrested by third parties and will be sold by the Court.

[100] In conclusion, in my view the Prothonotary's failure to apply the principles of contract interpretation so as to determine the true intent of the parties based on the whole of the transaction and within the relevant factual matrix, and in a manner that would not lead to a commercial

absurdity as regards to the absence of a "fund" created to repay the Builder's Mortgage, was a palpable and overriding error which led to an erroneous conclusion that the Builder's Mortgage does not create a lien or charge against the Vessel other than to secure its delivery. Upon interpreting the overall context of the VCA, I find that the Builder's Mortgage secured the unearned advances which were in the nature of a loan or a potential debt and an obligation to repay in the event of non-delivery in the circumstances described in this decision.

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**(3) Did the Prothonotary err by not considering Sargeant's alternate claim under subsection 22(2)(n) *Federal Courts Act*?**

[101] Sargeant submits that the Prothonotary failed to consider or apply the applicable legal principles to his alternative subsection 22(2)(n) claim.

[102] In his decision, the Prothonotary stated that for the reasons set out in paragraphs 60 to 64 of Offshore's supplementary written reasons, which the Prothonotary adopted and made his own, the submission by Sergeant that he had an equitable mortgage or a subsection 22(2)(n) claim was "of no moment".

[103] Those reasons read as follows:

> 60. An equitable mortgage is one that does not transfer the legal estate in the property to the mortgagee, but [only] creates in equity a charge upon the property. [*Helmey v. Helmy* 2000 CanLII 22452 (ON SC) at para 104]
>
> 61. If Section 12.1 of the VCA does serve to create an equitable mortgage, one is then drawn back to the same issue: what is the obligation secured?

> 62. An equitable mortgage in this case can only serve to secure obligations of the Builder up until delivery of the Vessel but does not at any time create an obligation of repayment of advances because the VCA does not make such an obligation on the Builder.
>
> 63. Any equitable mortgage will be subject to the terms and conditions of the VCA. Section 12.1 provides that any security interest as such will be subordinate to Sargeant's obligations to Worldspan under the VCA.
>
> 64. Once the Vessel is delivered pursuant to the terms of the VCA, such security ceases to exist. Alternatively, if the Vessel is sold pursuant to the terms of the VCA, such security ceases to exist with the only obligation to Sargeant being payment (if any) of sale proceeds (as *in personam l*iability).
>
> [Emphasis in original]

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Thus, based on those reasons, the decision does not address the subsection 22(2)(n) alternate claim nor does it provide reasons as to why this was unnecessary.

[104] Sargeant submits that subsection 22(2)(n) establishes that any claim arising out of a contract relating to the construction, repair or equipping of a ship falls within this Court's jurisdiction. Section 43 of the *Federal Courts Act* which specifies when the jurisdiction conferred by section 22 may be exercised *in rem*, confirms that a claim that falls within subsection 22(2)(n) may be exercised *in rem*. Sargeant's claim against Worldspan arises from the VCA and, therefore, falls within the Court's maritime jurisdiction. Worldspan failed to complete the Vessel in breach of its obligations under the VCA as supported by Sargeant's Affidavit of October 13, 2011.

[105] Offshore submits that the affidavits filed on behalf of Sargeant and Comerica pursuant to the Federal Court Claims Process Order were to the effect that the construction cost had escalated leading to the termination of the contract and that Sargeant and/or Comerica had advanced

$21million towards the construction secured by a mortgage. No claim was made in respect of damages for breach of the VCA and no particulars of the breach were provided. No claim was made for delivery, possession or ownership. Thus, any claim pursuant to subsection 22(2)(n) is barred by the Claims Process Order except for a claim that $21 million was advanced and is debt obligation to be repaid by Worldspan. Subsection 22(2)(n) creates the jurisdiction of the Court to deal with certain subject matter, it does not create a cause of action. The Prothonotary did not err when he held that claims based on an equitable mortgage or subsection 22(2)(n) were "of no moment".

[106] There is no question that this Court has jurisdiction over claims arising from a ship construction contract:

| | |
|---|---|
| 22. … | 22. … |
| Maritime jurisdiction | Compétence maritime |
| (2) Without limiting the generality of the subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to the following: | (2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants : |
| … | … |
| (n) any claim arising out of a contract relating to the construction, repair or equipping of a ship; | n) une demande fondée sur un contrat de construction, de réparation ou d'équipement d'un navire; |

(See *R v Cdn Vickers Ltd*. [1980] 1 FC 266 (CA) [*Cdn Vickers*]; *Canadian General Electric Co v The Queen*, [1979] 2 FC 410 (CA); *Comfact Corporation v Hull 717 (Ship)*, 2012 FC 1161; *FC Yachts*, above).

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[107] It is also without question that subsection 22(2)(n) jurisdiction may be exercised *in personam* and *in rem*:

| Jurisdiction in personam | Compétence en matière personnelle |
|---|---|
| **43.** (1) Subject to subsection (4), the jurisdiction conferred on the Federal Court by section 22 may in all cases be exercised in personam. | **43.** (1) Sous réserve du paragraphe (4), la Cour fédérale peut, aux termes de l'article 22, avoir compétence en matière personnelle dans tous les cas. |
| Jurisdiction in rem | Compétence en matière réelle |
| (2) Subject to subsection (3), the jurisdiction conferred on the Federal Court by section 22 may be exercised in rem against the ship, aircraft or other property that is the subject of the action, or against any proceeds from its sale that have been paid into court. | (2) Sous réserve du paragraphe (3), elle peut, aux termes de l'article 22, avoir compétence en matière réelle dans toute action portant sur un navire, un aéronef ou d'autres biens, ou sur le produit de leur vente consigné au tribunal. |

[108] It is also true that these provisions address the jurisdiction of the Court to deal this subject matter but do not create a cause of action.

[109] Sargeant's affidavit of October 13, 2011 states that it supports his claim against the Vessel "which is derived from payments that were made by me or on my behalf, at my direction and for my benefit to the legal owner of the Vessel, the Defendant Worldspan Marine Inc totalling $20,965,924.05…for the construction of the Vessel, and from the security interest in the Vessel granted to me by Worldspan to secure these payments, all as further described below." The affidavit proceeds to describe the VCA including that Worldspan undertook to design, construct,

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outfit, launch, complete and sell and delivery the Vessel to Sargeant as well as the security interest provided pursuant to the VCA. The remainder of the affidavit describes the payments made in connection with the Vessel construction.

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[110] While it is true that the affidavit does not assert a claim for "delivery, possession or ownership" as submitted by Offshore, in my view, this is not required to support a claim made pursuant to subsection 22(2)(n) which permits any claim arising out of a contract relating to the construction of a ship. Here, the claim is for recovery of the advances made for the construction of the Vessel pursuant to the VCA, a ship construction contract. In my view, this is a sufficient basis to found an *in rem* claim pursuant to subsection 22(2)(n). This Court has confirmed its jurisdiction under subsection 22(2)(n) over claims which arise out of a ship construction contract (*Cdn Vickers*, above; *FC Yachts*, above).

[111] As the Prothonotary did not give reasons for refusing to consider the alternate subsection 22(2)(n) claim it is not possible to determine if he erred in his assessment. However, the failure to address the issue is an error of law attracting the correctness standard. As the standard of review on pure questions of law is one of correctness, an appellate court is free to replace the opinion of the trial judge with its own opinion (*Housen*, above). Accordingly, as in my view the alternate position has merit, Sargeant and Comerica's position in this regard is to be addressed at the priorities hearing.

## ORDER

**THIS COURT'S JUDGMENT is that:**

1. This appeal is allowed.
2. The order of Prothonotary Lafrenière dated March 5, 2013 in finding that the Builder's Mortgage granted to Harry Sargeant III, against the Defendant Vessel "QE014226C010" pursuant to the Vessel Construction Agreement between Harry Sargeant III and the Defendant, Worldspan Marine Inc dated February 29, 2008 does not create a lien or charge in the Vessel other than to secure delivery, is set aside.
3. Costs of the motion shall be paid to each of the Appellants, Sargeant and Comerica on this motion by the Defendant, Offshore in the amount of $1,500 inclusive of disbursements and taxes.

"Cecily Y. Strickland"
Judge

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**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-1226-10 |
| **STYLE OF CAUSE:** | OFFSHORE INTERIORS INC. v WORLDSPAN MARINE INC., CRESCENT CUSTOM YACHTS INC., THE OWNERS AND ALL OTHERS INTERESTED IN THE VESSEL "QE014226C010" AND THE VESSEL "QE014226C010" AND WOLRIGE MAHON LIMITED IN ITS CAPACITY AS APPOINTED VESSEL CONSTRUCTION OFFICER OF THE DEFENDANT VESSEL "QE014226C010" AND HARRY SARGEANT III, MOHAMMED ANWAR FARID AL-SALEH, COMERICA BANK |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | MAY 6 AND 7, 2013 |
| **REASONS FOR ORDER AND ORDER:** | STRICKLAND J. |
| **DATED:** | DECEMBER 19, 2013 |

**APPEARANCES:**

| | |
|---|---|
| Mr. W. Gary Wharton | FOR THE PLAINTIFF OFFSHORE INTERIORS INC. |
| Mr. John Bromley<br>Mr. Kieran Siddall | FOR THE INTERVENOR HARRY SARGEANT III |
| Mr. John McLean<br>Mr. Scott Andersen | FOR THE INTERVENOR COMERICA BANK |
| Mr. Dionysios Rossi<br>Mr. Graham Walker | FOR THE INTERVENOR MOHAMMED ANWAR FARID AL-SALEH |

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**SOLICITORS OF RECORD:**

| | |
|---|---|
| Bernard LLP<br>Barristers and Solicitors<br>Vancouver, British Columbia | FOR THE PLAINTIFF OFFSHORE INTERIORS INC. |
| Bull Housser LLP<br>Barristers and Solicitors<br>Vancouver, British Columbia | FOR THE INTERVENOR HARRY SARGEANT III |
| Gowling Lafleur Henderson LLP<br>Barristers and Solicitors<br>Vancouver, British Columbia | FOR THE INTERVENOR COMERICA BANK |
| Borden Ladner Gervais LLP<br>Barristers and Solicitors<br>Vancouver, British Columbia | FOR THE INTERVENOR MOHAMMED ANWAR FARID AL-SALEH |

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# Maritime Lien

**Definition of *foreign vessel***

**139 (1)** In this section, ***foreign vessel*** has the same meaning as in section 2 of the *Canada Shipping Act, 2001*.

**Maritime lien**

**(2)** A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise

**(a)** in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or

**(b)** out of a contract relating to the repair or equipping of the foreign vessel.

**Services requested by owner**

**(2.1)** Subject to section 251 of the *Canada Shipping Act, 2001*, for the purposes of paragraph (2)(a), with respect to stevedoring or lighterage, the services must have been provided at the request of the owner of the foreign vessel or a person acting on the owner's behalf.

**Exception**

**(3)** A maritime lien against a foreign vessel may be enforced by an action *in rem* against a foreign vessel unless

**(a)** the vessel is a warship, coast guard ship or police vessel; or

**(b)** at the time the claim arises or the action is commenced, the vessel is being used exclusively for non-commercial governmental purposes.

***Federal Courts Act***

**(4)** Subsection 43(3) of the *Federal Courts Act* does not apply to a claim secured by a maritime lien under this section.

**Frans G. A. De Roy and Thierry Van Doosselaere, as Trustees in Bankruptcy of ABC Containerline N.V., the Owners, Charterers and all others interested in the Ship "Brussel", and the Ship "Brussel"** *Appellants*

*v.*

**Holt Cargo Systems Inc.** *Respondent*

**Indexed as: Holt Cargo Systems Inc. *v.* ABC Containerline N.V. (Trustees of)**

**Neutral citation: 2001 SCC 90.**

File No.: 27290.

2001: March 20; 2001: December 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Courts — Jurisdiction — Federal Court of Canada — Maritime law — Stay of proceedings — U.S. creditor bringing maritime law action against Belgian ship in Federal Court — Belgian shipowner subsequently adjudged bankrupt in Belgium — Quebec Superior Court making orders purporting to dispose of ship and proceeds of sale — Whether Federal Court erred in exercise of its discretion to deny trustees' application for stay of proceedings — Federal Court Act, R.S.C. 1985, c. F-7, s. 50.*

In late March 1996, a Belgian ship was arrested at Halifax in connection with an *in rem* action commenced by the respondent Holt, a U.S. company, in the Federal Court claiming a maritime lien for stevedoring services provided in the U.S. The ship's Belgian owner was subsequently adjudged bankrupt by the Belgian bankruptcy court and the appellants were appointed the trustees in bankruptcy. In May the appellant trustees obtained an order of the Quebec Superior Court, Civil Chamber that "recognized and declared executory in Quebec" the Belgian bankruptcy order. Their application to the Federal Court, Trial Division for an adjournment of the *in rem* proceedings against the ship was denied,

**Frans G. A. De Roy et Thierry Van Doosselaere, en qualité de syndics de faillite de ABC Containerline N.V., les propriétaires, affréteurs et toutes autres personnes ayant un droit sur le navire « Brussel », et le navire « Brussel »** *Appelants*

*c.*

**Holt Cargo Systems Inc.** *Intimée*

**Répertorié : Holt Cargo Systems Inc. *c.* ABC Containerline N.V. (Syndics de)**

**Référence neutre : 2001 CSC 90.**

N° du greffe : 27290.

2001 : 20 mars; 2001 : 20 décembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

*Tribunaux — Compétence — Cour fédérale du Canada — Droit maritime — Suspension des procédures — Créancier américain intentant en Cour fédérale une action fondée sur le droit maritime contre un navire belge — Faillite du propriétaire belge survenue par la suite en Belgique — Cour supérieure du Québec délivrant des ordonnances censées statuer sur le sort du navire et le produit de la vente — La Cour fédérale a-t-elle commis une erreur dans l'exercice de son pouvoir discrétionnaire de refuser la demande de suspension des procédures présentée par les syndics? — Loi sur la Cour fédérale, L.R.C. 1985, ch. F-7, art. 50.*

À la fin du mois de mars 1996, un navire belge a été saisi à Halifax à la suite d'une action *in rem* que l'intimée Holt, une compagnie américaine, avait intentée devant la Cour fédérale et dans laquelle elle invoquait un privilège maritime pour des services d'acconage fournis aux États-Unis. Le propriétaire belge du navire a, par la suite, été mis en faillite par le tribunal de faillite belge, et les appelants ont été désignés syndics de faillite. Au cours du mois de mai, les syndics appelants ont obtenu auprès de la Chambre civile de la Cour supérieure du Québec une ordonnance « reconn[aissant] et déclar[ant] exécutoir[e] au Québec » l'ordonnance de faillite délivrée en Belgique. Leur requête déposée devant la Section

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and in default of defence, judgment was awarded to Holt against the ship, with leave to the trustees to challenge the precise quantum of the judgment if done promptly. The Federal Court ordered the ship appraised and laid down the procedure for its sale. The trustees then requested a stay of proceedings from the Federal Court "pending final disposition of the matter by the Superior Court". They produced various orders from the Quebec Superior Court sitting in bankruptcy one of which purported to dispose of the ship and the proceeds of sale. The Federal Court, Trial Division declined to give effect to the orders of the Canadian bankruptcy court or to stay its own proceedings. The Federal Court of Appeal upheld that decision.

de première instance de la Cour fédérale en vue d'obtenir l'ajournement des procédures *in rem* contre le navire a été rejetée et, faute de défense, Holt a obtenu jugement contre le navire, les syndics étant autorisés à contester le montant accordé à la condition d'agir promptement. La Cour fédérale a ordonné l'évaluation du navire et établi la procédure à suivre pour le vendre. Les syndics ont alors demandé à la Cour fédérale de suspendre les procédures « en attendant le règlement définitif de l'affaire par la Cour supérieure ». Ils ont produit diverses ordonnances de la Cour supérieure du Québec siégeant en matière de faillite, dont l'une était censée statuer sur le sort du navire et le produit de la vente. La Section de première instance de la Cour fédérale a refusé de mettre à exécution les ordonnances du tribunal de faillite canadien et de suspendre ses propres procédures. La Cour d'appel fédérale a confirmé cette décision.

*Held*: The appeal should be dismissed.

A maritime lien validly created under foreign law will be recognized and given the same priority in Canada as would be given to a maritime lien created in Canada under Canadian maritime law unless opposed to some rule of domestic policy or procedure which prevents the recognition of the right. Holt was entitled to have its maritime lien recognized by the Federal Court in these proceedings.

The Federal Court did not lose jurisdiction to proceed as a result of the various orders of the Quebec Superior Court sitting in bankruptcy. The Federal Court trial judge was not exercising original, ancillary or auxiliary jurisdiction in bankruptcy, but was dealing with *in rem* claims against the ship. Having ruled that he would recognize Holt's security interest as a matter of maritime law, the trial judge rightly concluded that there was no jurisdictional barrier to the Federal Court continuing to adjudicate Holt's *in rem* action against the ship. Insofar as Holt's claim was integrally connected to maritime matters, it lay within the jurisdiction of the Federal Court and it was for that court to decide whether or not to defer to the Belgian bankruptcy court having due regard both to international comity and convenience and to the rights of its own citizens or other persons who are under the protection of our laws.

In addressing the issue of a stay, the trial judge acknowledged the importance of comity and international coordination in bankruptcy matters. Having done so, he went on to place primary emphasis on the fact he was dealing with an *in rem* action by secured creditors against a ship which at the time of the bankruptcy the Federal Court had already arrested and at the time of the

*Arrêt* : Le pourvoi est rejeté.

Un privilège maritime validement créé sous le régime d'une loi étrangère est reconnu et se voit accorder, au Canada, la même priorité qu'un privilège maritime créé au Canada sous le régime du droit maritime canadien, à moins qu'il n'aille à l'encontre d'une règle quelconque de politique ou de procédure intérieure qui en empêche la reconnaissance. Holt avait droit en l'espèce à la reconnaissance de son privilège maritime par la Cour fédérale.

La Cour fédérale n'a pas perdu compétence à la suite des diverses ordonnances délivrées par la Cour supérieure du Québec siégeant en matière de faillite. Le juge de la Section de première instance de la Cour fédérale n'exerçait pas une juridiction de première instance, auxiliaire ou subordonnée en matière de faillite, mais était plutôt saisi de réclamations *in rem* contre le navire. Après avoir décidé de reconnaître la garantie de Holt sur le plan du droit maritime, le juge de première instance a conclu à juste titre qu'aucune entrave juridictionnelle n'empêchait la Cour fédérale de continuer d'instruire l'action *in rem* de Holt contre le navire. Dans la mesure où la réclamation de Holt était entièrement liée aux affaires maritimes, elle relevait de la compétence de la Cour fédérale et il appartenait à cette cour de décider si elle devait s'en remettre au tribunal de faillite belge, compte tenu à la fois de la courtoisie et des convenances internationales et des droits de ses propres citoyens ou des autres personnes qui sont sous la protection de nos lois.

En examinant la question de la suspension, le juge de première instance a reconnu l'importance de la courtoisie et de la coordination internationale en matière de faillite. Il a ensuite insisté principalement sur le fait qu'il était saisi d'une action *in rem* intentée par des créanciers garantis contre un navire dont la Cour fédérale avait déjà ordonné la saisie au moment de la faillite, et dont il avait

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interventions of the Canadian bankruptcy court he had already ordered appraised and sold.

The appellants' strongest argument is that the parties and the subject matter of the dispute are but weakly connected to Canada. However, lack of substantive connection to any particular jurisdiction, including their home port, is a feature of ships engaged in international maritime commerce. The trial judge considered the relevant factors in reaching his conclusion that the Federal Court was the appropriate forum to resolve Holt's secured claim against the ship. He committed no error in principle and did not refuse to take into consideration any major element appropriate for the determination of the case. In the absence of such error, the exercise of his discretion should be affirmed.

**Cases Cited**

**Referred to:** *Antwerp Bulkcarriers, N.V. (Re)*, [2001] 3 S.C.R. 951, 2001 SCC 91; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *In re Treco*, 240 F.3d 148 (2001); *Laane and Baltser v. Estonian State Cargo & Passenger Steamship Line*, [1949] S.C.R. 530; *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683; *The Tolten*, [1946] P. 135; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165; *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17; *Roberts v. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218; *Re Walker* (1998), 5 C.B.R. (4th) 123; *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *The Strandhill v. Walter W. Hodder Co.*, [1926] S.C.R. 680; *Todd Shipyards Corp. v. Altema Compania Maritima S.A.*, [1974] S.C.R. 1248; *Marlex Petroleum Inc. v. Har Rai (The)*, [1987] 1 S.C.R. 57, aff'g [1984] 2 F.C. 345; *Riordon Co. v. Danforth Co.*, [1923] S.C.R. 319; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Galbraith v. Grimshaw*, [1910] A.C. 508; *Anantapadmanabhaswami v. Official Receiver of Secunderabad*, [1933] A.C. 394; *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752; *Zingre v. The Queen*, [1981] 2 S.C.R. 392; *Spencer v. The Queen*, [1985] 2 S.C.R. 278; *Hilton v. Guyot*, 159 U.S. 113 (1895); *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N PLC*, [1993] 4 S.C.R. 289; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527 (1883); *Allen v. Hanson* (1890), 18 S.C.R. 667; *Re Breakwater Co.* (1914), 33 O.L.R. 65; *Re E. H. Clarke & Co.*, [1923] 1 D.L.R. 716; *Re Stewart & Matthews,*

déjà ordonné l'évaluation et la vente au moment des interventions du tribunal de faillite canadien.

L'argument le plus solide des appelants veut que les parties et l'objet du litige ne soient que faiblement liés au Canada. Cependant, l'absence de lien important avec un ressort particulier, y compris leur port d'attache, est une caractéristique des navires qui servent au commerce maritime international. Le juge de première instance a tenu compte des facteurs pertinents pour conclure que la Cour fédérale était le tribunal compétent pour régler la réclamation garantie de Holt contre le navire. Il n'a commis aucune erreur de principe et n'a pas refusé de tenir compte d'un élément prépondérant en l'espèce. En l'absence d'une telle erreur, il y a lieu de confirmer la validité de l'exercice de son pouvoir discrétionnaire.

**Jurisprudence**

**Arrêts mentionnés :** *Antwerp Bulkcarriers, N.V. (Re)*, [2001] 3 R.C.S. 951, 2001 CSC 91; *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897; *In re Treco*, 240 F.3d 148 (2001); *Laane and Baltser c. Estonian State Cargo & Passenger Steamship Line*, [1949] R.C.S. 530; *Q.N.S. Paper Co. c. Chartwell Shipping Ltd.*, [1989] 2 R.C.S. 683; *The Tolten*, [1946] P. 135; *Olympia & York Developments Ltd. c. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165; *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17; *Roberts c. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218; *Re Walker* (1998), 5 C.B.R. (4th) 123; *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061; *The Strandhill c. Walter W. Hodder Co.*, [1926] R.C.S. 680; *Todd Shipyards Corp. c. Altema Compania Maritima S.A.*, [1974] R.C.S. 1248; *Marlex Petroleum Inc. c. Har Rai (Le)*, [1987] 1 R.C.S. 57, conf. [1984] 2 C.F. 345; *Riordon Co. c. Danforth Co.*, [1923] R.C.S. 319; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Galbraith c. Grimshaw*, [1910] A.C. 508; *Anantapadmanabhaswami c. Official Receiver of Secunderabad*, [1933] A.C. 394; *ITO—International Terminal Operators Ltd. c. Miida Electronics Inc.*, [1986] 1 R.C.S. 752; *Zingre c. La Reine*, [1981] 2 R.C.S. 392; *Spencer c. La Reine*, [1985] 2 R.C.S. 278; *Hilton c. Guyot*, 159 U.S. 113 (1895); *Succession Ordon c. Grail*, [1998] 3 R.C.S. 437; *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077; *Hunt c. T&N PLC*, [1993] 4 R.C.S. 289; *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022; *Canada Southern Railway Co. c. Gebhard*, 109 U.S. 527 (1883); *Allen c. Hanson* (1890), 18 R.C.S. 667; *Re Breakwater Co.* (1914), 33 O.L.R. 65; *Re E. H. Clarke & Co.*, [1923] 1 D.L.R. 716; *Re Stewart & Matthews, Ltd. and The Winding-Up Act* (1916),

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*Ltd. and The Winding-Up Act* (1916), 10 W.W.R. 154; *Antares Shipping Corp. v. The Ship "Capricorn"*, [1977] 2 S.C.R. 422; *The Atlantic Star*, [1973] 2 All E.R. 175; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

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*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 2 "secured creditor", 43(7), 69.3 [ad. 1992, c. 27, s. 36], 136(1), 183(1)(*b*), Part XIII [ad. 1997, c. 12, s. 118], 268(2), (3), (6) [*idem*], 269 [*idem*], 271(1) [*idem*].

*Commercial Instruments and Maritime Liens Act*, 46 U.S.C. § 31342.

*Federal Court Act*, R.S.C. 1985, c. F-7, ss. 3, 17(6) [rep. & sub. 1990, c. 8, s. 3], 22(1), 50(1).

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10 W.W.R. 154; *Antares Shipping Corp. c. Le navire « Capricorn »*, [1977] 2 R.C.S. 422; *The Atlantic Star*, [1973] 2 All E.R. 175; *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3.

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*Commercial Instruments and Maritime Liens Act*, 46 U.S.C. § 31342.

*Loi sur la Cour fédérale*, L.R.C. 1985, ch. F-7, art. 3 [abr. & rempl. 1993, ch. 34, art. 68], 17(6) [abr. & rempl. 1990, ch. 8, art. 3], 22(1), 50(1).

*Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3, art. 2 « créancier garanti », 43(7), 69.3 [aj. 1992, ch. 27, art. 36], 136(1), 183(1)*b*), partie XIII [aj. 1997, ch. 12, art. 118], 268(2), (3), (6) [*idem*], 269 [*idem*], 271(1) [*idem*].

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*David G. Colford*, for the appellants.

*Thomas E. Hart* and *Jane O'Neill*, for the respondent.

The judgment of the Court was delivered by

BINNIE J. — The problems of international bankruptcies have excited much recent judicial and academic commentary. In this appeal, we are required to determine whether a maritime law proceeding by a U.S. creditor against a Belgian ship in a Canadian court ought to have been stayed in deference to a Belgian court dealing with the subsequent bankruptcy of its Belgian shipowner. Deference to the Belgian bankruptcy court, it is argued, was required by the principles of international comity. Despite the obvious benefits of international coordination of bankruptcies that spread their financial wreckage across multiple jurisdictions, the Federal Court of Canada declined to stay its proceedings under Canadian maritime law. The present appeal is from its decision. The companion case, *Antwerp Bulkcarriers, N.V. (Re)*, [2001] 3 S.C.R. 951, 2001 SCC 91, released at the same time, deals with the appeal from the Quebec Court of Appeal on the bankruptcy side of the concurrent and interconnected proceedings.

The history of this litigation, in brief summary, is as follows. On March 30, 1996, the M/V "Brussel" (the "Ship") was arrested in Canadian waters near the entrance to Halifax harbour by order of the Federal Court of Canada. A week later, its Belgian owner made an assignment in bankruptcy at Antwerp with debts vastly exceeding its assets. The U.S. creditor, Holt Cargo Systems Inc. ("Holt"), persisted with its *in rem* action. Four months later, after a storm of motions and applications in the Federal Court and the Superior Court of Quebec sitting in Bankruptcy, with periodic interventions by the Eleventh Chamber of the Commercial Court of the Judicial District of Antwerp (the "Belgian bankruptcy court") and a related order by a U.S. bankruptcy court, the Ship was sold over the objection of the trustees in bankruptcy. The Federal Court ruled

*David G. Colford*, pour les appelants.

*Thomas E. Hart* et *Jane O'Neill*, pour l'intimée.

Version française du jugement de la Cour rendu par

1 LE JUGE BINNIE — Les problèmes de faillites internationales ont récemment fait l'objet de nombreux commentaires jurisprudentiels et doctrinaux. Dans le présent pourvoi, nous devons décider si des procédures en droit maritime qu'une créancière américaine a engagées contre un navire belge devant un tribunal canadien auraient dû être suspendues par déférence pour le tribunal belge saisi de la faillite subséquente du propriétaire belge du navire. Cette déférence pour le tribunal de faillite belge découlait, soutient-on, des principes de courtoisie internationale. Malgré les avantages évidents qu'offre la coordination internationale des faillites ayant des répercussions financières dans plus d'un ressort, la Cour fédérale du Canada a refusé de suspendre ses procédures en droit maritime canadien. C'est cette décision qui fait l'objet du présent pourvoi. L'arrêt connexe, *Re Antwerp Bulkcarriers, N.V.*, [2001] 3 R.C.S. 951, 2001 CSC 91, rendu simultanément, fait suite à l'appel interjeté contre un arrêt de la Cour d'appel du Québec portant sur l'aspect « faillite » des procédures concomitantes et étroitement liées.

2 Voici un bref historique du présent litige. Le 30 mars 1996, le N/M « Brussel » ( le « navire ») a été saisi dans les eaux canadiennes, près de l'entrée du port de Halifax, conformément à une ordonnance de la Cour fédérale du Canada. Une semaine plus tard, le propriétaire du navire, dont le passif excédait largement l'actif, a fait cession de ses biens à Anvers, en Belgique. La créancière américaine, Holt Cargo Systems Inc. (« Holt »), a maintenu son action *in rem*. Quatre mois plus tard, après une pluie de requêtes et de demandes en Cour fédérale et en Cour supérieure du Québec siégeant en matière de faillite, ponctuée d'interventions de la part de la Onzième Chambre du Tribunal de commerce du district judiciaire d'Anvers (le « tribunal de faillite belge ») et d'une ordonnance connexe délivrée par un tribunal de faillite américain, le navire a été vendu malgré

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that the proceeds of the sale are eventually to be distributed to secured creditors, including the respondent, depending on the outcome of this appeal.

3 The Superior Court of Quebec sitting in Bankruptcy (the "Canadian bankruptcy court") played a potentially important role in responding to the request for assistance from the Belgian Commercial Court exercising Belgian bankruptcy jurisdiction. However, I believe the trustees asked for more assistance from the Canadian bankruptcy court than could lawfully be given, and that the Federal Court did not err in principle in refusing a stay of the maritime law proceedings.

4 I would therefore dismiss the appeal.

I. Facts

5 The Ship was arrested at Halifax under a warrant of arrest issued at the instance of Holt, a U.S. company incorporated under the laws of New Jersey. The warrant for arrest was issued in connection with an *in rem* action commenced by Holt the same day in the Federal Court of Canada against the "owners, charterers and all others interested in the ship", and the Ship itself. The M/V "Brussel" was owned by Antwerp Bulkcarriers N.V. which, with other interrelated companies, carried on the business of international carriage of goods by sea.

6 Holt's action was for unpaid fees and charges for stevedoring and other related services provided to the Ship at Gloucester City, New Jersey, in the United States between 1994 and 1996 inclusive. No part of the debt was incurred in Canada and neither the Ship nor its creditors were ordinarily resident here.

7 Following the arrest of the Ship, cargo and container owners, shippers, suppliers, insurers and others also filed claims in the Federal Court. In total, statements of claim were filed in 27 separate actions. Moreover, notices of claim were filed in

l'opposition des syndics de faillite. La Cour fédérale a décidé que le produit de la vente serait réparti ultérieurement entre les créanciers garantis, dont l'intimée, selon l'issue du présent pourvoi.

La Cour supérieure du Québec siégeant en matière de faillite ( le « tribunal de faillite canadien ») a joué un rôle potentiellement important en répondant à la demande de concours présentée par le Tribunal de commerce belge exerçant compétence en matière de faillite. Cependant, j'estime que les syndics ont demandé au tribunal de faillite canadien un concours plus important que ce qui pouvait être accordé légalement, et que la Cour fédérale n'a commis aucune erreur de principe en refusant la suspension des procédures en droit maritime.

En conséquence, je suis d'avis de rejeter le pourvoi.

I. Les faits

Le navire a été saisi à Halifax en vertu d'un mandat de saisie décerné à la demande de Holt, une compagnie américaine constituée en vertu des lois du New Jersey. Le mandat de saisie a été décerné dans le cadre d'une action *in rem* que Holt avait intentée le même jour devant la Cour fédérale du Canada contre les « propriétaires, affréteurs et toutes autres personnes ayant un droit sur le navire », et le navire lui-même. Le N/M « Brussel » appartenait à Antwerp Bulkcarriers, N.V. qui, conjointement avec d'autres compagnies étroitement liées, exploitait une entreprise de transport maritime international de marchandises.

L'action de Holt visait le paiement des services d'acconage et autres services connexes fournis au navire à Gloucester City (New Jersey), aux États-Unis, entre 1994 et 1996 inclusivement. Aucune partie de la dette n'a été contractée au Canada, et ni le navire ni ses créanciers n'avaient leur lieu de résidence habituelle au Canada.

À la suite de la saisie du navire, les propriétaires de la cargaison et des conteneurs, les expéditeurs, les fournisseurs, les assureurs et d'autres personnes ont également déposé des réclamations en Cour fédérale. En tout, des déclarations ont été déposées

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Holt's *in rem* action against the Ship by more than 20 claimants in response to the Federal Court's order, discussed below, that the Ship be appraised and sold.

dans le cadre de 27 actions distinctes. De plus, réagissant à l'ordonnance d'évaluation et de vente du navire délivrée par la Cour fédérale et analysée plus loin, plus de 20 réclamants ont déposé des avis de réclamation dans l'action *in rem* de Holt contre le navire.

8 On April 5, 1996, a week after the Ship's arrest, the shipowner was adjudged bankrupt by the Belgian bankruptcy court, which appointed the appellants, T. Van Doosselaere and F. De Roy, as trustees in bankruptcy (the "Trustees"). Under Belgian law, the Trustees were required to take possession of all assets of the bankrupt holding company and its bankrupt affiliated companies, wherever situated. The major assets of the group of bankrupt companies were six cargo vessels, and at the time of the bankruptcy order at least five of these were under arrest in ports in Israel, Singapore, New Zealand, the Bahamas and, as stated, Canada. Other assets owned or leased by the debtors, including unpaid freight and shipping containers, had also been arrested, detained or threatened with seizure at various locations throughout the world. The Trustees filed applications in jurisdictions where proceedings had been commenced against the debtors seeking the release of the bankrupts' assets from arrest, preventing further seizure and arrest of their assets, and directing the submission of all claims against them to the bankruptcy proceedings in Belgium.

Le 5 avril 1996, soit une semaine après la saisie du navire, le propriétaire du navire a été mis en faillite par le tribunal de faillite belge, qui a désigné les appelants T. Van Doosselaere et F. De Roy syndics de faillite (les « syndics »). Sous le régime du droit belge, les syndics étaient tenus de prendre possession de tous les éléments d'actif de la société de portefeuille faillie et de ses sociétés affiliées faillies, où qu'ils soient. Les principaux éléments d'actif du groupe de sociétés faillies étaient six cargos dont au moins cinq étaient saisis dans des ports d'Israël, de Singapour, de Nouvelle-Zélande, des Bahamas et, comme nous l'avons vu, du Canada, au moment de l'ordonnance de faillite. D'autres éléments d'actif appartenant aux débiteurs ou loués par eux, notamment du fret et des conteneurs d'expédition impayés, avaient également été saisis, retenus ou menacés de saisie à différents endroits dans le monde. Dans les ressorts où des procédures avaient été engagées contre les débiteurs, les syndics ont présenté des demandes visant à faire lever la saisie des éléments d'actif des faillies, à empêcher d'autres saisies de leurs éléments d'actifs et à obtenir que toutes les réclamations les visant soient présentées dans le cadre des procédures de faillite en Belgique.

9 Faced with these difficult circumstances, the appellant Trustees urged on the Federal Court on several occasions the need for international cooperation in the resolution of bankruptcies and insolvencies that cross national boundaries. The effect of these arguments was to advocate deference to the Belgian courts, being the courts of the bankrupts' domicile. Adherence to what is sometimes called the "Grab Rule", in which each national court takes charge of assets in its own jurisdiction for the benefit of creditors who win the race to its courthouse, was said to be destructive of international order and fairness. (As will be seen, there is much merit in these submissions.)

Aux prises avec cette situation difficile, les syndics appelants ont souligné, à maintes reprises, en Cour fédérale la nécessité de la coopération internationale pour régler les faillites et les insolvabilités qui débordent les frontières nationales. Ils prônaient ainsi la déférence pour les tribunaux belges, qui sont les tribunaux du domicile des faillies. Ils ont fait valoir que le respect de ce qu'on appelle parfois la [TRADUCTION] « règle de l'appropriation », suivant laquelle chaque tribunal national s'occupe des éléments d'actif situés dans son propre ressort au profit des créanciers qui obtiennent gain de cause devant lui, nuit à l'ordre et à l'équité internationales. (Comme nous le verrons, ces observations sont très justes.)

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10 The "universalist" position advocated by the appellant Trustees was put forward in a series of motions and applications before the courts of Quebec and the Federal Court of Canada. A detailed summary of the complicated procedural history of this dispute is set out in an Appendix to the judgment in the companion case, *Antwerp Bulkcarriers, N.V.*, *supra*. What follows is a summary of the motions and applications most relevant to this appeal:

May 3, 1996

The appellant Trustees appear before MacKay J. of the Federal Court, Trial Division, to support moving the Ship to a "safe berth" at Halifax and to "remain under arrest" at its new location "until further orders are given by this Court". Order granted. The Ship was moved and remained there until its sale closed on August 1, 1996.

May 9, 1996

The appellant Trustees move *ex parte* before the Quebec Superior Court, Civil Chamber (i.e., not specified to be sitting in bankruptcy) and obtain an order which "recognized and declared executory in Quebec" the Belgian bankruptcy order (emphasis added).

May 13, 1996

The appellant Trustees apply to the Federal Court to have the *in rem* proceedings against the Ship adjourned for four weeks to enable them to make further inquiries about the claims and assets of the bankrupt estate. They do not undertake to file a defence in the action, or indeed suggest that a valid defence exists. MacKay J. expresses concern that the Ship has been under arrest for six weeks and that dock charges and other expenses are mounting. He concludes that he is exercising a maritime law jurisdiction, not a bankruptcy jurisdiction. The adjournment is denied.

L'approche « universaliste » préconisée par les syndics appelants a été énoncée dans une série de requêtes et de demandes déposées devant les tribunaux du Québec et la Cour fédérale du Canada. On trouve un résumé détaillé de l'historique procédural complexe du présent litige à l'annexe de l'arrêt connexe *Antwerp Bulkcarriers, N.V.*, précité. Voici un résumé des requêtes et des demandes les plus pertinentes en l'espèce :

3 mai 1996

Les syndics appelants comparaissent devant le juge MacKay de la Section de première instance de la Cour fédérale pour appuyer le déplacement du navire vers un [TRADUCTION] « poste d'amarrage sûr » à Halifax et pour qu'il y « demeure sous saisie jusqu'à ce que notre cour en ordonne autrement ». L'ordonnance est accordée. Le navire est déplacé et reste au même endroit jusqu'à sa vente, le 1er août 1996.

9 mai 1996

Les syndics appelants déposent une requête *ex parte* devant la Cour supérieure du Québec, Chambre civile (c'est-à-dire non désignée comme siégeant en matière de faillite), et obtiennent une ordonnance qui [TRADUCTION] « reconn[aît] et déclar[e] exécutoir[e] au Québec » l'ordonnance de faillite délivrée en Belgique (je souligne).

13 mai 1996

Les syndics appelants demandent à la Cour fédérale d'ajourner les procédures *in rem* contre le navire pour une période de quatre semaines afin de leur permettre d'obtenir plus de renseignements sur les réclamations et l'actif de la faillie. Ils ne s'engagent pas à produire une défense à l'action et n'indiquent pas non plus qu'il existe un moyen de défense valide. Le juge MacKay s'inquiète du fait que le navire est saisi depuis six semaines et que les droits de bassin et autres dépenses s'accumulent. Il conclut qu'il exerce une compétence en droit maritime et non une compétence en matière de faillite. L'ajournement est refusé.

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May 14, 1996

In default of defence, judgment is awarded to Holt against the Ship for $572,128.06, with leave to the Trustees to challenge the precise quantum of the judgment if done promptly.

May 17, 1996

The Federal Court orders the Ship appraised and lays down the procedure for its sale. The Trustees appeal. They also seek review and reconsideration of the orders of appraisal and sale of the Ship.

June 14, 1996

The appellant Trustees request a stay of proceedings from the Federal Court "pending final disposition of the matter by the [Quebec] Superior Court". The Trustees produce an *ex parte* order dated June 11, 1996 obtained from the Quebec Superior Court sitting in Bankruptcy that purports to dispose of the Ship and the proceeds of sale. Despite the Trustees' participation in the Federal Court proceedings over the previous six weeks, no notice of the application in Montreal was given to the Federal Court litigants. It subsequently emerges that the Quebec judge hearing the *ex parte* application was not told that the Ship has been arrested and ordered sold by the Federal Court. The stay is denied for reasons eventually issued on April 9, 1997. In MacKay J.'s view, this is still a maritime law case.

July 9, 1996

The appellant Trustees return before the Federal Court seeking to have the proceeds paid to them if the sale goes ahead, as ordered, on July 12. They are now armed with a further order dated June 28, 1996 of the Quebec Superior Court sitting in Bankruptcy, in which Guthrie J. confirmed with variations the *ex parte* order of June 11, after notice to all interested parties and a full hearing on the merits. It is the June 28, 1996 order that is the centrepiece of

14 mai 1996

Faute de défense, un jugement ordonnant de verser à Holt la somme de 572 128,06 $ est rendu contre le navire, les syndics étant autorisés à contester le montant accordé à la condition d'agir promptement.

17 mai 1996

La Cour fédérale ordonne l'évaluation du navire et établit la procédure à suivre pour le vendre. Les syndics interjettent appel. Ils sollicitent également la révision et le réexamen des ordonnances d'évaluation et de vente du navire.

14 juin 1996

Les syndics appelants demandent à la Cour fédérale de suspendre les procédures [TRADUCTION] « en attendant le règlement définitif de l'affaire par la Cour supérieure du Québec ». Les syndics produisent une ordonnance ex parte datée du 11 juin 1996, qu'ils ont obtenue auprès de la Cour supérieure du Québec siégeant en matière de faillite et qui est censée statuer sur le sort du navire et le produit de la vente. Bien que les syndics aient participé aux procédures devant la Cour fédérale au cours des six semaines précédentes, aucun avis de la requête déposée à Montréal n'a été donné aux parties devant la Cour fédérale. Il en ressort donc que le juge du Québec qui a entendu la requête ex parte n'a pas été avisé que le navire avait été saisi et que la Cour fédérale en avait ordonné la vente. La suspension est refusée pour les motifs déposés ultérieurement le 9 avril 1997. De l'avis du juge MacKay, il s'agit toujours d'une affaire de droit maritime.

9 juillet 1996

Les syndics appelants s'adressent de nouveau à la Cour fédérale dans le but d'obtenir le produit de la vente si cette dernière a lieu le 12 juillet, tel qu'ordonné. Ils sont maintenant munis d'une autre ordonnance de la Cour supérieure du Québec siégeant en matière de faillite, qui est datée du 28 juin 1996 et dans laquelle le juge Guthrie, après avoir avisé toutes les parties intéressées et avoir tenu une audience complète sur le fond, confirme l'ordon-

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the appellants' argument. I therefore reproduce its relevant portions below:

. . . THE COURT:

. . .

RECOGNIZES the Trustees as trustees in the bankruptcy of Antwerp Bulkcarriers, N.V., with the duty and power to take possession of, realise upon and confirm the assets of the Bankrupt situated anywhere in Canada, subject however to the rights, if any, of any creditors with claims secured under the laws of Canada, as by law provided;

PERMITS the sale of the ship "Brussel" to take place in accordance with the judgment rendered by the Federal Court of Canada, Trial Division, on May 17, 1996 provided that such sale is completed and the purchase price paid in full by the close of business in Halifax, Canada on July 12, 1996;

ORDERS that, in the event that the said sale is completed as aforesaid, the net proceeds of such sale (after payment of all expenses of advertisement of the sale, appraisal fees, insurance and all other costs, disbursements, commissions and other expenses necessary for the sale) be paid promptly to the Trustees for distribution amongst the creditors of the Bankrupt in observance of all their rights and in conformity with Belgian law;

ORDERS that, in the event the said sale is not so completed, the ship "Brussel" be delivered into the possession of the Trustees so that they can proceed to the sale of the said ship, locally or in any other place they consider more appropriate, and to the distribution of the net proceeds amongst the creditors of the Bankrupt in observance of all their rights and in conformity with Belgian law;

REQUESTS the aid of the Supreme Court of Nova Scotia with jurisdiction in bankruptcy, insofar as such aid may be necessary under the laws of Nova Scotia to give effect to the present judgment;

ORDERS that the present judgment be served promptly on Chief Justice of the Supreme Court of Nova Scotia, on the Marshall of the Federal Court of Canada in Halifax, on the Sheriff of the Halifax Regional Municipality, and on all parties who have asserted a claim in Canada in respect of the ship "Brussel"; . . . [Emphasis added.]

nance ex parte du 11 juin, sous réserve de certaines modifications. C'est l'ordonnance du 28 juin 1996 qui est l'élément central de l'argumentation des appelants. J'en reproduis donc ci-après les parties pertinentes :

[TRADUCTION] . . . LA COUR :

. . .

RECONNAÎT les syndics en qualité de syndics de la faillite de Antwerp Bulkcarriers, N.V., ayant l'obligation et le pouvoir de prendre possession des éléments d'actif de la faillie où qu'ils soient au Canada, de les réaliser et de les confirmer, sous réserve toutefois des droits des créanciers dont les réclamations sont garanties sous le régime des lois du Canada, conformément à la loi;

PERMET que le navire « Brussel » soit vendu conformément au jugement rendu par la Section de première instance de la Cour fédérale du Canada, le 17 mai 1996, à la condition que cette vente soit conclue et que le prix d'achat soit intégralement versé à la fin de la journée ouvrable à Halifax, au Canada, le 12 juillet 1996;

ORDONNE que, si ladite vente est conclue comme susdit, le produit net de la vente (après paiement de toutes les dépenses d'annonce de la vente, d'évaluation, d'assurance et autres coûts, débours, commissions et autres dépenses nécessaires à la vente) soit versé sans délai aux syndics en vue de sa répartition entre les créanciers de la faillie dans le respect de tous leurs droits et en conformité avec le droit belge;

ORDONNE que, si ladite vente n'est pas ainsi conclue, le navire « Brussel » soit remis aux syndics pour qu'ils le vendent, sur place ou à tout autre endroit qu'ils estiment plus convenable, et en répartissent le produit net entre les créanciers de la faillie dans le respect de tous leurs droits et en conformité avec le droit belge;

SOLLICITE le concours de la Cour suprême de la Nouvelle-Écosse ayant compétence en matière de faillite, dans la mesure où ce concours pourra être nécessaire sous le régime des lois de la Nouvelle-Écosse pour exécuter le présent jugement;

ORDONNE que le présent jugement soit signifié sans délai au juge en chef de la Cour suprême de la Nouvelle-Écosse, au prévôt de la Cour fédérale du Canada à Halifax, au shérif de la municipalité régionale de Halifax, et à toutes les parties qui ont fait valoir une réclamation au Canada à l'égard du navire « Brussel »; . . . [Je souligne.]

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It is clear from the order of June 28, 1996 that the Canadian bankruptcy court is now asserting control over the Ship and the related proceedings. It "permits" the sale ordered by MacKay J. to proceed, but only if it is completed by July 12. The proceeds of sale are to go to the appellant Trustees, not to the secured claimants who are litigating in the Federal Court. If the sale is not completed by July 12, the Ship is to be turned over to the Trustees irrespective of the orders of the Federal Court. The Supreme Court of Nova Scotia is requested to "aid" in giving effect to these directions.

As of July 1996, it will be noted, default judgment had been signed in the *in rem* action, the Ship had been appraised, and bids were being invited from potential purchasers. MacKay J. eventually ruled that the Trustees could obtain the proceeds of sale only if they posted security to answer the claims of the secured creditors. This was never forthcoming. His reasons were compendiously explained in a subsequent judgment of April 9, 1997, as will now be described.

II. Judicial History

A. *Federal Court, Trial Division*, [1997] 3 F.C. 187

MacKay J. said he accepted the principle of comity of nations but pointed out that "the Court is urged to respect jurisdiction claimed by others and to forego considering claims to relief in proceedings long established in maritime law" (para. 45). The Trustees alleged that Holt was forum shopping, but MacKay J. said he was "not persuaded it did more than seek recovery of its claim against the vessel where the ship was located" (para. 46).

MacKay J. "found no persuasive grounds . . . [for the Court] to stay its own processes which were

11 Il ressort clairement de l'ordonnance du 28 juin 1996 que le tribunal de faillite canadien exerce maintenant un contrôle sur le navire et les procédures qui y sont liées. Il « permet » que la vente ordonnée par le juge MacKay ait lieu, mais seulement à la condition qu'elle soit conclue le 12 juillet au plus tard. Le produit de la vente doit être versé aux syndics appelants et non aux créanciers garantis ayant intenté une action en Cour fédérale. Si la vente n'est pas conclue le 12 juillet au plus tard, le navire doit être remis aux syndics indépendamment des ordonnances de la Cour fédérale. Le « concours » de la Cour suprême de la Nouvelle-Écosse est sollicité pour exécuter ces directives.

12 Dès juillet 1996, comme nous le verrons, un jugement par défaut avait été rendu dans l'action *in rem*, le navire avait été évalué et les acquéreurs potentiels étaient invités à présenter des soumissions. Le juge MacKay a, par la suite, décidé que les syndics ne pourraient toucher le produit de la vente que s'ils constituaient un cautionnement pour satisfaire aux réclamations des créanciers garantis. Cela ne s'est jamais concrétisé. Comme nous le verrons, ses motifs ont été exposés de manière concise dans un jugement subséquent rendu le 9 avril 1997.

II. Historique des procédures judiciaires

A. *Cour fédérale, Section de première instance*, [1997] 3 C.F. 187

13 Le juge MacKay a dit qu'il acceptait le principe de la courtoisie internationale, mais il a souligné que « la Cour est instamment priée de respecter la compétence invoquée par d'autres et d'abandonner l'examen des demandes de redressement dans des procédures longtemps établies en droit maritime » (par. 45). Les syndics ont fait valoir que Holt était à la recherche d'un tribunal favorable, mais le juge MacKay a répondu qu'il n'était « pas persuadé qu'elle a fait plus que chercher à recouvrer sa créance contre le navire là où il se trouvait » (par. 46).

14 Le juge MacKay n'était « pas convaincu [. . .] du bien-fondé [pour la cour] [. . .] de suspendre

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then underway, and to permit determination of the outcome to be effectively left to the bankruptcy proceedings of the Commercial Court at Antwerp, recognized by the Superior Court of Quebec" (para. 47). He was "not persuaded that matters before this Court were those of bankruptcy" nor had it been "suggested that any bankruptcy would be based in or administered by any court in Canada" (para. 47). "[T]he balance of convenience favoured denying the stay since the majority of claimants, in Canada and the United States, appeared to be based on the east coast of North America with relatively easy access to the Court's process in Canada" (para. 48). Accordingly, the stay was refused.

ses propres procédures qui avaient alors été mises en branle et de permettre que l'issue de l'affaire soit effectivement laissée aux procédures de faillite [du Tribunal de commerce] d'Anvers qui avaient été reconnues par la Cour supérieure du Québec » (par. 47). Il n'était « pas persuadé du fait que les affaires dont la présente Cour a été saisie relevaient de la faillite », ajoutant que « personne n'a dit que la faillite relèverait d'un tribunal canadien ou serait administrée par un tribunal au Canada » (par. 47). « [L]a prépondérance des inconvénients favorisait le refus de la suspension puisque la majorité des réclamants, au Canada et aux États-Unis, semblaient être établis sur la côte est de l'Amérique du Nord, d'où ils jouissaient d'un accès relativement facile à la Cour, au Canada » (par. 48). En conséquence, la suspension a été refusée.

15 The claim of the appellant Trustees to the proceeds of the sale of the Ship was based on their view that once the matter was before the bankruptcy court in Quebec, "it alone had jurisdiction over the assets of the bankrupt" (para. 72). MacKay J. disagreed. On the contrary, he ruled "the determinations of this Court in relation to the arrest of a ship, a judgment in default and the sale of the ship, or the determination of a claim by a secured creditor to the proceeds of the sale of the ship, [are not] proceedings in bankruptcy" (para. 74). Therefore, in his view, the involvement of the Canadian bankruptcy court did not divest the Federal Court of jurisdiction.

La réclamation des syndics appelants visant à obtenir le produit de la vente du navire reposait sur leur point de vue que le tribunal de la faillite du Québec « avait compétence exclusive à l'égard des biens de la faillite » dès qu'il était saisi de l'affaire (par. 72). Le juge MacKay n'était pas de cet avis. Au contraire, il a décidé que « les décisions de la présente Cour en matière de saisie d'un navire, de jugement par défaut et de vente du navire ou [. . .] le fait qu'elle tranche la revendication du produit de la vente du navire par un créancier garanti [ne] sont [pas] des procédures de faillite » (par. 74). Il estimait donc que l'intervention du tribunal de faillite canadien ne dépouillait pas la Cour fédérale de sa compétence.

16 As to the Trustees' argument that the Federal Court, even if it had jurisdiction, should in any event defer to the order for the distribution of the proceeds approved by the Quebec Superior Court sitting in Bankruptcy, MacKay J. held that Canadian law "does not establish a process that in any way bars a secured creditor from realizing on the security given by the debtor before its bankruptcy" (para. 80). A maritime lien is a secured claim. Accordingly, "a maritime lien, attaching before bankruptcy of a ship's owner, may be enforced and the claim based upon it may be realized from proceeds of sale of a ship without restriction under the *Bankruptcy and Insolvency Act*, or, with respect to

Au sujet de l'argument des syndics selon lequel, même si elle avait compétence, la Cour fédérale devrait de toute façon s'en remettre à l'ordonnance de répartition du produit de la vente approuvée par la Cour supérieure du Québec siégeant en matière de faillite, le juge MacKay a conclu que la loi canadienne « n'établit pas de processus qui interdit de quelque façon que ce soit à un créancier garanti de réaliser la garantie constituée par le débiteur avant sa faillite » (par. 80). Un privilège maritime est une créance garantie. En conséquence, « un privilège maritime, constitué avant la faillite du propriétaire d'un navire, peut être exécuté et la réclamation qui prend appui sur celui-ci peut se réaliser sur le

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other views, by the courts acting under that Act" (para. 83). MacKay J. thus concluded that Holt and the other secured creditors should have their secured claims paid out of the proceeds of sale in priority to the Trustees. (In the end, the fund was exhausted by the secured claims.)

produit de la vente du navire sans restriction imposée soit par la *Loi sur la faillite et l'insolvabilité*, soit, avec égards pour les opinions contraires, par les tribunaux agissant sous le régime de cette Loi » (par. 83). Le juge MacKay a donc conclu que les réclamations garanties de Holt et des autres créanciers garantis devaient être payées sur le produit de la vente avant tout versement aux syndics. (Finalement, les réclamations garanties ont épuisé le fonds.)

B. *Federal Court of Appeal* (1999), 173 D.L.R. (4th) 493

B. *Cour d'appel fédérale*, [1999] A.C.F. n$^{o}$ 337 (QL)

Noël J.A. observed, at para. 4, that Holt would "derive a distinct legal advantage" from having its claim determined by the Federal Court. Relying on this Court's decision in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, he acknowledged that juridical advantage is but one factor to consider when determining whether a Canadian court should stay its proceedings in favour of a foreign court. However, this factor takes on "considerable significance" (para. 4) when it arises in the normal course of litigation and not as a result of forum shopping. Here there had been a finding that no such forum shopping had occurred. "Having arrested the ship where it was found, the respondent could legitimately expect that Canadian maritime law would apply" (para. 5). Using the words of this Court in *Amchem*, *supra*, Noël J.A. found that Holt's "claim had a 'real and substantial connection' with Canadian maritime law and there was a 'reasonable expectation' that the rights arising thereunder would be enforced" (para. 5). Accordingly, he concluded, MacKay J. did not err in exercising his discretion against a stay.

17 Le juge Noël a fait observer que Holt « bénéficier[ait] d'un net avantage juridique » si sa réclamation était examinée par la Cour fédérale (par. 4). Se fondant sur l'arrêt de notre Cour *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897, il a reconnu que l'avantage juridique n'est qu'un des facteurs dont on peut tenir compte pour décider si un tribunal canadien devrait suspendre ses procédures par déférence pour un tribunal étranger. Cependant, lorsque l'avantage résulte du cours normal du litige et non de la recherche du tribunal le plus favorable, ce facteur revêt une « importance considérable » (par. 4). On a conclu, en l'espèce, qu'une telle recherche du tribunal le plus favorable n'avait pas eu lieu. « Ayant saisi le navire là où il se trouvait, l'intimée pouvait légitimement s'attendre à ce que le droit maritime canadien s'applique » (par. 5). Reprenant les propos de notre Cour dans l'arrêt *Amchem*, précité, le juge Noël a estimé que « la réclamation [de Holt] avait un "lien réel et important" avec le droit maritime canadien et [qu']on pouvait "raisonnablement s'attendre" à ce que les droits en découlant soient exercés » (par. 5). En conséquence, a-t-il conclu, le juge MacKay n'a pas commis d'erreur en exerçant son pouvoir discrétionnaire de refuser la suspension.

With respect to the intervention of the Quebec Superior Court sitting in Bankruptcy, Noël J.A. said "comity also extends to domestic courts" (para. 10). In his view, it was "significant that domestically at least, the secured nature of maritime liens has

18 En ce qui concerne l'intervention de la Cour supérieure du Québec siégeant en matière de faillite, le juge Noël a dit que « [l]es tribunaux internes sont également assujettis à un devoir réciproque de courtoisie » (par. 10). À son avis,

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always been maintained in the context of bankruptcy proceedings without the need for either of the two jurisdictions to supersede one another" (para. 10). By seeking an *ex parte* order from the Quebec Superior Court for the release of the Ship, "the appellants launched what is in effect a collateral attack on MacKay J.'s decision" (para. 12). In Noël J.A.'s view, the proper approach would have been to seek "the assistance of the Federal Court which is the only Court that had jurisdiction over the arrested ship and the respondent's *in rem* claim" (para. 13). The appeal was accordingly dismissed.

il était « significatif qu'en droit interne du moins, le caractère garanti des privilèges maritimes a toujours été reconnu dans les procédures de faillite sans qu'il soit nécessaire qu'une juridiction en supplante une autre » (par. 10). En demandant à la Cour supérieure du Québec de rendre une ordonnance *ex parte* enjoignant de lever la saisie du navire, « les appelants se sont de fait lancés dans une contestation parallèle de la décision du juge MacKay » (par. 12). D'après le juge Noël, il aurait convenu davantage de « s'adresser [. . .] à la Cour fédérale, qui est la seule juridiction compétente sur le navire saisi et sur la réclamation *in rem* de l'intimée » (par. 13). L'appel a donc été rejeté.

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## III. Relevant Statutory Provisions

19 *Federal Court Act*, R.S.C. 1985, c. F-7

**3.** The court of law, equity and admiralty in and for Canada now existing under the name of the Federal Court of Canada is hereby continued as an additional court for the better administration of the laws of Canada and shall continue to be a superior court of record having civil and criminal jurisdiction.

**17.** . . .

(6) Where an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Trial Division has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on the Court.

**22.** (1) The Trial Division has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

**50.** (1) The Court may, in its discretion, stay proceedings in any cause or matter,

(*a*) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(*b*) where for any other reason it is in the interest of justice that the proceedings be stayed.

## III. Dispositions législatives pertinentes

*Loi sur la Cour fédérale*, L.R.C. 1985, ch. F-7

**3.** Tribunal de droit, d'equity et d'amirauté du Canada, la Cour fédérale du Canada est maintenue à titre de tribunal additionnel propre à améliorer l'application du droit canadien. Elle continue d'être une cour supérieure d'archives ayant compétence en matière civile et pénale.

**17.** . . .

(6) La Section de première instance n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

**22.** (1) La Section de première instance a compétence concurrente, en première instance, dans les cas — opposant notamment des administrés — où une demande de réparation ou un recours est présenté en vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution expresse contraire de cette compétence.

**50.** (1) La Cour a le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

*a*) au motif que la demande est en instance devant un autre tribunal;

*b*) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

**2.** In this Act,

. . .

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable;

*Stay of Proceedings*

**69.3** (1) Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

(2) Subject to sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders . . . .

*Scheme of Distribution*

**136.** (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows: . . .

*Jurisdiction of Courts*

**183.** (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

. . .

*Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3

**2.** Les définitions qui suivent s'appliquent à la présente loi.

. . .

« créancier garanti » Personne détenant une hypothèque, un nantissement, une charge, un gage ou un privilège sur ou contre les biens du débiteur ou sur une partie de ses biens, à titre de garantie d'une dette échue ou à échoir, ou personne dont la réclamation est fondée sur un effet de commerce ou garantie par ce dernier, lequel effet de commerce est détenu comme garantie subsidiaire et dont le débiteur n'est responsable qu'indirectement ou secondairement.

*Suspension des procédures*

**69.3** (1) Sous réserve du paragraphe (2) et des articles 69.4 et 69.5, à compter de la faillite d'un débiteur, les créanciers n'ont aucun recours contre le débiteur ou contre ses biens et ne peuvent intenter ou continuer aucune action, exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite, et ce jusqu'à la libération du syndic.

(2) Sous réserve des articles 79 et 127 à 135 et du paragraphe 248(1), la faillite d'un débiteur n'a pas pour effet d'empêcher un créancier garanti de réaliser sa garantie ou de faire toutes autres opérations à son égard tout comme il aurait pu le faire en l'absence du présent article, à moins que le tribunal n'en ordonne autrement . . .

*Plan de répartition*

**136.** (1) Sous réserve des droits des créanciers garantis, les montants réalisés provenant des biens d'un failli sont distribués d'après l'ordre de priorité de paiement suivant : . . .

*Compétence des tribunaux*

**183.** (1) Les tribunaux suivants possèdent la compétence en droit et en équité qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

. . .

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(*b*) in the Province of Quebec, the Superior Court;

IV. Analysis

20 In this appeal we are urged to adopt a "universalist approach" to bankruptcies and insolvencies that affect more than one jurisdiction. I accept at the outset that bankruptcies that engage multiple jurisdictions may not be administered effectively if each national court goes its own way with the assets that happen physically to be within its control. The chaotic fact situation faced by the Trustees in this case, from Singapore to the Bahamas and Israel to New Zealand, is eloquent testimony to the need for judicial cooperation and international comity.

21 Moreover, it must also be freely acknowledged that the connection between this litigation and Canada is relatively weak. None of the parties (including the Ship) resides here. The debt was incurred in the United States. The shipowner resides in Belgium. There are no bankruptcy proceedings in Canada other than those initiated by the appellant Trustees for recognition of various orders of the Belgian bankruptcy court.

22 Canadian courts have become seized with the dispute only because the vagaries of maritime commerce carried the M/V "Brussel" into Canadian waters on March 30, 1996. It was certainly open to the Federal Court to defer in these matters to the bankruptcy court of the bankrupt's domicile. The question is whether, as contended by the appellant Trustees, the Federal Court was *obliged* to do so. If not, did the Federal Court nevertheless commit an error in the exercise of its discretion not to stay the *in rem* action in deference to the Belgian bankruptcy court?

23 For present purposes, I accept the following convenient definitions of the "universalist approach" and the "territorialist approach" (sometimes referred to as the "Grab Rule"):

*b*) dans la province de Québec, la Cour supérieure;

IV. Analyse

Dans le présent pourvoi, nous sommes invités à adopter une « approche universaliste » dans les affaires de faillite et d'insolvabilité ayant des répercussions dans plus d'un ressort. J'admets d'emblée que les faillites mettant en cause plus d'un ressort ne peuvent pas être administrées efficacement si chaque tribunal national gère à sa façon les biens qui sont physiquement sous son contrôle. En l'espèce, la situation factuelle chaotique avec laquelle sont aux prises les syndics, de Singapour aux Bahamas et d'Israël à la Nouvelle-Zélande, témoigne éloquemment de la nécessité de la coopération judiciaire et de la courtoisie internationale.

En outre, il faut bien reconnaître que le lien entre le présent litige et le Canada est relativement faible. Aucune des parties (y compris le navire) n'a son lieu de résidence dans notre pays. La dette a été contractée aux États-Unis. Le propriétaire du navire réside en Belgique. Il n'y a, au Canada, aucune instance en matière de faillite autre que les procédures engagées par les syndics appelants en vue de faire reconnaître diverses ordonnances délivrées par le tribunal de faillite belge.

Les tribunaux canadiens n'ont été saisis du litige que parce que les aléas du commerce maritime ont fait en sorte que le N/M « Brussel » s'est retrouvé en eaux canadiennes le 30 mars 1996. Il était alors certainement loisible à la Cour fédérale de s'en remettre au tribunal de faillite du domicile de la faillie. La question est de savoir si la Cour fédérale était *tenue* de le faire, comme le prétendent les syndics appelants. Dans la négative, la Cour fédérale a-t-elle néanmoins commis une erreur lors de l'exercice de son pouvoir discrétionnaire en ne suspendant pas l'action *in rem* par déférence pour le tribunal de faillite belge?

Aux fins de la présente affaire, je fais miennes les définitions pratiques suivantes de l'« approche universaliste » et de l'« approche territorialiste » (parfois appelée [TRADUCTION] « règle de l'appropriation ») :

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. . . courts and commentators have identified two general approaches to distributing assets in such proceedings. Under the "territoriality" approach, or the "Grab Rule," the court in each jurisdiction where the debtor has assets distributes the assets located in that jurisdiction pursuant to local rules. Under the "universality" approach, a primary insolvency proceeding is instituted in the debtor's domiciliary country, and ancillary courts in other jurisdictions — typically in jurisdictions where the debtor has assets — defer to the foreign proceeding and in effect collaborate to facilitate the centralized liquidation of the debtor's estate according to the rules of the debtor's home country.

(*In re Treco*, 240 F.3d 148 (2d Cir. 2001), at p. 153)

The Federal Court was clearly of the view that it was not in this case choosing between the "universalist" approach and the "Grab Rule". It was making a choice between the conflicting demands of two international systems of commercial dispute resolution, namely the rules of maritime law, with long historical roots in the practicalities of ocean shipping, and more recent legal initiatives to establish coherent rules for the administration of international bankruptcies and insolvencies. In its view, I think correctly, the choice was dictated not by some abstract rule of "universalism" but by what the Federal Court understood to be the specific circumstances and justice of this particular case.

A. *Maritime Law*

Shipping was one of the earliest activities that required international cooperation in the regulation of the rights and obligations of its participants. "For the cradle of our maritime law we must turn to the Mediterranean Sea where the sea commerce has had a continuous history for nearly five thousand years": *Benedict on Admiralty* (7th ed. (looseleaf)), vol. 1, at p. 1-4; and see generally W. Tetley, *Maritime Liens and Claims* (2nd ed. 1998), at pp. 7-8. Maritime lawyers were forced to confront the need for rules to govern international commerce centuries before the "universalist approach" became a key issue in bankruptcy. Seamen, sal-

[TRADUCTION] . . . les tribunaux et les commentateurs ont reconnu deux approches générales applicables à la répartition des éléments d'actif dans le cadre de telles procédures. Selon l'approche territorialiste ou « règle de l'appropriation », le tribunal de chaque ressort dans lequel le débiteur possède des éléments d'actif répartit les éléments d'actif situés dans ce ressort conformément aux règles locales. Selon l'approche universaliste, les procédures d'insolvabilité principales sont engagées dans le pays où est domicilié le débiteur, et les tribunaux secondaires situés dans d'autres ressorts — habituellement les ressorts où le débiteur possède des éléments d'actif — s'en remettent aux procédures engagées à l'étranger et, en fait, collaborent pour faciliter la liquidation centralisée de l'actif du débiteur conformément aux règles en vigueur dans le pays où habite le débiteur.

(*In re Treco*, 240 F.3d 148 (2d Cir. 2001), p. 153)

24 La Cour fédérale était nettement d'avis qu'elle n'avait pas en l'espèce à choisir entre l'approche « universaliste » et la « règle de l'appropriation ». Elle devait plutôt faire un choix entre les exigences opposées de deux systèmes internationaux de règlement des conflits commerciaux, à savoir les règles du droit maritime, qui reposent depuis longtemps sur les considérations pratiques du transport maritime, et les plus récentes initiatives juridiques visant l'établissement de règles cohérentes pour l'administration des affaires de faillite et d'insolvabilité internationales. La Cour fédérale a estimé, à juste titre selon moi, que ce choix était dicté non par une règle abstraite d'« universalisme », mais par sa propre perception de la situation particulière et de ce qui était juste en l'occurrence.

A. *Le droit maritime*

25 Le transport maritime est l'une des premières activités ayant nécessité une coopération internationale en matière de réglementation des droits et des obligations des parties qui s'y livrent. [TRADUCTION] « En ce qui concerne les origines de notre droit maritime, nous devons nous tourner vers la Méditerranée où le commerce maritime existe depuis près de cinq mille ans » : *Benedict on Admiralty* (7e éd. (feuilles mobiles)), vol. 1, p. 1-4, et voir généralement W. Tetley, *Maritime Liens and Claims* (2e éd. 1998), p. 7-8. Les avocats spécialisés en droit maritime ont dû faire face à la nécessité d'établir des règles régissant le commerce

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vors, ship chandlers, repairers and other suppliers of essential goods and services to the ship in foreign ports required some assurance of payment. They looked to the ship. Common rules were essential because suppliers dealt with ships from many countries and the Masters found themselves in distant ports in an age when communications with ship owners were slow and unreliable. In maritime commerce, "rules of practical convenience commanding general assent are a virtual necessity": *Laane and Baltser v. Estonian State Cargo & Passenger Steamship Line*, [1949] S.C.R. 530, *per* Rand J., at p. 545. See also: *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683, at p. 695. Practicality required an *in rem* proceeding against the ship as distinguished from an *in personam* action against the shipowner. The need for predictability and uniformity was so strong that even the common law courts, ever protective of their own ways, ceded jurisdiction to specialized courts of admiralty applying a largely international law of maritime commerce. As Professor Tetley, *supra*, writes, at p. 56:

> [M]aritime law as we know it today is civilian in nature, finding its source in the *lex maritima* (the law maritime) which is a part of the *lex mercatoria* (the law merchant). Maritime law was codified, international law and, in England, it was apart from, and opposed to, its nearly mortal enemy, the common law.

26 The *in rem* interest in ships took many forms, some created by statute, others by mortgage, still others by possession. One of the most ancient and effective forms of security was (and is) the maritime lien. In this action, Holt claims a maritime lien for stevedoring services pursuant to the U.S. *Commercial Instruments and Maritime Liens Act*, 46 U.S.C. § 31342. Broadly speaking, a maritime lien arises without registration or other formality when debts of a specific nature are incurred by or on behalf of a ship. The lien creates a charge which "goes with

international des siècles avant que « l'approche universaliste » devienne une question-clé en matière de faillite. Les marins, sauveteurs, approvisionneurs, réparateurs et autres fournisseurs de biens et services essentiels aux navires se trouvant dans des ports étrangers avaient besoin de certaines garanties de paiement. Ils comptaient sur le navire. Il était essentiel d'établir des règles communes parce que les fournisseurs transigeaient avec des navires en provenance de nombreux pays et que les capitaines se retrouvaient dans des ports éloignés à une époque où la communication avec les propriétaires des navires était lente et peu fiable. Dans le domaine du commerce maritime, [TRADUCTION] « des règles d'utilité pratique requérant un consentement général sont quasi indispensables » : *Laane and Baltser c. Estonian State Cargo & Passenger Steamship Line*, [1949] R.C.S. 530, le juge Rand, p. 545. Voir également : *Q.N.S. Paper Co. c. Chartwell Shipping Ltd.*, [1989] 2 R.C.S. 683, p. 695. Pour des raisons pratiques, il convenait d'intenter une action *in rem* contre le navire au lieu d'une action *in personam* contre le propriétaire du navire. Le besoin de prévisibilité et d'uniformité était si fort que même les tribunaux de common law, toujours jaloux de leurs méthodes, ont cédé leur compétence aux tribunaux d'amirauté chargés d'appliquer un droit largement international en matière de commerce maritime. Comme l'écrit le professeur Tetley, *op. cit.*, p. 56 :

> [TRADUCTION] [L]e droit maritime, tel que nous le connaissons aujourd'hui, est de nature civile et émane de la *lex maritima* (droit maritime) qui fait partie de la *lex mercatoria* (droit commercial). Le droit maritime était un droit international codifié et, en Angleterre, il était séparé de la common law, son ennemi quasi mortel, et s'y opposait.

Le droit réel sur un navire revêtait maintes formes — créé par la loi dans certains cas, il découlait d'une hypothèque ou encore de la possession dans d'autres cas. L'une des formes de garantie les plus anciennes et efficaces était (et est toujours) le privilège maritime. Dans la présente action, Holt invoque un privilège maritime pour des services d'acconage, conformément à la *Commercial Instruments and Maritime Liens Act* américaine, 46 U.S.C. § 31342. D'une manière générale, un privilège maritime prend naissance sans enregistrement

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the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages" (*The Tolten*, [1946] P. 135 (C.A.), *per* Scott L.J., at p. 150). It may be described, in that sense, as a "secret lien".

ou autre formalité dès qu'une dette d'une nature particulière est contractée par un navire ou au nom d'un navire. Le privilège donne naissance à un droit réel [TRADUCTION] « qui suit le navire où qu'il soit, même entre les mains d'un acquéreur à titre onéreux sans préavis, et occupe le même rang que les autres privilèges maritimes, tous ces privilèges ayant préséance sur les hypothèques » (*The Tolten*, [1946] P. 135 (C.A.), le lord juge Scott, p. 150). Dans ce sens, il peut être décrit comme un « privilège occulte ».

27 The reason for this privileged status for maritime lien holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships (as indeed was the case here, where initially Holt named the wrong corporation as ship owner). Merchant seamen will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage. The Master may be embarrassed for lack of funds, but the ship itself is assumed to be worth something and is readily available to provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence. The appellant Trustees' claim to "international comity" in matters of bankruptcy must therefore be weighed against competing considerations of a more ancient and at least equally practical international system — the law of maritime commerce.

Ce statut privilégié des titulaires de privilège maritime existe pour une raison purement pratique. Un navire peut naviguer sous pavillon de complaisance. Il peut être difficile d'en identifier les propriétaires dans un réseau complexe d'entreprises (comme cela s'est produit dans la présente affaire où, au départ, Holt a désigné incorrectement la société propriétaire du navire). Les marins de la marine marchande ne travailleront pas sur un navire à moins que leur salaire ne constitue une créance prioritaire sur le navire. Il en est de même pour ceux dont le travail ou les approvisionnements sont essentiels à la poursuite du voyage. Le capitaine peut être à court d'argent, mais on présume que le navire lui-même a une certaine valeur et qu'il peut facilement constituer une certaine garantie. Cette garantie était et est toujours essentielle au commerce maritime. L'incertitude minerait la confiance. Il faut donc soupeser l'argument de la courtoisie internationale en matière de faillite avancé par les syndics appelants en fonction des considérations opposées d'un système international plus ancien et au moins tout aussi pratique — le droit commercial maritime.

### B. *Foreign Bankruptcy Orders*

### B. *Les ordonnances de faillite délivrées à l'étranger*

28 The appellant Trustees take the position that once the Canadian bankruptcy court was activated on this file, its power and authority occupied the field in relation to matters pertaining to the bankrupt, so to speak, to the exclusion of courts not possessing bankruptcy jurisdiction. This proposition is, in my view, too broad.

Les syndics appelants prétendent que, dès qu'il a été saisi du présent dossier, le tribunal de faillite canadien avait, pour ainsi dire, compétence exclusive sur les questions reliées à la faillite, ce qui avait pour effet d'exclure les tribunaux n'ayant pas compétence en matière de faillite. À mon avis, cette affirmation est trop générale.

29 I propose to make a few preliminary observations about the appellant Trustees' position. More detailed consideration follows.

Je compte formuler quelques observations préliminaires au sujet de la position des syndics appelants. Un examen plus détaillé suivra.

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30 The first preliminary observation is that Antwerp Bulkcarriers, N.V. was not placed in bankruptcy under the laws of Canada. The only proceedings before a Canadian bankruptcy court were for the recognition and implementation of the orders of the Belgian bankruptcy court. Part XIII of the *Bankruptcy and Insolvency Act* (the "Act"), entitled "International Insolvencies", was not yet in force at the time of these events. Nevertheless, Canadian bankruptcy courts have long exercised a jurisdiction to come to the aid of foreign bankruptcy courts where it has been in their power to do so. Part XIII put the stamp of parliamentary approval on an initiative supported by judges and scholarly practitioners, both before and after enactment of Part XIII: see *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165 (Ont. Ct. (Gen. Div.)), at p. 167; *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17 (Ont. Ct. (Gen. Div.)); *Roberts v. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218 (Q.B.), at pp. 224 and 226; *Re Walker* (1998), 5 C.B.R. (4th) 123 (Ont. Ct. (Gen. Div.)); *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.); and see generally J. D. Honsberger, "Canadian Recognition of Foreign Judicially Supervised Arrangements" (1990), 76 C.B.R. (N.S.) 204.

La première observation préliminaire est que la société Antwerp Bulkcarriers, N.V. n'a pas été mise en faillite sous le régime des lois du Canada. Les seules procédures engagées devant un tribunal de faillite canadien visaient à obtenir la reconnaissance et l'exécution des ordonnances du tribunal de faillite belge. La partie XIII de la *Loi sur la faillite et l'insolvabilité* (la « Loi »), intitulée « Insolvabilité en contexte international », n'était pas encore en vigueur à l'époque. Néanmoins, lorsqu'ils sont en mesure de le faire, les tribunaux de faillite canadiens exercent depuis longtemps leur compétence pour prêter concours aux tribunaux de faillite étrangers. La partie XIII constitue une approbation par le Parlement d'une initiative appuyée par les juges et les auteurs de doctrine avant et après l'adoption de cette partie de la Loi : voir *Olympia & York Developments Ltd. c. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165 (C. Ont. (Div. gén.)), p. 167; *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17 (C. Ont. (Div. gén.)); *Roberts c. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218 (B.R.), p. 224 et 226; *Re Walker* (1998), 5 C.B.R. (4th) 123 (C. Ont. (Div. gén.)); *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 (C.S. Ont.); voir également, de façon générale, J. D. Honsberger, « Canadian Recognition of Foreign Judicially Supervised Arrangements » (1990), 76 C.B.R. (N.S.) 204.

31 My second preliminary observation is that the bankruptcy courts in Belgium and Canada had (and have) a legitimate interest in the *in rem* action in the Federal Court. On May 9, 1996, when the Trustees obtained the order of recognition of the Belgian judgment, title to the M/V "Brussel", however heavily encumbered, was still registered in the name of the bankrupt. It is true that the market value of the Ship (ultimately sold for US$4.6 million) was a mere fraction of the first mortgage (about $68 million) held by the Belgian state bank, Société Nationale de Crédit à l'Industrie S.A. ("SNCI"). It is also true that there were maritime liens and statutory charges that ranked ahead of the first mortgage. The bankrupt company nevertheless retained legal title, and to that extent the Ship constituted part of the property of the bankrupt, at least as that term is understood in Canadian law: *Federal Business*

Ma deuxième observation préliminaire est que les tribunaux de faillite en Belgique et au Canada avaient (et ont toujours) un intérêt légitime dans l'action *in rem* intentée devant la Cour fédérale. Le 9 mai 1996, lorsque les syndics ont obtenu l'ordonnance reconnaissant le jugement belge, le titre de propriété du N/M « Brussel », si lourdement grevé fût-il, était toujours enregistré au nom de la faillie. Il est vrai que la valeur marchande du navire (finalement vendu pour 4 600 000 $US) ne représentait qu'une fraction de la première hypothèque (d'environ 68 000 000 $) détenue par la banque d'État belge, la Société Nationale de Crédit à l'Industrie S.A. (« SNCI »). Il est également vrai qu'il existait alors des privilèges maritimes et légaux ayant priorité de rang sur la première hypothèque. La société faillie conservait néanmoins le titre de propriété et, dans cette mesure, le navire

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*Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061.

Counsel for the respondent appeared to consider it dispositive of the appeal to characterize the issue before us as concerning "maritime law" as opposed to "bankruptcy law". The facts here present both aspects, and in my view, with respect, the issue before the Federal Court was one of finding the proper balance of relevant factors on the stay application as opposed to trying to preempt further debate with a "pith and substance" characterization of the nature of the proceeding.

Thirdly, a Canadian bankruptcy court has a responsibility to consider the interests of the litigants before it and other affected parties in this country as well as the desirability of international cooperation and other relevant circumstances. Its function is not simply to rubber stamp commands issuing from the foreign court of the primary bankruptcy. Thus the exigencies of international cooperation were significant to both the Federal Court and the Canadian bankruptcy court, but they were not a factor that necessarily trumped all other factors.

Fourthly, the Canadian bankruptcy court derives its authority from Canadian law. When called upon to lend assistance to foreign bankruptcy courts, Canadian law requires our courts to consider as *one* of the relevant circumstances the juridical advantage which those disadvantaged by deferral to the foreign court would enjoy in a Canadian court. I appreciate that over-emphasis on juridical advantage as a factor would lead to enthronement of the "Grab Rule" because claimants in the Canadian court will inevitably have a good reason why they do not wish to take their chances in the general bankruptcy in the court of the bankrupt's domicile. Nevertheless, all of the relevant factors must be weighed in a stay application and the nature and extent of juridical

faisait partie de ses biens, du moins selon l'interprétation de ce terme en droit canadien : *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061.

32 L'avocat de l'intimée paraissait croire que le pourvoi serait réglé si on considérait que la question qui nous est soumise relève du « droit maritime » au lieu du « droit de la faillite ». Les deux aspects sont présents en l'espèce et j'estime, en toute déférence, qu'il s'agissait pour la Cour fédérale de trouver le juste équilibre entre les facteurs pertinents quant à la demande de suspension et non pas de tenter d'éviter tout autre débat en déterminant la nature des procédures en fonction de leur « caractère véritable ».

33 Troisièmement, un tribunal de faillite canadien doit tenir compte des intérêts des parties qui plaident devant lui et des autres parties touchées au Canada, ainsi que de l'utilité d'une coopération internationale et d'autres circonstances pertinentes. Son rôle ne consiste pas simplement à approuver sans discussion les ordres du tribunal étranger saisi de la faillite principale. Ainsi, les exigences de la coopération internationale étaient un facteur important tant pour la Cour fédérale que pour le tribunal de faillite canadien, mais ce facteur n'éclipsait pas nécessairement tous les autres facteurs.

34 Quatrièmement, la compétence du tribunal de faillite canadien découle du droit canadien. Lorsqu'ils sont appelés à prêter leur concours à des tribunaux de faillite étrangers, nos tribunaux sont tenus, en vertu du droit canadien, de considérer comme étant *une* circonstance pertinente l'avantage juridique dont bénéficieraient devant un tribunal canadien ceux qui sont désavantagés par le recours à un tribunal étranger. Je suis conscient du fait qu'une insistance trop grande sur le facteur de l'avantage juridique mènerait à la consécration de la « règle de l'appropriation », étant donné que les réclamants devant le tribunal canadien auraient inévitablement une bonne raison de ne pas vouloir tenter leur chance dans la faillite générale devant le tribunal du domicile du failli. Toutefois, tous les

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advantage for the various parties was clearly an important factor to throw into the balance.

35 Fifthly, the public policy expressed in our own bankruptcy laws is a relevant consideration. Bankruptcy usually signals at least a temporary "cease fire" against the bankrupt's estate. However, if this had been a Canadian bankruptcy, the statutory stay of a creditor's action would have been of little practical relevance because s. 69.3 of the Act exempts from the statutory stay (with exceptions not relevant here) proceedings by secured creditors to realize on their security. Section 69.3(2)(*a*) would have authorized the Canadian bankruptcy court to order a postponement of no more than six months. The effect of the Canadian bankruptcy court's order in this case was a permanent stay of proceedings for realization of the security of the Ship in Canada.

36 I now turn to the more detailed submissions of the parties.

C. *Issues Raised by the Present Appeal*

37 It is common ground that ordinarily the Federal Court, Trial Division, would have jurisdiction to arrest the Ship, to entertain Holt's claim for debts incurred on the Ship's behalf, to assess the validity of Holt's claim to a maritime lien, to order the appraisal and sale of the Ship and to see the successful secured claimants paid out of the proceeds of sale.

38 The Trustees advance three broad submissions in support of their position that once the shipowner was declared bankrupt on April 5, 1996, the Federal Court was "bound to act in comity with the direction" given by the Belgian bankruptcy court, whose edicts were recognized and accepted by the Canadian bankruptcy court. Firstly, as already mentioned, they say that Canadian courts should follow a "universalist" rather than a "territorialist" approach to bankruptcy. Secondly, they say that a Canadian

facteurs pertinents doivent être soupesés dans le cas d'une demande de suspension, et la nature de même que l'étendue de l'avantage juridique pour les différentes parties constituaient nettement un facteur important qui devait être soupesé.

Cinquièmement, la politique générale énoncée dans nos lois sur la faillite est une considération pertinente. Habituellement, la faillite annonce au moins une suspension temporaire des recours contre l'actif du failli. Cependant, si la faillite était survenue au Canada, la suspension légale de l'action intentée par un créancier aurait été peu pertinente en pratique étant donné que l'art. 69.3 de la Loi soustrait à la suspension légale (sous réserve d'exceptions non applicables en l'espèce) les procédures engagées par les créanciers garantis en vue de réaliser leur garantie. L'alinéa 69.3(2)*a*) aurait permis au tribunal de faillite canadien d'ordonner un report maximum de six mois. En l'espèce, l'ordonnance du tribunal de faillite canadien a eu pour effet de suspendre de façon permanente au Canada les procédures de réalisation de la garantie du navire.

J'examinerai maintenant plus en détail les arguments des parties.

C. *Les questions soulevées par le présent pourvoi*

Nul ne conteste que la Section de première instance de la Cour fédérale aurait normalement compétence pour saisir le navire, examiner la réclamation de Holt relativement aux dettes contractées au nom du navire, déterminer la validité du privilège maritime invoqué par Holt, ordonner l'évaluation et la vente du navire et veiller à ce que les créanciers garantis ayant gain de cause soient payés sur le produit de la vente.

Les syndics avancent trois arguments généraux à l'appui de leur point de vue selon lequel, dès que le propriétaire du navire a été mis en faillite le 5 avril 1996, la Cour fédérale avait [TRADUCTION] « une obligation de courtoisie envers la directive » du tribunal de faillite belge, dont les ordres ont été reconnus et acceptés par le tribunal de faillite canadien. Premièrement, comme nous l'avons vu, les syndics soutiennent que les tribunaux canadiens devraient adopter une approche « universaliste » plutôt que

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court exercising admiralty jurisdiction (the Federal Court) must defer to or at least cooperate with (which in their eyes seems to amount to the same thing) the Canadian court exercising bankruptcy jurisdiction (the Quebec Superior Court). Thirdly, the Trustees say that the response of Canadian courts should be "uniform" by which they appear to mean the Federal Court should have acceded to the request of the Belgian court because the Quebec Superior Court sitting in Bankruptcy had already done so.

« territorialiste » en matière de faillite. Deuxièmement, ils affirment que le tribunal canadien ayant compétence en matière d'amirauté (à savoir la Cour fédérale) devrait s'en remettre au tribunal canadien ayant compétence en matière de faillite (à savoir la Cour supérieure du Québec) ou à tout le moins coopérer avec lui (ce qui à leurs yeux revient au même). Troisièmement, les syndics soutiennent que la réponse des tribunaux canadiens devrait être « uniforme » et, à cet égard, ils semblent vouloir dire que la Cour fédérale aurait dû faire droit à la demande du tribunal belge étant donné que la Cour supérieure du Québec siégeant en matière de faillite l'avait déjà fait.

39 In light of these preliminary observations, I think the Trustees' arguments may be conveniently addressed under the following headings:

À la lumière de ces observations préliminaires, les arguments des syndics peuvent, à mon sens, être commodément abordés sous les rubriques suivantes :

1. Did the respondent Holt possess a valid claim to a maritime lien under Canadian law against the M/V "Brussel" prior to the Belgian bankruptcy of the owners on April 5, 1996?

2. Did Holt thereby enjoy a juridical advantage in Canada that would be in jeopardy if the Federal Court proceedings were stayed in deference to the Belgian bankruptcy court?

3. Did the Federal Court err in treating Holt as a "secured creditor" as that term is understood in Canadian bankruptcy law?

4. Did the Belgian bankruptcy of April 5, 1996 give the Belgian Trustees a valid claim to the Ship?

5. Did the Federal Court of Canada lose jurisdiction to proceed as a result of the various orders of the Quebec Superior Court sitting in Bankruptcy?

6. Even if the Federal Court retained jurisdiction, ought it nevertheless to have deferred to the Belgian bankruptcy court on the basis of "international comity" and the need for an

1. L'intimée Holt pouvait-elle, en droit canadien, invoquer validement un privilège maritime sur le N/M « Brussel » avant la faillite des propriétaires survenue en Belgique le 5 avril 1996?

2. Holt bénéficiait-elle au Canada d'un avantage juridique qui serait compromis si les procédures engagées devant la Cour fédérale étaient suspendues par déférence pour le tribunal de faillite belge?

3. La Cour fédérale a-t-elle commis une erreur en traitant Holt comme un « créancier garanti » selon l'interprétation de cette expression en droit canadien de la faillite?

4. La faillite survenue en Belgique le 5 avril 1996 a-t-elle conféré aux syndics belges un droit de réclamation valide à l'égard du navire?

5. La Cour fédérale du Canada a-t-elle perdu compétence à la suite des diverses ordonnances délivrées par la Cour supérieure du Québec siégeant en matière de faillite?

6. Même si la Cour fédérale avait conservé compétence, aurait-elle dû néanmoins s'en remettre au tribunal de faillite belge au nom de la « courtoisie internationale » et en raison de la nécessité d'une

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integrated "universalist" approach to the bankruptcy?

7. In light of the foregoing, did the Federal Court err in the exercise of its discretion to deny the Trustees' application for a stay of proceedings?

40 I will address each of these issues in turn.

1. Did the Respondent Holt Possess a Valid Claim to a Maritime Lien Under Canadian Law Against the M/V "Brussel" Prior to the Belgian Bankruptcy of the Owners of April 5, 1996?

41 A maritime lien validly created under foreign law will be recognized and given the same priority in Canada as would be given to a maritime lien created in Canada under Canadian maritime law "unless opposed to some rule of domestic policy or procedure which prevents the recognition of the right": *The Strandhill v. Walter W. Hodder Co.*, [1926] S.C.R. 680, *per* Newcombe J., at p. 685. The theory is that "[i]f a maritime lien exists it cannot be shaken off by changing the location of the *res*": *Todd Shipyards Corp. v. Altema Compania Maritima S.A.*, [1974] S.C.R. 1248, at p. 1252.

42 Under U.S. law, as stated, the respondent Holt acquired a maritime lien against the Ship at the moment when services were rendered in U.S. ports. All such services were rendered prior to March 30, 1996. The Ship thus arrived in Canadian waters burdened with a maritime lien. A maritime lien would not have arisen under Canadian law for similar stevedoring services rendered to a ship at a port in Canada, but the proper law giving rise to the debt was U.S. law, not Canadian law.

43 It is Canadian law, once it recognizes the right, that grants the remedy and sets the priorities. At Canadian law, a maritime lien ranks ahead of a ship's mortgage (i.e., the $68 million claim of SNCI). See *Todd Shipyards*, *supra*, at p. 1259, and

approche « universaliste » intégrée en matière de faillite?

7. À la lumière de ce qui précède, la Cour fédérale a-t-elle commis une erreur dans l'exercice de son pouvoir discrétionnaire de refuser la demande de suspension des procédures présentée par les syndics?

J'examinerai ces questions l'une après l'autre.

1. L'intimée Holt pouvait-elle, en droit canadien, invoquer validement un privilège maritime sur le N/M « Brussel » avant la faillite des propriétaires survenue en Belgique le 5 avril 1996?

Un privilège maritime validement créé sous le régime d'une loi étrangère est reconnu et se voit accorder, au Canada, la même priorité qu'un privilège maritime créé au Canada sous le régime du droit maritime canadien, [TRADUCTION] « à moins qu'il n'aille à l'encontre d'une règle quelconque de politique ou de procédure intérieure qui en empêche la reconnaissance » : *The Strandhill c. Walter W. Hodder Co.*, [1926] R.C.S. 680, le juge Newcombe, p. 685. La théorie veut que « [l]orsqu'un privilège maritime existe, on ne [puisse] s'en débarrasser en changeant la chose de place » : *Todd Shipyards Corp. c. Altema Compania Maritima S.A.*, [1974] R.C.S. 1248, p. 1252.

Rappelons qu'en vertu du droit américain, l'intimée Holt a acquis un privilège maritime sur le navire lorsqu'elle a fourni ses services dans des ports américains. Ces services ont tous été fournis avant le 30 mars 1996. Le navire est ainsi arrivé dans les eaux canadiennes grevé d'un privilège maritime. En droit canadien, un tel privilège n'aurait pas pris naissance à la suite de services d'acconage semblables fournis à un navire se trouvant dans un port au Canada, mais le droit qui avait donné naissance à la dette était le droit américain et non le droit canadien.

Une fois qu'il reconnaît l'existence du droit en cause, le droit canadien accorde le recours et établit les priorités. En droit canadien, le privilège maritime a priorité de rang sur l'hypothèque qui grève un navire (soit la créance de 68 000 000 $

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*Marlex Petroleum Inc. v. Har Rai (The)*, [1987] 1 S.C.R. 57, aff'g [1984] 2 F.C. 345 (C.A.).

The appellant Trustees argue that a "universalist" approach to trans-border bankruptcies is a domestic policy opposable to recognition of the U.S. maritime lien in this case within the meaning of the *Strandhill* exception, but I do not think so. Newcombe J. was looking to something offensive about the origin of the right being asserted (as was the case in *Laane and Baltser*, *supra*). There is nothing offensive about the origin of Holt's claim. If stevedoring services had not been rendered, the Ship could not have unloaded its cargo at Gloucester City, New Jersey. If Holt is to be defeated by considerations of "universalism", it will be as a result of a balancing of relevant factors under s. 50 of the *Federal Court Act* which authorizes the court, in its discretion, to stay its own proceedings.

In my view, on the existing state of the law, Holt was entitled to have its maritime lien recognized as such by the Federal Court in these proceedings.

2. Did Holt Thereby Enjoy a Juridical Advantage in Canada that Would Be in Jeopardy if the Federal Court Proceedings Were Stayed in Deference to the Belgian Bankruptcy Court?

There were clear advantages to Holt in having its claim disposed of in Canada. Firstly, at the time the Trustees intervened, Holt's *in rem* action was undefended and speeding to a successful conclusion. According to the anticipated timetable, its claim would be paid in full, plus expenses, within a matter of months. The Belgian bankruptcy was still in the early stages of organization.

Secondly, and more importantly, it seems clear that Holt's claim would not enjoy the same priority in Belgium as it enjoyed under Canadian maritime law.

de la SNCI). Voir *Todd Shipyards*, précité, p. 1259, et *Marlex Petroleum Inc. c. Har Rai (Le)*, [1987] 1 R.C.S. 57, conf. [1984] 2 C.F. 345 (C.A.).

44 Les syndics appelants allèguent qu'en l'espèce une approche « universaliste » en matière de faillites transfrontalières est une politique intérieure opposable à la reconnaissance du privilège maritime américain, au sens de l'exception prévue dans l'arrêt *Strandhill*, mais je ne crois pas que ce soit le cas. Le juge Newcombe exigeait que l'origine du droit revendiqué ait quelque chose d'inconvenant (comme c'était le cas dans l'affaire *Laane and Baltser*, précitée). L'origine de la réclamation de Holt n'a rien d'inconvenant. Si les services d'acconage n'avaient pas été fournis, la cargaison du navire n'aurait pas pu être déchargée à Gloucester City, au New Jersey. Si Holt doit échouer pour des considérations d'« universalisme », ce sera à la suite d'une évaluation de facteurs pertinents fondée sur l'art. 50 de la *Loi sur la Cour fédérale*, qui donne à la cour le pouvoir discrétionnaire de suspendre ses propres procédures.

45 À mon avis, compte tenu de l'état actuel du droit, Holt avait droit en l'espèce à la reconnaissance de son privilège maritime par la Cour fédérale.

2. Holt bénéficiait-elle au Canada d'un avantage juridique qui serait compromis si les procédures engagées devant la Cour fédérale étaient suspendues par déférence pour le tribunal de faillite belge?

46 Holt avait manifestement avantage à ce que sa réclamation soit tranchée au Canada. Premièrement, au moment de l'intervention des syndics, l'action *in rem* de Holt n'était pas contestée et se dirigeait rapidement vers une conclusion favorable. Selon l'échéancier prévu, sa réclamation, incluant les frais, serait entièrement acquittée en quelques mois. La faillite belge en était encore au stade initial de l'organisation.

47 Deuxièmement, et qui plus est, il semble évident que la réclamation de Holt n'aurait pas la même priorité en Belgique que celle dont elle bénéficiait en droit maritime canadien.

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48 In an affidavit sworn in this action on June 5, 1996, the appellant De Roy deposed that the applicable Belgian law "prohibits the arrest or execution by creditors of the debtor's property to enforce preferential/lien claims" (para. 26). De Roy further deposed that Belgian maritime law "gives specific priorities to certain types of claims" (para. 42) but declined to state whether such "priority" claims included that of Holt and other maritime lien holders. In the hearing before Guthrie J. of the Canadian bankruptcy court, M^e^ Édouard Baudry, an experienced admiralty law practitioner arguing for the intervener, SNCI, who supported the appellant Trustees, expressed the common understanding of counsel that Holt would likely be disadvantaged if required to take its claim to Belgium:

Me ÉDOUARD BAUDRY

I would add, though, as my friend will no doubt tell you, that the possibility of an American maritime lien being recognized by Belgian Court is a . . .

THE COURT

Being maintained by the Antwerp Court is slimmer than in here?

Me ÉDOUARD BAUDRY

. . . is a lot slimmer than here.

THE COURT

I can understand that.

Me ÉDOUARD BAUDRY

I think we all . . .

THE COURT

I think that is one of the reasons, if not the major reason, why we're here.

49 Further, according to endnote 5 of the judgment of the Federal Court of Appeal, counsel for both parties conceded on the appeal that it was "unlikely that the respondent's *in rem* rights could subsist in one form or another under Belgian bankruptcy laws" (emphasis added).

Dans un affidavit daté du 5 juin 1996 et produit dans le cadre de la présente action, l'appelant De Roy a déclaré que le droit belge [TRADUCTION] « empêche la saisie des biens du débiteur par les créanciers afin de permettre l'exécution des créances prioritaires ou privilégiées » (par. 26). Monsieur De Roy a en outre déclaré que le droit maritime belge [TRADUCTION] « accorde des priorités particulières à certains types de réclamation » (par. 42), mais il a refusé de dire si la réclamation de Holt et d'autres titulaires de privilège maritime faisait partie de ces réclamations prioritaires. Lors de l'audience devant le juge Guthrie du tribunal de faillite canadien, M^e^ Édouard Baudry, avocat expérimenté en droit maritime, plaidant pour l'intervenante SNCI qui appuyait les syndics appelants, a déclaré que les avocats s'entendaient pour dire que Holt serait probablement désavantagée si elle devait présenter sa réclamation en Belgique :

[TRADUCTION] M^e^ ÉDOUARD BAUDRY

J'ajouterais cependant, comme mon collègue ne manquera pas de vous le dire, que la possibilité qu'un privilège maritime américain soit reconnu par le tribunal belge est . . .

LA COUR

Qu'il soit maintenu par le tribunal d'Anvers, est plus mince qu'elle ne l'est ici?

Me ÉDOUARD BAUDRY

. . . beaucoup plus mince qu'ici.

LA COUR

Je peux comprendre cela.

Me ÉDOUARD BAUDRY

Je pense que nous sommes tous . . .

LA COUR

Je pense que c'est l'une des raisons, sinon la raison principale, de notre présence ici.

En outre, selon la cinquième note de renvoi du jugement de la Cour d'appel fédérale, les avocats des deux parties ont admis en appel qu'il était « peu probable que les droits *in rem* de l'intimée puissent subsister sous une forme ou une autre sous le régime des lois belges sur la faillite » (je souligne).

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While the onus was on the appellant Trustees to establish the grounds for a stay of proceedings, it was up to Holt to prove Belgian law if Holt wished to rely on any difference between the expected treatment of its claim under Belgian law as opposed to Canadian law. The trial judge noted the absence of evidence on this point. However, as the parties were apparently in agreement that Belgian law would not recognize Holt's maritime lien both before Guthrie J. in the Canadian bankruptcy court, and subsequently in the present case before the Federal Court of Appeal, I do not think we should interfere with the Federal Court of Appeal on this factual point. As Guthrie J. pointed out, the reason "we're here" is that Holt's claim enjoys a juridical advantage in the Federal Court of Canada that it would not command in the Belgian bankruptcy court.

50 Même s'il incombait aux syndics appelants d'établir les motifs justifiant une suspension des procédures, il appartenait à Holt de faire la preuve du droit belge si elle souhaitait invoquer une différence quant à la façon dont le droit belge et le droit canadien traiteraient sa réclamation. Le juge de première instance a souligné l'absence d'élément de preuve sur ce point. Cependant, comme les parties paraissent avoir convenu, devant le juge Guthrie du tribunal de faillite canadien et ensuite devant la Cour d'appel fédérale, que le droit belge ne reconnaîtrait pas le privilège maritime de Holt, j'estime que nous ne devrions pas modifier la décision de la Cour d'appel fédérale sur cette question de fait. Comme le juge Guthrie l'a fait remarquer, la raison [TRADUCTION] « de notre présence ici » est que la réclamation de Holt bénéficie devant la Cour fédérale du Canada d'un avantage juridique dont elle ne bénéficierait pas devant le tribunal de faillite belge.

3. Did the Federal Court Err in Treating Holt as a "Secured Creditor" as that Term is Understood in Canadian Bankruptcy Law?

3. La Cour fédérale a-t-elle commis une erreur en traitant Holt comme un « créancier garanti » selon l'interprétation de cette expression en droit canadien de la faillite?

Canadian bankruptcy law takes an expansive view of who is a secured creditor, as confirmed by the relevant provisions in the Act. If Antwerp Bulkcarriers, N.V. had declared bankruptcy in Canada, there is no doubt that Holt would be considered "a person holding a . . . lien . . . against the property of the debtor . . . as security for a debt due" within the definition of "secured creditor" in s. 2 of the Act. Once the Federal Court had determined as a matter of Canadian maritime law that Holt's claim was secured by a maritime lien on the Ship itself, the bankruptcy court would be bound by that determination: *Riordon Co. v. Danforth Co.*, [1923] S.C.R. 319.

51 Le droit canadien de la faillite a une conception large du créancier garanti, comme le confirment les dispositions pertinentes de la Loi. Si Antwerp Bulkcarriers, N.V. avait fait faillite au Canada, nul doute que Holt aurait été considérée comme une « [p]ersonne détenant [. . .] un privilège sur [. . .] les biens du débiteur [. . .] à titre de garantie d'une dette échue », selon la définition de « créancier garanti » figurant à l'art. 2 de la Loi. Une fois que la Cour fédérale avait décidé que la réclamation de Holt était, en droit maritime canadien, garantie par un privilège maritime sur le navire lui-même, le tribunal de faillite était lié par cette décision : *Riordon Co. c. Danforth Co.*, [1923] R.C.S. 319.

If this were a Canadian bankruptcy, Holt would have been entitled to realize on its security irrespective of the bankruptcy. As Gonthier J. said in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 9, "the entire scheme of distribution is '[s]ubject to the rights of secured creditors'". The opening words of s. 136

52 Si la faillite était survenue au Canada, Holt aurait eu le droit de réaliser sa garantie indépendamment de la faillite. Comme le juge Gonthier l'a affirmé dans *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 9, « l'ensemble du plan de répartition est appliqué "[s]ous réserve des droits des créanciers garantis" ».

(under the heading "Scheme of Distribution") establish the priority of claims against the bankrupt's estate subject always "to the rights of secured creditors". L. W. Houlden and G. B. Morawetz state that "[t]he policy of the Act in the case of bankruptcy is not to interfere with secured creditors except in so far as may be necessary to protect the estate as to any surplus on the assets covered by the security" (*The 2001 Annotated Bankruptcy and Insolvency Act* (2000), at p. 346). See also: L. M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" (1999), 84 *Cornell L. Rev.* 696.

53 I appreciate, of course, that "universalism" will not work if every jurisdiction only defers to the law of the primary bankruptcy where that law coincides precisely with the domestic law of the deferring court. The fact remains, however, that Canadian public policy, expressed through the Act, strongly supports the rights of claimants whom we would regard as secured creditors. Our law considers it in the interests of commercial activity generally that secured rights be protected. It seems to me that MacKay J. correctly regarded Holt as a "secured creditor" in bankruptcy terms, and in the exercise of his discretion under s. 50 of the *Federal Court Act*, he was entirely justified in putting considerable weight on that factor.

4. Did the Belgian Bankruptcy of April 5, 1996 Give the Belgian Trustees a Valid Claim to the Ship?

54 Under the Belgian bankruptcy court's order of April 5, 1996, the Trustees were given the duty and power to take possession of the assets of the bankrupt wherever located. At that stage, the Ship was no longer in the possession of the bankrupt shipowner. It was in the possession of the Marshal of the Federal Court at Halifax and subject to further orders of that court.

Le préambule de l'art. 136 (sous la rubrique « Plan de répartition ») établit l'ordre de priorité des créances grevant l'actif du failli, toujours sous réserve « des droits des créanciers garantis ». Selon L. W. Houlden et G. B. Morawetz, [TRADUCTION] « [l]a politique de la loi en matière de faillite est de ne pas faire obstacle aux créanciers garantis sauf dans la mesure où il peut être nécessaire de protéger l'actif quant à tout excédent sur les biens affectés à la garantie » (*The 2001 Annotated Bankruptcy and Insolvency Act* (2000), p. 346). Voir également : L. M. LoPucki, « Cooperation in International Bankruptcy : A Post-Universalist Approach » (1999), 84 *Cornell L. Rev.* 696.

Certes, j'estime que « l'universalisme » ne fonctionnera pas si un tribunal s'en remet au droit en vigueur dans le ressort où survient la faillite principale uniquement lorsque ce droit coïncide exactement avec le droit en vigueur dans le ressort où est situé le tribunal en question. Il reste cependant que la politique générale du Canada, énoncée dans la Loi, est très favorable aux droits des réclamants que nous considérerions comme des créanciers garantis. Notre droit considère qu'il est généralement dans l'intérêt de l'activité commerciale que les droits garantis soient protégés. Il me semble que le juge MacKay a eu raison de considérer Holt comme un « créancier garanti » en matière de faillite. Ainsi, lorsqu'il a exercé le pouvoir discrétionnaire que lui conférait l'art. 50 de la *Loi sur la Cour fédérale*, le juge MacKay était tout à fait justifié d'accorder une importance considérable à ce facteur.

4. La faillite survenue en Belgique le 5 avril 1996 a-t-elle conféré aux syndics belges un droit de réclamation valide à l'égard du navire?

En vertu de l'ordonnance du tribunal de faillite belge datée du 5 avril 1996, les syndics se sont vu attribuer l'obligation et le pouvoir de prendre possession des éléments d'actif de la faillie où qu'ils soient. Dès lors, le navire n'était plus en la possession de son propriétaire failli. Il était en la possession du prévôt de la Cour fédérale à Halifax et était assujetti à d'autres ordonnances de ce tribunal.

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55 In Canada, the bankruptcy order pronounced by the court of the domicile operated as an assignment by operation of law of the moveable assets of the bankrupt shipowner located in Canada, including its interest in the M/V "Brussel", but this assignment is subject to any prior charges upon it recognized by *Canadian* law (J.-G. Castel, *Canadian Conflict of Laws* (4th ed. 1997), at pp. 564-65).

56 In this respect, our conflict of laws rule is the same as the English rule set out by the editors of *Dicey and Morris on the Conflict of Laws* (13th ed. 2000), vol. 2, at p. 1184:

> The general principle of English law is that bankruptcy, or any proceeding in the nature of bankruptcy, in a foreign country whose courts have jurisdiction over a debtor operates as an assignment to the trustee, assignees, curators, syndics or others, who under the law of that country are entitled to administer his property, of all his movables in England, if that is its effect under the foreign law.

See also I. F. Fletcher, *Insolvency in Private International Law* (1999), at pp. 61-62.

As in Canada, the assignment by operation of law of the debtor's property is subject to a number of limitations, one of which as noted is that the property passes subject to existing charges recognized under English law:

> The property in England passes subject to any existing charges upon it recognised by the law of England, even if these charges would be postponed under the law of the place of bankruptcy to the claim of the creditors, and even if under the English bankruptcy the charges would be defeated by the title of the trustee in bankruptcy.

(*Dicey and Morris on the Conflict of Laws*, *supra*, at pp. 1184-85)

57 An illustration of the proposition that the trustee cannot obtain more of an interest than it was in the power of the debtor to assign is in *Galbraith v. Grimshaw*, [1910] A.C. 508 (H.L.). In that case, creditors had obtained judgment in Scotland against a Scottish company and, having had the judgment extended to England, served a garnishee order

Au Canada, l'ordonnance de faillite délivrée par le tribunal du domicile a eu l'effet d'une cession légale des biens meubles du propriétaire failli du navire qui sont situés au Canada, y compris son droit sur le N/M « Brussel », mais cette cession est faite sous réserve de toutes charges antérieures qui peuvent grever les biens en vertu du droit *canadien* (J.-G. Castel, *Canadian Conflict of Laws* (4e éd. 1997), p. 564-565).

À cet égard, notre règle de conflit des lois est identique à la règle anglaise énoncée par les éditeurs de *Dicey and Morris on the Conflict of Laws* (13e éd. 2000), vol. 2, p. 1184 :

> [TRADUCTION] Le principe général du droit anglais veut que la faillite ou toute autre procédure de même nature, survenue dans un pays étranger où les tribunaux ont compétence à l'égard d'un débiteur, agisse comme une cession de tous ses biens meubles situés en Angleterre, en faveur du syndic, des cessionnaires, des curateurs ou des autres personnes qui, suivant le droit en vigueur dans ce pays, ont le droit d'administrer ses biens, si c'est là l'effet du droit étranger.

Voir également I. F. Fletcher, *Insolvency in Private International Law* (1999), p. 61-62.

Comme c'est le cas au Canada, la cession légale des biens du débiteur est sujette à certaines restrictions dont l'une, comme nous l'avons vu, veut que les biens soient transmis sous réserve des charges existantes reconnues par le droit anglais :

> [TRADUCTION] Les biens situés en Angleterre sont transmis sous réserve de toute charge qui les grève en vertu du droit anglais, même si cette charge était subordonnée, en vertu de la loi du lieu de la faillite, à la réclamation des créanciers, et même si en vertu de la faillite anglaise, elle était annulée par le titre du syndic de faillite.

(*Dicey and Morris on the Conflict of Laws*, *op. cit.*, p. 1184-1185)

57 On trouve, dans l'arrêt *Galbraith c. Grimshaw*, [1910] A.C. 508 (H.L.), un exemple de la proposition selon laquelle le syndic ne peut obtenir plus de droits que ceux qui pouvaient être cédés par le débiteur. Dans cette affaire, les créanciers avaient eu gain de cause en Écosse contre une société écossaise et, après avoir obtenu que le jugement soit

on an English firm that was indebted to the Scottish debtor. Two weeks later, the Scottish debtor became bankrupt. The trustee sought to take possession of the garnisheed debt, but was refused by the House of Lords on the principle that the trustee "could not have it unless the bankrupt could himself have assigned it" (p. 511). Accordingly, the trustee was not entitled to receive the debt free of the garnishee order "because the bankrupt could only have assigned it on November 12, subject to the garnishee order" (p. 511). In *Anantapadmanabhaswami v. Official Receiver of Secunderabad*, [1933] A.C. 394, the Privy Council extended the *Galbraith* analysis to debts that were the subject of collection proceedings in progress provided that at the date of the bankruptcy the bankrupt could not have assigned the debt clear of the plaintiff's claim.

exécutoire en Angleterre, ils avaient signifié une ordonnance de saisie-arrêt à une entreprise anglaise endettée envers le débiteur écossais. Deux semaines plus tard, le débiteur écossais faisait faillite. Le syndic a cherché à prendre possession de la créance saisie, mais s'est heurté au refus de la Chambre des lords qui s'est fondée sur le principe selon lequel le syndic [TRADUCTION] « ne pourrait l'obtenir que si le failli lui-même avait pu la céder » (p. 511). En conséquence, le syndic n'avait pas le droit d'obtenir la créance exempte de l'ordonnance de saisie-arrêt [TRADUCTION] « parce que le failli n'aurait pu la céder que le 12 novembre, sous réserve de l'ordonnance de saisie-arrêt » (p. 511). Dans *Anantapadmanabhaswami c. Official Receiver of Secunderabad*, [1933] A.C. 394, le Conseil privé a étendu l'analyse faite dans *Galbraith* aux créances qui faisaient l'objet d'une procédure de recouvrement pourvu que, à la date de la faillite, le failli n'ait pas été en mesure de céder la créance exempte de la réclamation du demandeur.

58 While such a rule may be modified by statute, it has not been so modified in Canada in any way relevant to the question of the foreign bankruptcy before us.

Bien qu'une telle règle puisse être modifiée par un texte législatif, elle n'a subi au Canada aucune modification pertinente quant à la question de la faillite étrangère dont nous sommes saisis.

59 I conclude therefore that on April 5, 1996, the Belgian Trustees acquired under Canadian law the interest of the bankrupt shipowner in the M/V "Brussel" but that its interest was and remained subject to the prior claim of the secured creditors, including the maritime lienholders, who were seeking relief in the Federal Court, Trial Division.

Je conclus donc que, le 5 avril 1996, les syndics belges ont, en vertu du droit canadien, acquis le droit que le propriétaire failli du navire avait sur le N/M « Brussel » mais que ce droit était et demeurait assujetti à la réclamation antérieure des créanciers garantis, y compris les titulaires du privilège maritime qui cherchaient à obtenir réparation devant la Section de première instance de la Cour fédérale.

5. Did the Federal Court of Canada Lose Jurisdiction to Proceed as a Result of the Various Orders of the Quebec Superior Court Sitting in Bankruptcy?

5. La Cour fédérale du Canada a-t-elle perdu compétence à la suite des diverses ordonnances délivrées par la Cour supérieure du Québec siégeant en matière de faillite?

60 The Trustees argue that once the Belgian bankruptcy court issued its order on April 5, 1996, or, at the very latest, when the request for assistance was accepted by the Canadian bankruptcy court, the matter before MacKay J. became one of bankruptcy and thus within the *exclusive* jurisdiction of the Canadian bankruptcy court. I have already rejected the Trustees' notion that once a foreign bankruptcy

Les syndics font valoir qu'une fois que le tribunal de faillite belge a délivré l'ordonnance sollicitant le concours des tribunaux canadiens le 5 avril 1996 ou, au plus tard, lorsque le tribunal de faillite canadien a accueilli cette requête, l'affaire soumise au juge MacKay est devenue une affaire de faillite relevant de la compétence *exclusive* du tribunal de faillite canadien. J'ai déjà rejeté l'idée des syndics

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court is activated it necessarily occupies the field in relation to matters pertaining to the bankrupt in this country. I have also rejected the idea that "international coordination" necessitates the rubber stamping of orders made by the foreign bankruptcy court.

que, dès qu'un tribunal de faillite étranger est saisi d'un dossier, il a nécessairement compétence exclusive sur les questions concernant le failli dans notre pays. J'ai également rejeté l'idée que la « coordination internationale » exige l'approbation sans discussion des ordonnances délivrées par le tribunal de faillite étranger.

The appellant Trustees nevertheless contend that the Federal Court lost jurisdiction because of the combined operation of s. 183(1) of the *Bankruptcy and Insolvency Act* and s. 17(6) of the *Federal Court Act*. Section 183(1) reads as follows:

Les syndics appelants affirment néanmoins que la Cour fédérale a perdu compétence en raison de l'effet conjugué du par. 183(1) de la *Loi sur la faillite et l'insolvabilité* et du par. 17(6) de la *Loi sur la Cour fédérale*. Le paragraphe 183(1) se lit ainsi :

**183.** (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

**183.** (1) Les tribunaux suivants possèdent la compétence en droit et en équité qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

. . .

(*b*) in the Province of Quebec, the Superior Court;

*b*) dans la province de Québec, la Cour supérieure;

(The Trustees commenced their proceedings in Montreal, Quebec, because that was the place of business of the shipowner's agents in Canada.)

(Les syndics ont engagé leurs procédures à Montréal (Québec), parce que c'était le lieu d'affaires des représentants du propriétaire du navire au Canada.)

Section 17(6) of the *Federal Court Act* provides:

Le paragraphe 17(6) de la *Loi sur la Cour fédérale* prévoit ce qui suit :

**17.** . . .

(6) Where an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Trial Division has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on the Court.

**17.** . . .

(6) La Section de première instance n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

The Trustees do not contend that the arrest of the Ship and the adjudication of claims under maritime law are bankruptcy matters. Their position is that the bankruptcy order of the Belgian bankruptcy court, and the follow-up orders of the Canadian bankruptcy court, transformed a maritime matter into one of bankruptcy. The corollary to this argument is that the Federal Court, which has no

Les syndics ne prétendent pas que la saisie du navire et le règlement des réclamations en vertu du droit maritime sont des questions de faillite. Ils estiment que l'ordonnance de faillite délivrée par le tribunal de faillite belge et les ordonnances complémentaires du tribunal de faillite canadien ont transformé une question de droit maritime en une question de faillite. Cet argument a pour corollaire que

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bankruptcy jurisdiction, thereby lost subject-matter jurisdiction in the case.

la Cour fédérale, qui n'a pas compétence en matière de faillite, a de ce fait perdu sa compétence *ratione materiae* dans l'affaire.

64 In my view MacKay J. was not exercising original, ancillary or auxiliary jurisdiction in bankruptcy. If he had, he would have been without jurisdiction and it would not be necessary to have recourse to s. 17(6) of the *Federal Court Act*. This is because s. 17(6) presupposes that the Federal Court *would* have jurisdiction but for that subsection. In *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, at p. 766, this Court concluded that the Federal Court has jurisdiction only if certain conditions are satisfied, including a statutory grant of jurisdiction by the federal Parliament. There has been no such statutory grant of bankruptcy jurisdiction to the Federal Court.

À mon avis, le juge MacKay n'exerçait pas une juridiction de première instance, auxiliaire ou subordonnée en matière de faillite. Si cela avait été le cas, il n'aurait pas eu compétence et il ne serait pas nécessaire de recourir au par. 17(6) de la *Loi sur la Cour fédérale*, parce que ce paragraphe présuppose que la Cour fédérale *serait* a priori compétente. Dans l'arrêt *ITO—International Terminal Operators Ltd. c. Miida Electronics Inc.*, [1986] 1 R.C.S. 752, p. 766, notre Cour a conclu que la Cour fédérale a compétence seulement si certaines conditions sont remplies, notamment s'il y a attribution de compétence par une loi du Parlement fédéral. La Cour fédérale ne s'est pas vu attribuer pareille compétence en matière de faillite.

65 The subject matter of the dispute before MacKay J. was the maritime lien asserted by Holt and the claims of other creditors to security in the Ship. He was dealing with *in rem* claims against the Ship, not *in personam* claims against the shipowner. It was apparent from the SNCI's intervention that its mortgage claim of $68 million would, if allowed, swallow whatever funds might be left after the claims of the maritime lienholders had been satisfied. There was therefore no realistic possibility of any residual funds to which the Trustees could properly lay claim.

Le litige soumis au juge MacKay concernait le privilège maritime invoqué par Holt ainsi que les réclamations par d'autres créanciers d'une garantie sur le navire. Le juge MacKay était saisi de réclamations *in rem* contre le navire et non pas de réclamations *in personam* contre le propriétaire du navire. Il ressortait de l'intervention de la SNCI que sa créance hypothécaire de 68 000 000 $ engloutirait, si on y faisait droit, tous les fonds qui pourraient rester après l'acquittement des réclamations des titulaires de privilège maritime. Il n'y avait donc aucune possibilité réaliste qu'il reste des fonds auxquels les syndics pourraient régulièrement prétendre.

66 The bankruptcy was certainly not irrelevant to the Federal Court proceedings. The Trustees rightly demanded (and were accorded) rights of participation in the proceedings to protect the interest of the bankrupt shipowner. There was a continuing bankruptcy aspect throughout the Federal Court proceedings after April 5, 1996 which MacKay J. acknowledged in his various orders. Nevertheless, having ruled that he would recognize Holt's security interest as a matter of maritime law, and having regard to the priority accorded to secured creditors in the order of the Canadian bankruptcy court dated June

La faillite n'était certainement pas dépourvue de pertinence dans le cadre des procédures engagées devant la Cour fédérale. Les syndics ont à bon droit demandé (et obtenu) le droit de participer aux procédures afin de protéger les intérêts du propriétaire failli du navire. Après le 5 avril 1996, les procédures devant la Cour fédérale ont comporté un aspect « faillite » dont le juge MacKay a tenu compte dans ses diverses ordonnances. Néanmoins, après avoir décidé de reconnaître la garantie de Holt sur le plan du droit maritime et avoir tenu compte de la priorité accordée aux créanciers garantis dans l'ordonnance

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28, 1996, he rightly concluded that there was no jurisdictional barrier to the Federal Court continuing to adjudicate Holt's *in rem* action against the Ship.

6. Even If the Federal Court Retained Jurisdiction, Ought It Nevertheless to Have Deferred to the Belgian Bankruptcy Court on the Basis of "International Comity" and the Need for an Integrated "Universalist" Approach to the Bankruptcy?

I should first of all address the issue of "international comity" as it pertains to the present appeal and then move on to consider some of the more specific approaches that have been devised to solve problems arising from international bankruptcies. I will then outline what I believe is the preferred approach in cases of this kind.

(a) *The Role of International Comity*

In *Zingre v. The Queen*, [1981] 2 S.C.R. 392, Dickson J. (as he then was) commented at p. 401 that "the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect".

Subsequently, in *Spencer v. The Queen*, [1985] 2 S.C.R. 278, at p. 283, Estey J. accepted as accurate the following definition of international comity:

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws: *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-64.

The Canadian bankruptcy court in this case did not have a monopoly in the determination of what level of "deference and respect" was owed to the Belgian bankruptcy court. Within its own

du tribunal de faillite canadien en date du 28 juin 1996, il a conclu à juste titre qu'aucune entrave juridictionnelle n'empêchait la Cour fédérale de continuer d'instruire l'action *in rem* de Holt contre le navire.

6. Même si la Cour fédérale avait conservé compétence, aurait-elle dû néanmoins s'en remettre au tribunal de faillite belge au nom de la « courtoisie internationale » et en raison de la nécessité d'une approche « universaliste » intégrée en matière de faillite?

67 Je vais examiner d'abord la question de la « courtoisie internationale » qui s'applique au présent pourvoi. Par la suite, j'analyserai certaines approches plus particulières qui ont été conçues pour régler les problèmes résultant des faillites internationales. Je vais enfin exposer l'approche qui, selon moi, doit être privilégiée en pareils cas.

a) *Le rôle de la courtoisie internationale*

68 Dans l'arrêt *Zingre c. La Reine*, [1981] 2 R.C.S. 392, p. 401, le juge Dickson (plus tard Juge en chef) affirme que « les tribunaux d'un ressort donneront effet aux lois et aux décisions judiciaires d'un autre, non parce qu'ils y sont tenus, mais par déférence et respect mutuels ».

69 Subséquemment, dans l'arrêt *Spencer c. La Reine*, [1985] 2 R.C.S. 278, p. 283, le juge Estey reconnaît la justesse de la définition suivante de la courtoisie internationale :

> [TRADUCTION] La « courtoisie » au sens juridique n'est ni une question d'obligation absolue d'une part ni de simple politesse et bonne volonté de l'autre. Mais c'est la reconnaissance qu'une nation accorde sur son territoire aux actes législatifs, exécutifs ou judiciaires d'une autre nation, compte tenu à la fois des obligations et des convenances internationales et des droits de ses propres citoyens ou des autres personnes qui sont sous la protection de ses lois : *Hilton v. Guyot*, 159 U.S. 113 (1895), aux pp. 163 et 164.

70 En l'espèce, le tribunal de faillite canadien n'avait pas le monopole pour ce qui était de décider quelle mesure « de déférence et de respect » était due au tribunal de faillite belge. Certes, il pouvait

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bankruptcy jurisdiction, of course, it could and did make that determination. Insofar as Holt's claim was "integrally connected to maritime matters", it lay within the jurisdiction of the Federal Court (*Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 73) and it was for that court to decide whether to defer to the Belgian bankruptcy court "having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws".

prendre cette décision en vertu de sa propre compétence en matière de faillite, et il l'a fait. Dans la mesure où la réclamation de Holt était « entièrement liée aux affaires maritimes », elle relevait de la compétence de la Cour fédérale (*Succession Ordon c. Grail*, [1998] 3 R.C.S. 437, par. 73) et il appartenait à cette cour de décider si elle devait s'en remettre au tribunal de faillite belge « compte tenu à la fois des obligations et des convenances internationales et des droits de ses propres citoyens ou des autres personnes qui sont sous la protection de ses lois ».

71 In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, the Court expanded on the definition of international comity by noting that the twin objectives sought by private international law in general and the doctrine of international comity in particular were order and fairness. This was reiterated in *Hunt v. T&N PLC*, [1993] 4 S.C.R. 289, at p. 325, and again in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1058, where the Court gave preeminence to the objective of order:

> While, no doubt, as was observed in *Morguard*, the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice.

Dans l'arrêt *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077, la Cour a élargi la définition de la courtoisie internationale en soulignant que le droit international privé, en général, et la règle de la courtoisie internationale, en particulier, poursuivaient un double objectif d'ordre et d'équité. Cela a été réitéré dans l'arrêt *Hunt c. T&N PLC*, [1993] 4 R.C.S. 289, p. 325, et de nouveau dans l'arrêt *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022, p. 1058, où la Cour a donné préséance à l'ordre :

> S'il ne fait aucun doute, ainsi qu'il a été souligné dans l'arrêt *Morguard*, que l'ordre et l'équité sont les principes fondamentaux du droit international privé, l'ordre vient en premier. L'ordre est une condition préalable de la justice.

72 It has been, of course, the objective of international maritime law for centuries to create conditions of order and fairness for those engaged in maritime commerce.

Bien sûr, le droit maritime international vise, depuis des siècles, à créer un climat d'ordre et d'équité pour ceux qui se livrent au commerce maritime.

(b) *The "Universalist" Approach*

b) *L'approche « universaliste »*

73 The Trustees argue that to achieve the twin objectives of order and fairness in an international insolvency, it is necessary to adopt the "universalist" approach because in fairness "the claims of creditors can be finally determined only by the court of the debtor's domicile in accordance with the law of that place" (Castel, *supra*, at p. 553). They advocate a "close networking between courts on an international level" (factum, at para. 36).

Les syndics allèguent que, pour réaliser ce double objectif d'ordre et d'équité en matière d'insolvabilité internationale, il est nécessaire d'adopter l'approche « universaliste » parce qu'en toute équité [TRADUCTION] « les réclamations des créanciers ne peuvent être définitivement réglées que par le tribunal du domicile du débiteur conformément au droit en vigueur à cet endroit » (Castel, *op. cit.*, p. 553). Ils préconisent [TRADUCTION] « l'établissement entre les tribunaux d'un réseau serré d'entraide internationale » (mémoire, par. 36).

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In the case at bar the debtor's domicile was Belgium, and the Trustees contend that the Federal Court erred in not requiring Holt and the other secured creditors to pursue their claims in that country. The Trustees also argue that as the Quebec Superior Court decided to come to the aid of the Belgian bankruptcy court, the Federal Court ought, as a matter of "domestic" comity, to have deferred to that decision.

74 En l'espèce, le débiteur était domicilié en Belgique, et les syndics soutiennent que la Cour fédérale a commis une erreur en n'exigeant pas que Holt et les autres créanciers garantis déposent leurs réclamations dans ce pays. Les syndics font également valoir que, puisque la Cour supérieure du Québec avait décidé de prêter son concours au tribunal de faillite belge, la Cour fédérale devait, par courtoisie « nationale », s'en remettre à cette décision.

There is much to be said for the proposition that primary insolvency proceedings having been instituted in Belgium, other jurisdictions where the bankrupt possessed assets should cooperate to the extent permitted by their respective laws with the Belgian courts. The need for such international cooperation in bankruptcy and insolvency has been evident for a very long time, though the ever-continuing ascendency of multi-national enterprises and acceleration towards a global economy have made the underlying problems more acute. As long ago as 1883, in the case of *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527 (1883), the United States Supreme Court said, at p. 539:

> Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries.

75 Il y a beaucoup à dire au sujet de la proposition selon laquelle, étant donné que les procédures principales d'insolvabilité ont été engagées en Belgique, les autres ressorts où la faillie possède des éléments d'actif devraient coopérer avec les tribunaux belges dans la mesure permise par leurs lois respectives. La nécessité d'une telle coopération internationale en matière de faillite et d'insolvabilité se fait sentir depuis fort longtemps, même si la montée constante des entreprises multinationales et l'accélération de la mondialisation de l'économie ont accentué les problèmes sous-jacents. Dès 1883, dans l'affaire *Canada Southern Railway Co. c. Gebhard*, 109 U.S. 527 (1883), la Cour suprême des États-Unis affirmait, à la p. 539 :

> [TRADUCTION] À moins que toutes les parties en cause, où qu'elles résident, ne puissent être liées par l'entente qu'on cherche à légaliser, l'initiative peut échouer. Tous les créanciers du pays peuvent être liés. Ce qu'il faut, c'est lier ceux qui sont à l'étranger. Dans ces circonstances, l'esprit véritable de la courtoisie internationale commande que des initiatives de cette nature, légalisées au pays, soient reconnues dans d'autres pays.

The essence of the universalist approach advocated by the Trustees is that there ought to be a primary bankruptcy proceeding, title to assets locally situated should be vested in the foreign representative of the bankrupt estate, creditors should not be permitted to realize on a foreign debtor's assets in the local courts outside the framework of the primary bankruptcy, and orders made in foreign bankruptcy proceedings should be recognized and enforced elsewhere.

76 L'approche universaliste préconisée par les syndics veut essentiellement qu'il y ait des procédures principales en matière de faillite, que le titre de propriété des biens situés sur place soit dévolu au représentant étranger de l'actif du failli, que les créanciers ne soient pas autorisés à réaliser les biens d'un débiteur étranger devant les tribunaux locaux en dehors du cadre de la faillite principale, et que les ordonnances délivrées dans le cadre de procédures de faillite à l'étranger soient reconnues et mises à exécution ailleurs.

Professor J. S. Ziegel contrasts the "universalist" approach to the "territorialist" approach, ear-

77 Le professeur J. S. Ziegel oppose l'approche « universaliste » à l'approche « territorialiste »,

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lier referred to as the "Grab Rule", and concludes that most jurisdictions exhibit elements of both approaches:

> International insolvency jurists have long classified countries and their conflict of laws rules according to their willingness to recognize and give effect to foreign insolvency orders and judgments. Those regimes that are hospitable to extending such recognition are labelled universalist; those that deny such recognition are classified as territorialist. Common law countries are often described as belonging among the universalist families, while civil law systems are believed to be territorialist.
>
> However, the pigeonholing is misleading. Common law countries differ as widely in their international insolvency rules as do civil law jurisdictions. On closer examination it will be found that some of the jurisdictions that claim to be universalist only practise a very diluted form of universalism while countries labelled as territorialist in fact extend varying measures of recognition to foreign insolvency orders and foreign insolvency representatives.

("Ships at Sea, International Insolvencies, and Divided Courts" (1998), 50 C.B.R. (3d) 310. See also *In re Treco*, *supra*, and Castel, *supra*, at pp. 553-54.)

78 Traditionally, only some of the key components of the universalist approach have been reflected in Canadian law. While our courts generally favour a process of universal distribution and recognize a foreign trustee's title to property, they also permit concurrent bankruptcies and protect the vested rights of what we regard as secured creditors under Canadian law. With respect to the latter, the usual Canadian position has been that a foreign trustee in bankruptcy should have no higher claim on the secured assets of a bankrupt than if the bankruptcy had occurred here. In a true universalist system the question of encumbrances would be settled by the law of the place of the bankruptcy (which may, as in this case, produce a result contrary to Canadian maritime law).

79 Further, Canadian law has always recognized that initiation of foreign bankruptcy proceedings

désignée plus haut comme étant la « règle de l'appropriation », et conclut que des éléments des deux approches se retrouvent dans la plupart des ressorts :

> [TRADUCTION] Les juristes spécialisés en insolvabilité internationale classent depuis longtemps les pays et leurs règles de conflit des lois en fonction de leur volonté de reconnaître et de mettre à exécution les ordonnances et les jugements en matière d'insolvabilité rendus à l'étranger. Les régimes qui sont favorables à cette reconnaissance sont dits universalistes, et ceux qui sont contre sont dits territorialistes. Les pays de common law sont souvent considérés comme faisant partie de la famille des universalistes, alors que les régimes de droit civil ont la réputation d'être territorialistes.
>
> Toutefois, cette catégorisation est trompeuse. Les pays de common law se distinguent autant entre eux par leurs règles d'insolvabilité internationale que le font les pays de droit civil. Un examen plus attentif montrera que certains pays qui se disent universalistes ne pratiquent qu'une forme très diluée d'universalisme alors que les pays dits territorialistes reconnaissent plus ou moins les ordonnances en matière d'insolvabilité délivrées à l'étranger et les représentants étrangers en la matière.

(« Ships at Sea, International Insolvencies, and Divided Courts » (1998), 50 C.B.R. (3d) 310. Voir aussi *In re Treco*, précité, et Castel, *op. cit*., p. 553-554.)

Traditionnellement, seuls quelques éléments-clés de l'approche universaliste ont marqué le droit canadien. Bien que nos tribunaux favorisent généralement une procédure de répartition universelle et reconnaissent le titre de propriété d'un syndic étranger, ils permettent également les faillites concomitantes et protègent les droits acquis de ce que nous considérons comme des créanciers garantis en droit canadien. Dans ce dernier cas, on estime habituellement au Canada qu'un syndic de faillite étranger ne doit pas avoir plus de droits sur les éléments d'actif garantis d'un failli que si la faillite était survenue dans notre pays. Dans un véritable régime universaliste, la question des charges serait réglée par la loi du lieu de la faillite (ce qui peut, comme en l'espèce, entraîner un résultat contraire au droit maritime canadien).

En outre, le droit canadien a toujours reconnu que l'engagement de procédures de faillite à

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does not prevent concurrent insolvency proceedings in Canada: see Castel, *supra*, at p. 565; *Allen v. Hanson* (1890), 18 S.C.R. 667; *Re Breakwater Co.* (1914), 33 O.L.R. 65 (H.C.), and *Re E. H. Clarke & Co.*, [1923] 1 D.L.R. 716 (Ont. S.C.). The existence of two sets of proceedings obviously raises the spectre of conflicting decisions or approaches, although as noted in 1890 by Ritchie C.J. of this Court in *Allen*, *supra*, at p. 674, it is "the duty of the courts of both countries to see no conflict should arise". Conflict avoidance can take many forms, including dismissing or staying Canadian proceedings. Section 43(7) of the *Bankruptcy and Insolvency Act* permits the court to dismiss a petition if it has "sufficient cause". This requirement may be satisfied if the debtor has been declared bankrupt elsewhere. In fact, the courts have stayed liquidation proceedings where bankruptcy proceedings are on foot in a foreign jurisdiction: *Re Stewart & Matthews, Ltd. and The Winding-Up Act* (1916), 10 W.W.R. 154 (Man. K.B.). Similarly, in an appropriate case, the Federal Court can avoid conflict by staying its proceedings pursuant to s. 50 of the *Federal Court Act*.

l'étranger n'empêche pas l'engagement de procédures d'insolvabilité concomitantes au Canada : voir Castel, *op. cit.*, p. 565; *Allen c. Hanson* (1890), 18 R.C.S. 667; *Re Breakwater Co.* (1914), 33 O.L.R. 65 (H.C.), et *Re E. H. Clarke & Co.*, [1923] 1 D.L.R. 716 (C.S. Ont.). L'existence de deux séries de procédures fait naître manifestement le spectre de décisions ou d'approches contradictoires même si, comme le faisait remarquer, en 1890, le juge en chef Ritchie de notre Cour dans l'arrêt *Allen*, précité, p. 674, [TRADUCTION] « les tribunaux des deux pays [sont] tenus de veiller à ce qu'aucun conflit ne survienne ». Les conflits peuvent être évités de plusieurs façons, notamment par le rejet ou la suspension des procédures au Canada. Le paragraphe 43(7) de la *Loi sur la faillite et l'insolvabilité* autorise le tribunal à rejeter une pétition pour une « cause suffisante ». Cette condition peut être remplie si le débiteur a été mis en faillite ailleurs. En fait, les tribunaux ont suspendu des procédures de liquidation au moment où des procédures de faillite étaient en cours dans un ressort étranger : *Re Stewart & Matthews, Ltd. and The Winding-Up Act* (1916), 10 W.W.R. 154 (B.R. Man.). De même, lorsqu'une affaire s'y prête, la Cour fédérale peut éviter un conflit en suspendant ses procédures conformément à l'art. 50 de la *Loi sur la Cour fédérale*.

80

In short, Canada has adhered to a middle position (dignified by the name "plurality approach") which recognizes that different jurisdictions may have a legitimate and concurrent interest in the conduct of an international bankruptcy, and that the interests asserted in Canadian courts may, but not necessarily must, be subordinated in a particular case to a foreign bankruptcy regime. The general approach reflects a desire for coordination rather than subordination, with deference being accorded only after due consideration of all the relevant circumstances rather than automatically accorded because of an abstract "universalist" principle. As pointed out by Professor Castel, *supra*, at pp. 554-55:

Bref, le Canada a adopté un point de vue intermédiaire (qualifié d'« approche pluraliste ») qui consiste à admettre que différents ressorts peuvent avoir un intérêt légitime et concomitant dans le déroulement d'une faillite internationale, et que les droits réclamés devant les tribunaux canadiens peuvent mais ne doivent pas nécessairement être subordonnés à un régime de faillite étranger dans un cas particulier. Cette approche générale témoigne d'un désir de coordination plutôt que de subordination, où l'on ne fait preuve de déférence qu'après avoir bien examiné toutes les circonstances pertinentes, et non pas automatiquement en fonction d'un principe « universaliste » abstrait. Comme l'a souligné le professeur Castel, *op. cit.*, p. 554-555 :

Under the doctrine of plurality which prevails in Canada, each country has the right, if it deems it advisable, to allow bankruptcy proceedings to begin in its territory by virtue of its bankruptcy law. The court applies its

[TRADUCTION] Selon la règle de la pluralité appliquée au Canada, chaque pays a le droit, s'il le juge utile, de permettre que des procédures de faillite soient engagées sur son territoire sous le régime de sa loi

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own substantive law. Thus, bankruptcies may be initiated in a number of countries with respect to the same debtor. In Canada, this rigid doctrine is partially tempered by close cooperation with foreign courts.

81 The question is whether, as argued by the appellant Trustees, this orientation in Canada ought now to be changed to a more "universalist" approach.

(c) *The 1997 Amendments to the Act*

82 In April 1997 Parliament enacted Part XIII of the *Bankruptcy and Insolvency Act*, entitled "International Insolvencies". It applies only to bankruptcy proceedings initiated after September 30, 1997, and thus has no direct application here. Nevertheless, it is worth noting that Parliament has continued the diluted universalism (or "plurality approach") adopted by Canadian courts under the common law. There is now, under Part XIII, specific authority to come to the aid of foreign courts and "foreign representatives" in the administration and adjudication of insolvencies that have international dimensions. There is also authority for Canadian courts, under s. 271(1), to request "the aid and assistance of a court, tribunal or other authority in a foreign proceeding". The objective of these provisions is to facilitate the coordination of foreign and domestic insolvency proceedings. Nevertheless, there is no rule requiring Canadian courts to refrain from entertaining concurrent proceedings. On the contrary, concurrent proceedings are anticipated as Canadian courts are given authority under s. 268(3) to make orders that will result in a *coordination* of domestic and foreign proceedings, not the *elimination* of one in preference to the other. By authorizing a Canadian court under subs. (2) to limit the domestic trustee's authority to property situated in Canada, Parliament obviously anticipated that in certain cases a territorialist approach would be acceptable. The amendments provide specifically that a court is not compelled to enforce any order made by a foreign court: s. 268(6).

sur la faillite. Le tribunal applique ses propres règles de fond. Ainsi, des procédures de faillite peuvent être engagées dans plusieurs pays à l'égard du même débiteur. Au Canada, cette règle rigide est partiellement tempérée par une étroite collaboration avec les tribunaux étrangers.

La question est de savoir si cette orientation canadienne doit maintenant céder le pas à une approche plus « universaliste », comme l'ont fait valoir les syndics appelants.

c) *Les modifications apportées à la Loi en 1997*

En avril 1997, le législateur a adopté la partie XIII de la *Loi sur la faillite et l'insolvabilité*, intitulée « Insolvabilité en contexte international ». Cette partie ne s'applique qu'aux procédures de faillite engagées après le 30 septembre 1997 et n'a donc aucun impact direct en l'espèce. Il importe néanmoins de souligner que le législateur a maintenu l'universalisme dilué (ou « approche pluraliste ») adopté par les tribunaux canadiens sous le régime de la common law. Il existe désormais, en vertu de la partie XIII, une autorisation particulière de prêter concours aux tribunaux étrangers et aux « représentants étrangers » dans l'administration et le règlement des insolvabilités ayant des dimensions internationales. Les tribunaux canadiens sont également autorisés, en vertu du par. 271(1), à demander « le concours d'une cour, d'un tribunal ou d'une autre autorité à l'étranger ». Ces dispositions ont pour objet de faciliter la coordination des procédures d'insolvabilité engagées à l'étranger et au pays. Néanmoins, aucune règle n'empêche les tribunaux canadiens d'instruire des procédures concomitantes. Au contraire, les procédures concomitantes sont prévues étant donné que le par. 268(3) habilite les tribunaux canadiens à rendre des ordonnances qui entraîneront une *coordination* des procédures engagées au pays et à l'étranger, et non l'*élimination* des unes au profit des autres. En autorisant, au par. (2), le tribunal canadien à limiter le pouvoir du syndic canadien aux biens situés au Canada, le législateur s'attendait visiblement à ce que l'approche territorialiste soit acceptable dans certains cas. Les modifications prévoient spécifiquement qu'un tribunal n'est pas tenu de mettre à exécution les ordonnances délivrées par un tribunal étranger : par. 268(6).

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Moreover, s. 269 explicitly denies extraterritorial reach to foreign stay orders. It says that a foreign stay of proceedings "does not apply in respect of creditors who reside or carry on business in Canada with respect to property in Canada unless the stay of proceedings is the result of proceedings taken in Canada".

83 De plus, l'art. 269 prévoit explicitement que les ordonnances de suspension des procédures à l'étranger n'ont aucune portée extraterritoriale. Aux termes de ce paragraphe, la suspension des procédures à l'étranger « n'est opposable aux créanciers qui résident ou font affaires au Canada en ce qui touche les biens du débiteur situés au Canada que si elle résulte de procédures intentées au Canada ».

It thus appears that Canadian public policy, expressed as recently as 1997 by Parliament, endorses the plurality approach developed over the years by the courts.

84 Il appert donc que la politique générale du Canada, énoncée dès 1997 par le législateur, entérine l'approche pluraliste établie au fil des ans par les tribunaux.

(d) *The Preferred Approach*

d) *L'approche privilégiée*

Given the almost infinite variations in circumstances that can occur in an "international bankruptcy", the pragmatism of the "plurality" approach continues to recommend itself. International coordination is an important factor, but it is not necessarily a controlling factor.

85 Vu la variété quasi infinie des circonstances qui peuvent entourer une « faillite internationale », le pragmatisme de l'approche pluraliste continue de s'imposer. La coordination internationale est un facteur important, mais elle ne constitue pas nécessairement un facteur déterminant.

Where a stay is sought of Canadian proceedings in deference to a foreign bankruptcy court, the Canadian court before which the stay application is made (in this case the Federal Court) ought to be mindful of the difficulties confronting the bankruptcy trustees in the fulfilment of their public mandate to bring order out of financial disorder and the desirability of maximizing the size of the bankrupt estate. These objectives are furthered by minimizing the multiplicity of proceedings, and the attendant costs, and the possibility of inconsistent decisions in relation to the same claims or assets.

86 Lorsqu'un tribunal canadien (en l'occurrence la Cour fédérale) est saisi d'une demande de suspension de ses procédures par déférence pour un tribunal de faillite étranger, il doit être conscient des difficultés auxquelles sont confrontés les syndics de faillite dans l'accomplissement de leur mandat public de rétablir l'ordre dans un désordre financier, et de l'intérêt de maximiser la taille de l'actif du failli. Ces objectifs peuvent être atteints en réduisant au minimum la multiplicité des procédures et les coûts qui s'y rattachent, ainsi que la possibilité que les mêmes réclamations ou les mêmes éléments d'actif fassent l'objet de décisions incompatibles.

Nevertheless, courts must have regard to the need to do justice to the particular litigants who come before them as well as to the public interest in the efficient administration of bankrupt estates. It would be inappropriate to elevate any one consideration to a controlling position in the exercise of a bankruptcy court's discretion to dismiss a petition under s. 43(7) *or* to stay proceedings under Part XIII of the Act *or* in the Federal Court's decision to stay proceedings under s. 50 of

87 Toutefois, les tribunaux doivent tenir compte de la nécessité de rendre justice aux parties qui se présentent devant eux, ainsi que de l'intérêt qu'a le public dans l'administration efficace de l'actif du failli. Il ne conviendrait pas qu'une considération soit qualifiée de déterminante par un tribunal de faillite qui exerce son pouvoir discrétionnaire de rejeter une pétition fondée sur le par. 43(7) *ou* de suspendre des procédures en vertu de la partie XIII de la Loi, *ou encore* par la Cour fédérale lorsqu'elle

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the *Federal Court Act*. Discretion should not be thus predetermined. The desirability of international coordination is an important consideration. In some cases, it may be the controlling consideration. The courts nevertheless have to exercise their discretion to stay or not to stay domestic proceedings according to all of the relevant facts of a particular case.

décide de suspendre des procédures en vertu de l'art. 50 de la *Loi sur la Cour fédérale*. Le pouvoir discrétionnaire ne doit pas être ainsi prédéterminé. L'utilité de la coordination internationale est certes une considération importante. Dans certains cas, elle peut être déterminante. Les tribunaux doivent néanmoins exercer leur pouvoir discrétionnaire de suspendre ou de ne pas suspendre les procédures engagées au pays en tenant compte de tous les faits pertinents de l'affaire.

7. In Light of the Foregoing, Did the Federal Court Err in the Exercise of its Discretion to Deny the Trustees' Application for a Stay of Proceedings?

7. À la lumière de ce qui précède, la Cour fédérale a-t-elle commis une erreur dans l'exercice de son pouvoir discrétionnaire de refuser la demande de suspension des procédures présentée par les syndics?

88 The dollars and cents issue in this case should not be obscured entirely by the scholarly debate between universalists, pluralists and territorialists. The Trustees advocate a "universalist" approach because it is in their interest, acting on behalf of all creditors, to take the proceeds of sale of the Ship home to Belgium for distribution according to Belgian law. It is clearly not in the respondent's interest, because it appears that Holt's claim would not enjoy under Belgian law the priority it has under Canadian law. If Holt is obliged to defend variations of the "territorialist" position, it is because it seems that is the only way its claim will be paid in full on a timely basis or perhaps at all.

La question monétaire en l'espèce ne doit pas être totalement éclipsée par le débat doctrinal entre les universalistes, les pluralistes et les territorialistes. Les syndics préconisent une approche « universaliste » parce que, du fait qu'ils agissent pour le compte de tous les créanciers, il est dans leur intérêt de rapatrier en Belgique le produit de la vente du navire pour le répartir conformément au droit belge. Une telle mesure n'est manifestement pas dans l'intérêt de l'intimée puisqu'il appert que, en droit belge, la réclamation de Holt ne bénéficierait pas de la priorité dont elle bénéficie en droit canadien. Si Holt doit défendre des variantes de l'approche « territorialiste », c'est parce qu'il semble que ce soit la seule façon de voir sa réclamation acquittée en totalité en temps opportun ou peut-être même tout simplement acquittée.

89 The Federal Court's authority to stay proceedings is found, as noted, in s. 50 of the *Federal Court Act*:

**50.** (1) The Court may, in its discretion, stay proceedings in any cause or matter,

(*a*) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(*b*) where for any other reason it is in the interest of justice that the proceedings be stayed.

Le pouvoir de la Cour fédérale de suspendre des procédures est, comme nous l'avons vu, conféré par l'art. 50 de la *Loi sur la Cour fédérale* :

**50.** (1) La Cour a le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

*a*) au motif que la demande est en instance devant un autre tribunal;

*b*) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

The principles on which the discretion should be exercised in this type of case were authoritatively settled in *Amchem*, *supra*. Sopinka J., speaking

Les principes qui doivent sous-tendre l'exercice du pouvoir discrétionnaire dans ce type d'affaire ont été établis péremptoirement dans l'arrêt

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for the Court, posed the question at p. 920, "is there a more appropriate jurisdiction based on the relevant factors", to which he added at p. 921, "the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff" (emphasis in original).

*Amchem*, précité. Le juge Sopinka, s'exprimant au nom de la Cour, s'est demandé, à la p. 920, si « un autre tribunal serai[t] plus approprié, compte tenu des facteurs pertinents », ce à quoi il a ajouté, à la p. 921, qu'« il faut établir clairement qu'un autre tribunal est plus approprié pour que soit écarté celui qu'a choisi le demandeur » (souligné dans l'original).

*Amchem* was a purely private piece of litigation involving product liability claims related to exposure to asbestos. International bankruptcies have a public aspect, because it is in the public interest to facilitate the speedy resolution of the fallout from a financial collapse. This does not change the *Amchem* analysis. It is simply to emphasize an important public aspect of this case that was not present in the *Amchem* fact situation.

90 L'affaire *Amchem* était un litige purement privé où il était question d'actions en responsabilité du fait du produit liées à une exposition à l'amiante. Les faillites internationales comportent un aspect public, car il est dans l'intérêt public de faciliter le règlement rapide des retombées d'un effondrement financier. Cela ne change rien à l'analyse prévue dans l'arrêt *Amchem*. Il s'agit simplement de souligner que la présente affaire comporte un aspect public important, qui était absent dans l'affaire *Amchem*.

The "natural forum" is the one to which the action has the most real and substantial connection (*Amchem*, at pp. 916 and 935). Relevant circumstances include not only issues of public policy (as in this case) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigating in one forum or the other, and the discouragement of forum shopping. In short, within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.

91 Le « ressort logique » est celui avec lequel l'action a le lien le plus réel et le plus important (*Amchem*, précité, p. 916 et 935). Les circonstances pertinentes comprennent non seulement les questions de politique générale (comme en l'espèce) mais également la possibilité que la suspension des procédures fasse perdre au demandeur un avantage juridique à tel point qu'il en résulterait une injustice, le ou les endroits où les parties exploitent leur entreprise, l'avantage de soumettre un litige dans un ressort ou un autre et les frais qui s'y rattachent, et la nécessité de dissuader les parties de rechercher un tribunal favorable. Bref, dans le contexte global d'une politique générale, toute injustice que subirait le demandeur si son action était suspendue doit être appréciée en fonction de toute injustice qui serait causée au défendeur si l'action pouvait suivre son cours. Ces facteurs doivent soigneusement être soupesés.

In addressing the issue of a stay, MacKay J. acknowledged the importance of comity and international coordination in a proper case. Having done so, he went on to place primary emphasis on the fact he was dealing with an *in rem* action by secured creditors against a ship which at the time of the bankruptcy the Federal Court had already arrested

92 En examinant la question de la suspension, le juge MacKay a reconnu l'importance de la courtoisie et de la coordination internationale lorsqu'une affaire s'y prête. Il a ensuite insisté principalement sur le fait qu'il était saisi d'une action *in rem* intentée par des créanciers garantis contre un navire dont la Cour fédérale avait déjà ordonné la saisie au moment de

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and at the time of the interventions of the Canadian bankruptcy court (June 11 and June 28, 1996) he had already ordered appraised and sold. Moreover, the order dated June 28 had expressly made the interest of the appellant Trustees subject "to the rights, if any, of any creditors with claims secured under the laws of Canada, as by law provided".

la faillite, et dont il avait déjà ordonné l'évaluation et la vente au moment des interventions du tribunal de faillite canadien (11 juin et 28 juin 1996). En outre, l'ordonnance du 28 juin avait expressément assujetti l'intérêt des syndics appelants aux [TRADUCTION] « droits des créanciers dont les réclamations sont garanties sous le régime des lois du Canada, conformément à la loi ».

93 The appellants' strongest argument is that the dispute is but weakly connected to Canada. This Court, however, in *Antares Shipping Corp. v. The Ship "Capricorn"*, [1977] 2 S.C.R. 422, recognized that lack of substantive connections to *any* particular jurisdiction, including its home port, is a feature of ships engaged in international maritime commerce. In that case, the Court refused to stay proceedings *in rem* in which three Liberian corporations contested in Canada the ownership of a Liberian registered ship. Liberia, of course, is a flag of convenience. Ships registered there may never have occasion to "go home". In *Antares Shipping*, the only connection to Canada was that the ship was arrested at the suit of one of the Liberian corporations while it was in Canadian waters. Ritchie J., speaking for the majority, recognized that ocean-going ships present a particular problem. At p. 453, he adopted the following observations of Lord Simon, dissenting, in *The Atlantic Star*, [1973] 2 All E.R. 175 (H.L.), at p. 197:

L'argument le plus solide des appelants veut que le litige ne soit que faiblement lié au Canada. Cependant, dans l'arrêt *Antares Shipping Corp. c. Le navire « Capricorn »*, [1977] 2 R.C.S. 422, notre Cour a reconnu que l'absence de lien important avec *un* ressort particulier, y compris leur port d'attache, est une caractéristique des navires qui servent au commerce maritime international. Dans cette affaire, la Cour a refusé de suspendre les procédures *in rem* dans lesquelles trois sociétés libériennes contestaient au Canada la propriété d'un navire immatriculé au Libéria. Bien entendu, le pavillon du Libéria est un pavillon de complaisance. Les navires qui y sont immatriculés n'auront peut-être jamais l'occasion de « rentrer à la maison ». Dans *Antares Shipping*, le seul lien qui existait avec le Canada était que le navire avait été saisi à la demande d'une des sociétés libériennes, alors qu'il était en eaux canadiennes. Le juge Ritchie, s'exprimant au nom de la majorité, a reconnu que les navires de haute mer posent un problème particulier. À la page 453, il a fait siennes les observations suivantes de lord Simon, dissident, dans *The Atlantic Star*, [1973] 2 All E.R. 175 (H.L.), p. 197 :

> Ships are elusive. The power to arrest in any port and found thereon an action in rem is increasingly required with the custom of ships being owned singly and sailing under flags of convenience. A large tanker may by negligent navigation cause extensive damage to beaches or to other shipping: she will take very good care to keep out of the ports of the 'convenient' forum. If the aggrieved party manages to arrest her elsewhere, it will be said forcibly (as the appellants say here): 'The defendant has no sort of connection with the forum except that she was arrested within its jurisdiction.' But that will frequently be the only way of securing justice.

> [TRADUCTION] Les navires se dérobent facilement. Le pouvoir de les saisir dans n'importe quel port et d'intenter une action in rem est de plus en plus nécessaire, compte tenu de la coutume de la propriété unique des navires et l'usage des pavillons de complaisance. Un grand pétrolier, naviguant avec négligence, peut causer des dommages considérables aux plages ou à d'autres navires; il évitera soigneusement les ports situés dans le ressort d'un tribunal « compétent ». Si la partie lésée parvient à le saisir ailleurs, on opposera énergiquement (comme le font les appelantes en l'espèce) que : « Le défendeur n'a aucun lien avec le tribunal, si ce n'est qu'il a été saisi dans son ressort. » Mais souvent, ce sera la seule façon d'obtenir justice.

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Belgium is not a "flag of convenience" like Liberia but the principle remains the same. The "real and substantial connection" test must take into account the special lifestyle of ocean-going freighters.

Le pavillon de la Belgique n'est pas un « pavillon de complaisance » comme l'était le pavillon du Libéria, mais le principe demeure le même. Le critère du « lien réel et important » doit tenir compte du « mode de vie » particulier des cargos.

As to the appellants' allegation that Holt was engaged in "forum shopping", the further observations of Lord Simon quoted in *Antares Shipping*, at p. 453, are also apposite:

94 Quant à l'allégation des appelants selon laquelle Holt était à la « recherche du tribunal le plus favorable », les observations suivantes de lord Simon, citées dans *Antares Shipping*, p. 453, sont également pertinentes :

'Forum-shopping' is, indeed, inescapably involved with the concept of maritime lien and the action in rem. Every port is automatically an admiralty emporium. This may be very inconvenient to some defendants; but the system has unquestionably proved itself on the whole as an instrument of justice.

[TRADUCTION] La « recherche d'un tribunal » est de fait inévitablement liée au concept du privilège maritime et à l'action *in rem*. Chaque port constitue automatiquement un choix possible en matière d'amirauté. Cela peut être très ennuyeux pour certains défendeurs; mais de façon générale, le système sert incontestablement les fins de la justice.

With respect to juridical advantage, the trial judge stated that "there simply was no evidence of the comparative status of the plaintiff's claim under Belgian and Canadian law" (para. 76). On appeal, as mentioned, the Federal Court of Appeal noted that "both parties concede [that it was] unlikely that [Holt's] *in rem* rights could subsist in one form or another under Belgian bankruptcy laws" (endnote 5). The apparent concession at the hearing before the Federal Court of Appeal only adds to the weight of the arguments earlier accepted by MacKay J. to allow the *in rem* action to proceed.

95 En ce qui a trait à l'avantage juridique, le juge de première instance a dit que « la Cour n'a été saisie d'aucun élément de preuve comparant le statut de la réclamation de la demanderesse en droit belge et en droit canadien » (par. 76). En appel, comme nous l'avons vu, la Cour d'appel fédérale a fait remarquer que les « deux parties admettent [qu'il était] peu probable que les droits *in rem* de [Holt] puissent subsister sous une forme ou une autre sous le régime des lois belges sur la faillite » (note de renvoi 5). Cette concession manifeste lors de l'audience devant la Cour d'appel fédérale ne fait que s'ajouter au poids des arguments précédemment acceptés par le juge MacKay pour autoriser la poursuite de l'action *in rem*.

If, contrary to the concession in the Federal Court of Appeal, we were to assume in the Trustees' favour that there was no juridical advantage to Holt or other secured creditors in keeping alive the *in rem* action in Canada, it means that there would equally be no advantage to the Trustees in moving the proceedings to Belgium. The same secured creditors would (on that assumption) exhaust the proceeds of the sale of the Ship, but pay the additional penalty of the cost of duplicative proceedings in Belgium. To talk of the benefits of the "universalist" approach to international bankruptcies in such circumstances is illusory.

96 Si, contrairement à la concession faite devant la Cour d'appel fédérale, nous devions présumer, au profit des syndics, que Holt ou les autres créanciers garantis n'avaient aucun avantage juridique à poursuivre l'action *in rem* au Canada, cela signifierait que les syndics n'auraient également aucun avantage à déplacer les procédures en Belgique. Les mêmes créanciers garantis (selon cette présomption) épuiseraient le produit de la vente du navire, mais devraient assumer les frais additionnels liés à la répétition des mêmes procédures en Belgique. Dans ces circonstances, parler des avantages de l'approche « universaliste » en matière de faillites internationales est illusoire.

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97 The trial judge also placed reliance on the convenience to the U.S. creditors of litigating in Canada rather than Belgium. This factor is relevant (*Amchem*, *supra*, at p. 917) but would not, I think, be of great weight if the appellant Trustees had been able to show that justice required deference to the court of the domicile of the bankrupt.

98 In summary, the trial judge considered the relevant factors in reaching his conclusion that the Federal Court was the appropriate forum to resolve the respondent's claim. He committed no error of principle and did not refuse "to take into consideration a major element for the determination of the case": *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 588; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 77. In the absence of error, we are not entitled to interfere with the exercise of his discretion.

V. Conclusion

99 The appeal is dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellants: Brisset Bishop, Montréal.*

*Solicitors for the respondent: McInnes Cooper & Robertson, Halifax, Nova Scotia.*

Le juge de première instance a également souligné qu'il était avantageux pour les créanciers américains d'engager des procédures au Canada plutôt qu'en Belgique. Ce facteur est pertinent (*Amchem*, précité, p. 917), mais je ne pense pas qu'il aurait une grande importance si les syndics appelants avaient pu établir que la justice exigeait de s'en remettre au tribunal du domicile de la faillie.

En résumé, le juge de première instance a tenu compte des facteurs pertinents pour conclure que la Cour fédérale était le tribunal compétent pour régler la réclamation de l'intimée. Il n'a commis aucune erreur de principe et n'a pas refusé « de tenir compte d'un élément prépondérant en l'espèce » : *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561, p. 588; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, p. 77. En l'absence d'erreur, nous n'avons pas le droit d'intervenir dans l'exercice de son pouvoir discrétionnaire.

V. Conclusion

Le pourvoi est rejeté avec dépens.

*Pourvoi rejeté avec dépens.*

*Procureurs des appelants : Brisset Bishop, Montréal.*

*Procureurs de l'intimée : McInnes Cooper & Robertson, Halifax, Nouvelle-Écosse.*

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**User Name:** Jenny Thornhill

**Date and Time:** Thursday, November 23, 2023 1:58:00PM NST

**Job Number:** 211157941

## Document (1)

1. *Vanguard Shipping (Great Lakes) Ltd. (Re)*

   **Client/Matter:** -None-

   **Search Terms:** vanguard shipping (great lakes) ltd. (re), [2013] o.j. no. 479

   **Search Type:** Natural Language

   **Narrowed by:**

| Content Type | Narrowed by |
|---|---|
| Cases | -None- |

# Vanguard Shipping (Great Lakes) Ltd. (Re)

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

G.B. Morawetz J.

Heard: January 29, 2013.

Judgment: January 29, 2013.

Court File No. CV-12-9655-00CL

**[2013] O.J. No. 479** | 2013 ONSC 768

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 Vanguard Shipping (Great Lakes) Ltd. and Vanship Ltd.

(11 paras.)

## Counsel

Kyla Mahar, for the Monitor.

Greg Azeff and A. Iqbal, for the Purchasers.

Patrick Welsh, for Eastern Canada Response Corporation.

Bradley Phillips, for St. Lawrence Seaway Management Corporation.

Marc Isaacs, for Laurentian Pilotage Authority.

Harvey Chariton, for Roynat Inc.

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**ENDORSEMENT**

**G.B. MORAWETZ J.**

**1** With the exception of two issues, the motion was not opposed. The outstanding issues arise out of the Claims Process Order and the Report of the Referee.

**2** It appears that the Claims Process Order did not address the issue of costs arising out of the proceedings before the Referee. The Referee is apparently uncertain as to whether he has the authority to address the issue of costs.

**3** In the circumstances of this case the Referee considered and adjudicated on a number of Maritime claims. The Referee produced a comprehensive report. The Referee is in the best position to determine whether costs should be awarded. It is arguable that the Referee may have had the authority to deal with the issue. However, for greater

certainty, the Referee is requested to address the issue in the manner set forward in the draft Order. This direction is made on the basis that the Referee is in the best position to make an informed decision.

**4** I do not see the basis to restrict cost submissions to those of Laurentian and St. Lawrence. All claimants should be on an equal footing.

**5** With respect to second issue, namely the request of St. Lawrence to have the Referee reconsider his decision and to receive further evidence and to possibly appeal the decision of the Referee, no formal motion has been served.

**6** If the matter is appealed, it seems to me that the appeal should be brought to this Court, as the supervising CCAA court. However, it is premature to consider such an appeal in the absence of a formal motion.

**7** If it is a request for reconsideration, it seems to me that the matter should be directed back to the Referee, who can make the determination as to whether the additional evidence is to be considered and whether the Referee should reconsider his decision.

**8** The Monitor is directed to communicate with the Referee to address scheduling issues on an expedited basis.

**9** The Report of the Referee is confirmed. This does not, however, preclude the Referee from filing a Supplementary Report, if he so chooses.

**10** The Eighth Report of the Monitor is approved together with the activities described therein.

**11** The Monitor is discharged on terms set forth in the draft Order subject to the condition that the Discharge Certificate is not be filed for at least 30 days. The draft Order is to be modified to affect the foregoing.

G.B. MORAWETZ J.

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**End of Document**

**User Name:** Jenny Thornhill

**Date and Time:** Thursday, November 23, 2023 1:59:00PM NST

**Job Number:** 211157964

## Document (1)

1. *Textainer Equipment Management B.V. v. Baltic Shipping Co.*

   **Client/Matter:** -None-

   **Search Terms:** textainer equipment management bv v. baltic shipping co, [1994] f.c.j. no. 1267

   **Search Type:** Natural Language

   **Narrowed by:**

| Content Type | Narrowed by |
|---|---|
| Cases | -None- |

# Textainer Equipment Management B.V. v. Baltic Shipping Co.

Federal Court Judgments

Federal Court of Canada - Trial Division

Ottawa, Ontario

Muldoon J.

Heard: August 26, 1994

Judgment: August 29, 1994

Action No. T-1995-94

**[1994] F.C.J. No. 1267** | [1994] A.C.F. no 1267 | 84 F.T.R. 108 | 50 A.C.W.S. (3d) 3

Between Textainer Equipment Management B.V., Plaintiff, and Baltic Shipping Company and the Motor Vessels Nikolay Golovanov, Akademik Gorbunov, Aleksandir Prokofyev, Aleksandr Ulyanov, Anatoliy Lunacharskiy, Anatoliy Vasilyev, [and all those other ships listed in the statement of claim, to, and including] William Foster, and the owners and all others interested in the said Motor Vessels, Defendants

(9 pp.)

## Case Summary

**Admiralty — Jurisdiction — To recognize maritime liens granted under agreement between foreign parties — Practice — Actions in rem, warrants of arrest — Release — Actions in rem, maritime liens — General.**

Motion for an order striking the in rem portions of the plaintiff's claim and, thereby, set aside the warrant for arrest of the defendant applicants' ship on the ground that the pleadings disclosed no reasonable cause of action in rem. The plaintiff was a Netherlands corporation specializing in the leasing of containers to international shipping firms while the applicant was a Russian shipowner operating a fleet of container vessels in international trade. By virtue of two written leases, the plaintiff leased over 3,800 containers to the applicant who agreed to pay the rental prices for those containers which were delivered to it at various locations around the world. There was default under the leases whereupon the plaintiff now sought recovery of over $3,000,000 (U.S.) in outstanding rental payments. The lease agreements accorded to the plaintiff both the right to claim return of the containers in the applicant's possession as well as a lien upon all of the vessels in the applicant's container fleet and their pending freight to cover outstanding liabilities.
HELD: Motion dismissed.

On a motion such as this, the court, assuming under Rule 419 that the facts alleged in the statement of claim were true, ought ex debito justiciae hold the parties to the rights and responsibilities which they themselves have created by their agreements. The present applicant had pledged its ship against the payment of rent and offered the plaintiff an enforceable, executable lien on its ships. It was also clearly apparent that the applicant had not come into the court with clean hands given that it was doubly in default both as to arrears of rent and actual rent. In these circumstances, the court would not strike the in rem portions of the statement of claim and would not release the applicant's ship from arrest without bail being posted.

## Statutes, Regulations and Rules Cited:

Federal Court Act, *R.S.C. 1985, c. F-7, ss. 22*, 43. Federal Court Rules, Rule 419.
John G. O'Connor, for the Plaintiff. Sean Harrington, for the Defendants.

**MULDOON J. (Reasons for Order)**

**1** The defendant, Baltic Shipping Company, the owners of the M.V. Nikolay Golovanov (hereinafter: the ship, the vessel; one of Baltic's ships [or] vessels) move for an order pursuant to Rule 419, striking the in rem portions or aspects of the plaintiff's claim and thereby setting aside the warrant for arrest and dismissing the arrest of the ship, on the grounds that the pleadings disclose no reasonable cause of action in rem. That defendant (hereinafter: Baltic) relies on the Federal Court Act, *R.S.C. 1985, Chap. F-7* and amendments thereto, and particularly on sections 22 and 43 thereof.

**2** The plaintiff (hereinafter sometimes: Textainer) is a Netherlands corporation specialized in the leasing of multimodal containers to international shipping firms. Baltic is a Russian shipowner operating, in international trade, a fleet of container vessels of which the ship is one. The ship is registered at the port of St. Petersburg, and according to the Lloyd's Register of Ships (1994-95 ed.), exhibit C to Jean Grégoire's affidavit, the ship, beneficially owned by Baltic, is a container ship built with "fixed guides" to carry containers and little else except on deck without undergoing significant modifications. That is the Court's understanding of the Lloyd's description, shown as and in exhibit C. Mr. Grégoire, a lawyer, is the deponent of the informative affidavit to lead warrant.

**3** By virtue of two leases entered into between Textainer and Baltic respectively on August 1, and on November 1, 1990, the former leased to Baltic on Baltic's own behalf and on behalf of all of Baltic's defendant motor vessels, a sizeable number of refrigerated "reefer" containers, approximately 220, and 3,646 non-reefer containers. The copies of those lease agreements are attached to Mr. Grégoire's affidavit as exhibit B. Baltic certainly did agree to pay the rental prices for those containers which were delivered to it at various locations around the planet. The containers have been, and are being used by Baltic in the operation of the defendant vessels.

**4** Baltic defaulted those leases prior to April 15, 1994, on or about which date Textainer gave Baltic a formal notice of default, according to the statement of claim. The plaintiff alleges that Baltic continued to refuse or to neglect to pay the rental and it owed the plaintiff, as of August 1, 1994, the sum of $3,197,911.51 U.S. in outstanding rental payments, none of which has since been paid. It hardly needs mention that, in these circumstances, Baltic's indebtedness to Textainer is increasing daily, due in part to interest accruing on the overdue principal sum pursuant to those leases.

**5** The lease agreements not only accord to the plaintiff the right to claim return of those widespread containers in Baltic's possession, but also accords the plaintiff, Textainer, a lien upon all of the vessels in Baltic's container fleet and their pending freight to cover outstanding liabilities.

**6** The scope of Canadian maritime liens is not a closed category. Jurists continue to discover subjects which have been within that scope all along, although it is not easy, without tight reasoning, to have the Court declare such a discovery. But more than that, it must be seen that the present maritime controversy sounds not in public law, but in private law. Generally speaking, if not inevitably, private law litigation "belongs" to the litigants, for in private law any composition of the dispute involves no State interest to be preserved, no matter what the litigants agree to do with and about "their" litigation. Certainly a purely commercial agreement - the lease for use in carrying cargo, in consideration of the payment of agreed rental money - is within the parties' private making, and the litigation arising out of default of payment is private-law litigation. Thus, whether Baltic be empowered to create and give a recognized maritime lien on its ships to Textainer in the event of the former's default in payment, it is apparent that no State interest prevents Baltic from voluntarily giving a lien of its own making and free will to Textainer as part of the consideration for remedy for default of rentals' payments.

**7** At first blush, the House of Lords' judgment in The River Rima, [1988] 2 Lloyd's L.R. 193, would, although not binding on this Court, seem to be at least intellectually dispositive of the matters in issue here. A closer comparative reading, however, shows that the first blush is a false blush. The headnote tells the salient facts:

> River Rima was a "Combo" vessel being equipped to carry both containers and general dry cargo [apparently quite unlike the Nikolay Golovanov], and was owned by the Nigerian National Shipping Line

(NNSL). NNSL had a number of contracts whereby they leased containers from their owners including one with the plaintiffs.

The contract with the plaintiffs specified daily rates of hire, handling and other charges and the various depots throughout the world at which containers could be picked up and redelivered.

On May 9, 1987, the plaintiffs issued a writ in rem claiming damages for the conversion of certain containers leased to NNSL and further damages for breach of an obligation to maintain the containers in good condition and repair. The vessel was arrested.

The issue for decision was whether these claims could be maintained in an action in rem. The jurisdiction of the Admiralty Court was governed so far as was material by ss. 20 and 21 of the Supreme Court Act. 1981. Section 20(m) brought within the Admiralty jurisdiction -

> any claim in respect of goods or materials supplied to a ship for her operation or maintenance.

The defendants applied to set aside the writ on the ground that the plaintiffs' claim did not come within inter alia s. 20(2)(m).

(emphasis not in original text)

**8** The principal judgment in the unanimous River Rima case was written by Lord Brandon of Overbrook. It is necessarily cautiously detailed:

> * * * the appellants [sic] in this case are [sic] Tiphook Container Rental Co. Ltd., whose business is the renting of cargo containers to those who use them, including shipowners. I shall refer to them as Tiphook.

*** *** ***

The agreement dated July 1, 1986 referred to in the endorsement on the writ was entitled "Lease Plan" and provided for the hiring of cargo containers from Tiphook by NNSL as required by the latter from time to time. It incorporated Tiphook's standard terms and conditions of business. The principal features of the agreement were these. First, containers hired by NNSL from Tiphook were to be collected by NNSL from, and redelivered by them to Tiphook at depots run by Tiphook at various ports and inland cities in numerous countries throughout the world. Secondly, the rent of containers was to be calculated on a daily basis at prescribed rates for different types, beginning on the day of collection and ending on the day of redelivery, and was to be paid monthly. Thirdly, containers were to be supplied by Tiphook at the time of collection in good order and condition, and were to be maintained during hire, and redelivered by the NNSL at the end of hire, in like condition, subject to fair wear and tear. Fourthly, the hire of each container was to be treated as a separate contract.

There was no term in the agreement relating to the use to which containers hired under it were to be put. In particular, there was no provision that containers so hired or any of them should be used for the carriage of cargo by any of NNSL's ships, specified or unspecified. The procedure followed by NNSL pursuant to the agreement was dealt with in an affidavit sworn by Mr. Abdullah Abubakar, the Liverpool line manager of NNSL, in which he deposed.

> 6. The procedure regarding the hire of the containers is as follows. As and when the containers are required, N.N.S.L. contact their leasing agents - all current leasing is now dealt with by Scamar of Paris. The agents then arrange for the containers to be leased and to be delivered to the location where they are required, normally direct to the shippers so that the containers can be stuffed and sometimes to a container terminal. 7. The containers will be carried by an N.N.S.L. vessel if such is available. However, if no N.N.S.L. vessel is available, they will be carried aboard any other vessel which is available with N.N.S.L. being named as the shipper on the bill of lading . . . 9. I am

> informed by Mr. Alegbeleye, the Hamburg line manager of N.N.S.L., that the containers leased to N.N.S.L. have been used by Nigerian Green Line Ltd. ... over the last six months by way of an agreement reached between N.N.S.L. and Nigerian Green Line Ltd. 10. Accordingly, I verily believe that the containers hired by N.N.S.L. are for the use of the company and not by way of supplies to N.N.S.L. vessels, for their operation or otherwise. The containers are for the convenience of the various shippers utilising N.N.S.L. services ...

It seems clear from this evidence, and I did not understand Counsel for Tiphook to contend otherwise, that, at the time when NNSL's agents took delivery of any container from the depot run by Tiphook at which it was to be found, Tiphook did not know, from the terms of Scamar's requests or otherwise, on what ship, whether owned by NNSL or some other shipowners, such container, after being stuffed with cargo somewhere on land, would ultimately be carried. As will appear later, I regard this circumstances as of the utmost importance in the decision of this appeal.

(pp. 194-95)

* * * the first, second and third propositions relied on by Tiphook may well be correct, and I am prepared to assume, without deciding, that they are. The fourth proposition, however, appears to me to present great difficulty. It is clear that par. (m) contemplates a contract of supply, whether by way of sale or hire, between the claimant and a shipowner. But the expression used in par. (m) is "supplied to a ship" and not "supplied to a shipowner". The question is what meaning should be given to the former expression. There are two main kinds of contract pursuant to which goods or materials required for the operation of a ship may reach her. The first kind of contract is one which expressly provides that the goods or materials are required for the use of a particular ship, the identify of which is specified in the contract or will be specified by the time when the contract comes to be performed. The second kind of contract is one which contains no reference to a particular ship for the use of which the goods or materials are required, leaving the shipowner to make his own decision about that later. The first kind of contract is, in my opinion, a contract under which goods or materials are "supplied to a ship" within the meaning of par. (m). The second kind of contract, however, is, in my opinion, not a contract for goods or materials to be "supplied to a ship" within the meaning of par. (m). It is no more than a contract for the supply of goods or materials to a shipowner, and as such does not come within par. (m).

The present case the series of contracts made between Tiphook and NNSL for the hire of individual containers were not contracts of the first kind described above, but contracts of the second kind. It follows that claims in respect of them do not come within par. (m) and are not therefore within the Admiralty jurisdiction of the High Court.

**9** The River Rima judgment was much emphasized by Baltic's counsel in oral argument. As counsel for Textainer allows, so the Court agrees: River Rima appears to be correctly decided (indeed it is the definitive word in the U.K.), but as counsel asserts, it does not apply in Canada, nor to the facts of the present case.

**10** In similar circumstances (not juridic facts), the Court of Appeal, speaking through Chief Justice Isaac in Banco do Brasil S.A. v. Alexandros G. Tsavliris (The), *[1992] 3 F.C. 735*, said, recorded at p. 747:

> Absent a transcript of the argument at trial which would settle the dispute between counsel, I must accept the facts stated in the passage just quoted at face value. To the extent that it contains an admission by counsel for the parties that the principles stated in The Myrto [[1977] 2 Lloyd's Rep. 243 (Q.B.C. Adm. Crt.)] represent the law of England, it is my opinion that counsel are bound by those admissions, the law of England being a fact in issue like any other, the proof of which could be dispensed with by admission of the parties or their counsel. To the extent that it contains an admission respecting the state of the maritime common law of Canada, different considerations arise. The law of Canada was not a fact in issue in the case. It was an element in the case which the learned Trial Judge had sole responsibility to determine. It is true that counsel, by their research and submissions, could have assisted him in the discharge of that responsibility; but they could not, by their admission, relieve him of it. Consequently, I consider the admission contained in the passage just quoted as being an admission of fact that the law of England is as stated in The Myrto. Indeed that was the conclusion

which the learned Trial Judge reached on conflicting expert evidence. As an admission of the state of the maritime common law of Canada, it is ineffective to bind this Court. In my opinion we are free, as the learned Trial Judge was, to determine the principles of Canadian law that govern this case, if we should determine that they differ from what was admitted or from the conclusion of the learned Trial Judge on the point.

(pp. 747-48)

*** *** ***

Having examined the Myrto and the authorities cited in it, I make the following observations. First, the facts of all those cases, including The Myrto, are different from those of the case before us. * * *

(p. 751)

**11** Here the Court does not suggest that the parties, by agreement, can invent a maritime lien where none has yet been discovered in Canadian maritime law. The Court however, assuming under Rule 419, that the facts alleged in the statement of claim, demonstrated and exhibited in the affidavit to lead warrant are true, ought ex debito justiciae hold the parties to the rights and responsibilities which they themselves have created by their agreements. Especially if, as it appears, the Federal Court Act in section 22, invests this Court with wider jurisdiction than that accorded in the U.K.

**12** First the Nikolay Golovanov appears on a balance of probabilities to be capable of carrying only containers according to its design description. (exhibits A and C Lloyd's Register). Secondly, as shown in Mr. Grégoire's exhibit B, the parties have agreed, not as to what constitutes the law, but to compacts and facts which bring them within the law. So, on page 4 of that agreement that which takes it out of the River Rima's sway are clauses under 14. DEFAULT AND REMEDIES (b), thus:

(b) Upon the occurrence of any Event of Default, and at any time thereafter so long as the same shall be continuing, Lessor may forthwith (but without prejudice to any rights under this Lease), by notice in writing to the Lessee, declare this Lease to be in default and may then exercise any permitted remedy at law or equity, including, without limitation, one or more of the following:

*** *** ***

(d) The remedies and other rights set forth in this Section, elsewhere in this Lease or otherwise available to Lessor, are cumulative and not alternative. Such remedies and rights may be exercised separately or in any combination or sequence, and the use of any remedy or right individually or in any combination or sequence shall be without prejudice to and shall not waiver any others. The exercise of any such remedy or right, including, without limitation, termination, shall not relieve Lessee of any liability or obligation under this Lease incurred prior to the exercise thereof.

*** *** ***

17. MISCELLANEOUS

(m) The Containers are maritime Containers, are supplied for use on and for the operation of a Vessel or Vessels, and shall be used only in international trade and in connection with contracts for the carriage of goods in ships. The Lessee undertakes that on each occasion it takes delivery of a Container it does so as an authorized agent of, and on behalf of a Vessel or Vessels. The Containers shall not be used for purposes of inland transport, save that they may be transferred from the shippers' premises directly to the port of exportation and from the port of importation directly to the primary destination or the Lessor's appointed depot.

(n) Lessee shall be obliged, upon request by Lessor, to immediately specify in writing the Vessel(s) to which Lessor's Containers have been or are to be supplied. Lessee agrees that the supply of Containers to the Vessel or Vessels is essential and necessary for the service provided by those Vessels. The parties further agree that this lease is a Maritime Contract. The Lessee recognizes and grants to the Lessor an express maritime lien against the Vessels and their pending freight to secure all obligations running from the Lessee to the Lessor under this Lease. The Lessor may execute its maritime lien on Vessels by appropriate process in any court of any country having general Admiralty and Maritime Jurisdiction.

**13** The Federal Court of Canada in its admiralty and maritime law rôle, exercises equitable as well as legal jurisdiction: Montréal Dry Docks & al. v. Halifax Shipyards Limited, *(1920) 60 S.C.R. 359*, *[1920] 3 W.W.R. 25*, *54 D.L.R. 185* at p. 371 in the S.C.R. and McBride v. SS. American and Darrell, (1920) 20 Ex. C.R. 271, *61 D.L.R. 661* (Audette, J.). At p. 277 of the Ex. C.R. in McBride, Audette, J. is reported thus:

> It is true the Admiralty Court, as said by Lord Stowell, exercises an equitable jurisdiction. The Court is not absolutely ministerial, and it is at liberty to hold its hand when it appears equitable to do so. See also The Montreal Dry Dock and Ship Repairing Co. v. Halifax Shipyards, Limited.
>
> *** *** ***
>
> While the Admiralty Court exercises this unquestionable equitable jurisdiction, it must not be expected to peddle small equities. The case presents equities on behalf of both sides and they seem equally balanced. The burden was upon the appellant to show a superior equity which I fail to discover on the facts before me.

Both of those authorities arose long ago, even before the Statute of Westminster, 1931, and there is no reason to think that this Court has, in the meanwhile lost any of its equitable jurisdiction in administering Canadian maritime law: Antares Shipping Corp'n v. The "Capricorn" & al., *[1980] 1 S.C.R. 553*, and especially pp. 562-67, and specifically, Ritchie, J., recorded at p. 565:

> It will be seen that I am, with all respect, unable to agree that the American doctrine should be applied in Canada or that s. 22(2)(a) of the Federal Court Act is to be so restrictively interpreted as to exclude from its ambit actions claiming specific enforcement of a contract entitling the claimant to "title, possession or ownership of a ship".

**14** Now, the question is asked by the plaintiff's counsel "would it be equitable to let the Nikolay Golovanov sail, in these circumstances, and especially if it would sail off with some of the plaintiff's containers aboard?" He asserts that legally Textainer can invoke paragraphs 22(2)(c) - "a charge on a ship" - and (m) - "claim in respect of goods, materials or services wherever supplied to a ship for the operation * * * of the ship", as well as subsection 22(1) of the Federal Court Act which is referable to subsection 43(2) indeed, all of Baltic's container ships which are all contemplated by subsection 43(8). By virtue of the lease, Baltic has pledged the credit of all its named container-carrying ships, including that quintessential and actual container-ship the Nikolay Golovanov.

**15** After all, equity imputes an obligation to fulfil an obligation, here, Baltic's obligation to pay rent, the arrears and the actual. It has pledged its ship against the payment of rent and offered the plaintiff an enforceable, executable lien on its ships, to be identified upon request. It is somewhat simplistically said that equity acts in personam, reasonable basis for subsection 43(3). Equity looks to intent, rather than form, in any event. The intent of the parties the mutual considerations upon which they dealt, is expressed in the leases. But Baltic comes into this Court seeking relief, and it does not come with clean hands, for it is doubly in default both as to arrears of rent and actual rent.

**16** For all the foregoing reasons together with any omitted arguments made to the Court by the plaintiff's counsel, the Court will not strike the in rem portions of the statement of claim and will not release Baltic's container ship from arrest without bail being posted.

**17** Accordingly the defendant Baltic's motion is dismissed with costs in the cause.

MULDOON J.

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**End of Document**

Federal Court Cour fédérale

**Date: 20130220**

**Dockets: T-484-11**
**T-1-12**

**Citation: 2013 FC 177**

2013 FC 177 (CanLII)

**Ottawa, Ontario, February 20, 2013**

**PRESENT: The Honourable Mr. Justice Harrington**

**BETWEEN:**

**CAMECO CORPORATION**
**CAMECO INC. AND**
**CAMECO EUROPE LTD.**

**Plaintiffs**

**and**

**THE OWNERS AND ALL OTHERS**
**INTERESTED IN THE SHIP "MCP ALTONA",**
**THE SHIP "MCP ALTONA",**
**MS MCP ALTONA GMBH & CO KG,**
**HARTMANN SCHIFFAHRTS GMBH & CO,**
**HARTMANN SHIPPING ASIA PTE LTD.,**
**FRASER SURREY DOCKS LP AND**
**PACIFIC RIM STEVEDORING LTD.**

**Defendants**

**REASONS FOR ORDER AND ORDER**
**(COSTS ON PRIORITIES MOTION)**

[1] After payment of the acting marshal's fees and disbursements arising from the judicial sale of the MCP Altona, there were two contenders for the balance of the proceeds of sale: Cameco and the caveator HSH Nordbank AG. The Bank moved for payment on the basis that at best Cameco

had a cargo claim, a claim which is ordinarily outranked by a mortgage. Cameco defended on the basis that it had four grounds on which it outranked the Bank. In reasons reported at 2013 FC 23, I ruled in the Bank's favour. Before me now is the Bank's motion for costs.

[2] The Bank's position is that it should be awarded costs on an enhanced basis. Cameco invites me to award no costs at all or, in the alternative, costs based on Column III of Tariff B of the *Federal Courts Rules*, the default column.

[3] The parties have been at loggerheads throughout the saga of the MCP Altona's return to Vancouver with spilled uranium loose in hold number 1, her arrest, her sale, the amount of disbursements reasonably incurred by the marshal, as financed by the Bank, and now the distribution of the proceeds of sale. It must also be kept in mind that at the same time Cameco has sued for its loss, it has been sued by others on the basis it caused the loss, and has been engaged in meaningful debates, exchange of pleadings, exchange of documents, as well as scientific testing, all in an effort to ascertain the cause of the spill and the liabilities which flow therefrom. The Bank, although only a caveator, was not entirely immune from these proceedings and properly participated in a number of case management conferences. However, what is before me is the issue of costs on the Bank's successful motion for payment out, no more and no less. For instance, the Bank has taken umbrage with Cameco's challenge of some of the disbursements incurred by the acting marshal, and funded by it. That challenge was successful, at least in part, and, in any event, costs arising therefrom are before the assessment officer, not me.

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[4] Both sides have criticized the behaviour of the other. However, I need go no further than my reasons on the priorities motion to say I pay no heed to the submissions of either side.

[5] The Bank points out, correctly, that the procedure the Court has developed for the resolution of disputes relating to priorities with respect to the proceeds of the judicial sale of ships are somewhat hybrid in nature. If memory serves, initially each claimant was to set itself up as a plaintiff, and each other party contesting that claim would set itself up as a defendant. Thus, one had a whole series of statements of claim and statements of defence, affidavits of documents and examinations for discovery leading ultimately to a trial.

[6] I believe it was Mr. Justice Addy who first decided this procedure was far too cumbersome and far too costly. He drew inspiration from the application portion of our rules, as they then were, rather than the action portion. Thus, the current practice, which was followed in this case, is that each side file written submissions setting out its case, backed up by affidavits and documents to be relied upon. Parties are entitled to cross-examine affiants, and then the matter proceeds to a hearing without witnesses. Essentially, this is no different from other applications. Indeed, applications with respect to the Patented Medicine (Notice of Compliance) Regulations are, invariably, far more lengthy than the two days of argument in this case.

[7] Cameco asserted four grounds why its claim should outrank the Bank's.

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[8] It submitted that the cost of discharging its cargo should be treated as a marshal's expense. This point had never been definitively decided in Canada before. English law went one way and American law the other.

[9] It also submitted it enjoyed a maritime lien in accordance with section 139 of the *Marine Liability Act*. There has been very little jurisprudence on that point.

[10] It submitted as it that it had a salvage lien, arising from the incorporation of the 1989 Salvage Convention into Canadian law. This was a novel point.

[11] Finally, it submitted that the Court, in its exercise of its equitable jurisdiction, should rearrange the normal sequence of priorities. For the reasons given, I declined to do so.

[12] I say this because although I ruled against Cameco, its position was far from frivolous or vexatious. It had legitimate arguing points.

[13] The Bank is correct in saying that in order to understand Cameco's claim for priority, it had to review the affidavit of documents in the cargo claim. There were over 20,000 of them. Again, this is not unusual in applications. In PM (NOC) applications referred to above, the record may easily comprise 40 or more volumes.

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[14] The Bank complains that it had to translate some of its documents into English. It is a rule of court that documents in a foreign language relied upon must be translated into either English or French.

[15] The Bank also suggests that if it were not for the arrest by Cameco, and an accompanying arrest by Tam International in T-424-11, it could have moved the ship to the Far East and obtained a better price. This is simply not so. Cameco has a reasonably arguable case and was entitled to arrest the ship. She would have been released if the owners had provided bail in the amount of such reasonably arguable case plus interest and costs, or the value of the ship, whichever was less. They did not do so. Furthermore, other parties had filed caveat releases.

[16] In any event, the ship was going nowhere from January to May 2011 because she was contaminated, a contamination which was cleaned up by Cameco.

[17] It is illusory to think that the Bank under a power of sale in its mortgage could have achieved a better price. All the Bank could do would be to sell its debtors', *i.e.* the shipowners, interest in the ship. It could not sell the ship free of liens and encumbrances, of which there were many, all of which were wiped away as a result of the sale in this Court.

[18] Cameco points out that no draft bill of costs has been provided and no supporting affidavit. Although the Court favours an award of lump sum costs when feasible, there is simply not enough information on file to allow me to come to any conclusion. Thus, I shall issue directions to the assessment officer.

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[19] The Bank submits that there were a number of complicated issues. Celerity calls for enhanced costs. The issues were complicated and interesting, but for the reasons given in *Universal Sales, Ltd v Edinburgh Assurance Co*, 2012 FC 1192, [2012] FCJ No 1292 (QL), and the jurisprudence cited therein, I should remain within the Tariff. Were it not for a relevant settlement offer in that case, I would have awarded fees at the low-end of Column IV. I shall do so in this case.

[20] The Bank shall also be entitled to reasonable disbursements, including the reasonable cost of translation from German to English, and the costs of travel from Vancouver to Ottawa for the purposes of arguing the priorities motion.

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## ORDER

**FOR REASONS GIVEN;**

**THIS COURT ORDERS that** the assessment officer tax costs in favour of HSH Nordbank AG in accordance therewith.

"Sean Harrington"

Judge

2013 FC 177 (CanLII)

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKETS:** | T-484-11<br>T-1-12 |
| **STYLE OF CAUSE:** | CAMECO CORPORATION, CAMECO INC. AND CAMECO EUROPE LTD. v THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MCP ALTONA", THE SHIP "MCP ALTONA", MS MCP ALTONA GMBH & CO KG, HARTMANN SCHIFFAHRTS GMBH & CO, HARTMANN SHIPPING ASIA PTE LTD., FRASER SURREY DOCKS LP AND PACIFIC RIM STEVEDORING LTD. |

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES***

| | |
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| **REASONS FOR ORDER AND ORDER (COSTS ON PRIORITIES MOTION):** | HARRINGTON J. |
| **DATED:** | FEBRUARY 20, 2013 |

**WRITTEN REPRESENTATIONS BY:**

| | |
|---|---|
| Marc D. Isaacs | FOR THE PLAINTIFFS |
| David F. McEwen, Q.C. | FOR THE CAVEATOR HSH NORDBANK AG |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Isaacs & Co.<br>Barristers & Solicitors<br>Toronto, Ontario | FOR THE PLAINTIFFS |
| Borden Ladner Gervais LLP<br>Barristers & Solicitors<br>Vancouver, British Columbia | FOR THE DEFENDANTS THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MCP ALTONA", THE SHIP "MCP ALTONA", MS MCP ALTONA GMBH & CO KG, HARTMANN SCHIFFAHRTS GMBH & CO, HARTMANN SHIPPING ASIA PTE LTD. |

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**SOLICITORS OF RECORD: cont'd**

| | |
|---|---|
| Fasken Martineau<br>Barristers & Solicitors<br>Vancouver, British Columbia | FOR THE DEFENDANTS<br>FRASER SURREY DOCKS LP AND<br>PACIFIC RIM STEVEDORING LTD. |
| Alexander Holburn Beaudin & Lang LLP<br>Barristers & Solicitors<br>Vancouver, British Columbia | FOR THE CAVEATOR HSH NORDBANK AG |

2013 FC 177 (CanLII)

1927 CanLII 769 (CA EXC)

1927
April 29.

QUEBEC ADMIRALTY DISTRICT

HAMILTON HARBOUR COMMISSIONERS ..... PLAINTIFF;

*v.*

THE SHIP *WENCHITA* ..... DEFENDANT.

*Shipping—"Necessaries"—Wharfage dues—Charter-party.*

On May 27, 1926, the defendant ship, a foreign ship, discharged her cargo at the port of Hamilton and loaded another cargo. The plaintiff's dock and warehouse were used by the defendant ship under the authority of the Master thereof. The defendant was bound to incur the charges made for the use of this dock and warehouse before he could discharge his cargo and leave the port of Hamilton.

*Held,* that such charges were to be considered as "necessaries" within the meaning of the Admiralty Act.

2. That where the plaintiff had no notice of the charter-party and the Master and crew remained the servants of the owners of the ship and there was no demise of the ship to the time charterers, the owners were liable for necessaries ordered and authorized by the Master and were liable for the necessaries above referred to.

ACTION *in rem* to recover the sum of $313.14 for necessaries.

The action was tried before the Honourable Mr. Justice Archer at Montreal.

*C. Russel McKenzie* for plaintiff.

*R. C. Holden, Jr.,* for defendant.

The facts are stated in the reasons for judgment.

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ARCHER L.J.A., now this 29th April, 1927, delivered judgment.

This is an action *in rem* by which plaintiff claims the sum of $313.43 for necessaries.

The plaintiff was duly incorporated by an Act of Parliament of Canada (2 Geo. V, chapter 98). By the said Act the Hamilton Harbour Commissioners have the power to make by-laws for the doing of everything necessary for the effectual execution of the duties and powers vested in the corporation.

Section 22 of the said Act enacts:—

The rates upon the cargoes of all vessels shall be paid by the master or person in charge of the vessel, saving to him such recourse as he may have by law against any other person for the recovery of the sums paid; but the Corporation may demand and recover the said rates from the owners or consignees or agents or shippers of such cargoes if it sees fit to do so.

Section 24 is as follows:—

The Corporation may, in the following cases, seize and detain any vessel at any place within the limits of the province of Ontario:—

(*a*) Whenever any sum is due in respect of a vessel for rates or for commutation of rates, and is unpaid;

(*b*) Whenever the master, owner or person in charge of the vessel, has infringed any provision of this Act, or any by-law in force under this Act, and has thereby rendered himself liable to a penalty.

Section 10 of the By-laws says:—

No vessel shall leave the harbour until the agent, consignee, shipper, master or person in charge thereof has made and delivered to the office of the Commissioners a full and correct report in writing, signed and certified by him, of her outward cargo, with the description thereof in detail, and its value, and also of her draft of water, nor until all dues on the vessel and on her cargo, and all penalties incurred in respect of the vessel or by the master or person in charge of the vessel, and all costs and charges with which the vessel or the master or the person in charge thereof is chargeable towards the Commissioners, have been fully paid.

Section 11 of the By-laws reads as follows:—

All rates, dues or penalties in respect of any vessel or cargo shall be paid or secured to the satisfaction of the Commissioners before such vessel or cargo leaves Hamilton Harbour, and in default thereof, the Secretary may cause such cargo or vessel to be seized and held therefor, and may require the Collector of Customs to refuse clearance papers to such vessel.

See Maclachlan's Law of Merchants' Shipping, (6th Ed.), p. 571.

On the 27th May, 1926, the defendant ship, the *SS. Wenchita,* a foreign ship registered at the Port of Oslo, Norway, discharged her cargo at the Port of Hamilton of one mil-

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lion and ninety thousand nine hundred and fifty-seven pounds of steel plates and loaded one hundred and sixty-two thousand eight hundred and thirty-one pounds of cargo. The plaintiff's dock and warehouse were used by the defendant ship, with the authority of the master thereof in the loading and unloading of the cargo. The rates on the cargo for said privileges amounting to $313.43 are made as follows:—

| | |
|---|---|
| Tonnage inward—1,090,957 lbs., at 50c. per ton. | $272 73 |
| Tonnage outward—162,831 lbs., at 50c. per ton. | 40 70 |
| Total ..... | $313 43 |

The plaintiff submits that these charges were charges which the defendant ship was bound to incur before she could discharge her cargo and leave the Port of Hamilton; that they were necessaries within the meaning of the law.

The defendant submits that these charges cannot be considered as necessaries; that the owners of the *Wenchita* had divested themselves by charter-party of the control and possession of the vessel for the time being in favour of the charterers, and that therefore there can be no claim against the ship.

I am of opinion that the charges amounting to $313.43 are to be considered as necessaries.

Roscoe, page 238, says:—

> The definition of the word necessaries has been judicially given as all things fit and proper for the service in which a vessel is engaged, whatever the owner of that vessel as a prudent man would order if present at the time; though primarily meaning indispensable repairs, anchors, cables, sails and provisions, the term has now, it is clear, a wider signification, and has been and is being gradually amplified by modern requirements, as is instanced by the case of *The Mecca,* where canal dues were pronounced to be within the scope of the word. No distinction can be drawn between necessaries for the ship and necessaries for the voyage, and all things reasonably requisite for the particular adventure on which the ship is bound are comprised in this category.

Claims for dock dues, canal dues, have been declared valid in actions for necessaries.

The *St. Lawrence* (1); The *Mecca* (2); *Simpson, Spence & Young* v. *Azpeitia* (3); *William Fleming* v. *Equator* (4).

(1) (1880) P.D. 250.
(2) (1895) 8 Asp. 266.
(3) (1921) 8 Llyod's List, Law Rep. 326.
(4) (1921) 9 Lloyd's List, Law Rep. 1.

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We have now to consider the effect of the charter party.

On the 6th February, 1926, a charter-party was entered into between the owners of the *Wenchita* and Frank Lane Co. of the city of New York, whereby the vessel was chartered to the latter for a term of eighteen months.

The charter-party contained several stipulations, and I will cite the most important:—

1. That the owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the captain, officers, engineers, firemen and crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, and maintain her class and keep the steamer in a thoroughly efficient state in hull, machinery and equipment for and during the service.

2. That the charterers shall provide and pay for all the coals except as otherwise agreed, port charges, pilotages, agencies, commissions, consular charges (except those pertaining to the captain, officers or crew), and all other usual expenses except those before stated, but when the vessel puts into a port for causes for which steamer is responsible, then and all such charges incurred shall be paid by owners.

Charterers are to provide necessary dunnage and shifting boards, but owners to allow them the use of the dunnage and shifting boards already aboard steamer. Charterers to have the privilege of using shifting boards for dunnage, they making good for any damage thereto.

6. That the cargo or cargoes be laden and or discharged in any dock or at any wharf or place that the charterers or their agents may direct, provided the steamer can always safely lie afloat at any time of tide, except at such places where it is customary for similar size steamers to safely lie aground.

18. That the owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this charter, and the charterers to have a lien on the ship for all moneys paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once.

19. That all derelicts and salvage shall be for owners' and charters' equal benefit after deducting owners' and charterers' expenses and crew's proportion general average, if any, to be according to York-Antwerp Rules, 1890.

If the owners of the ship shall have exercised due diligence to make said ship in all respects seaworthy, and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at the time of shipment or at the beginning of the voyage, but not discoverable by due diligence, the Consignees or Owners of the cargo shall not be exempted from liability for contribution in general average, or for any special charges incurred but with the shipowner, shall contribute in general average and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defect or unseaworthiness.

25. Nothing herein stated is to be construed as a demise of the steamer to the time charterers. The owners to remain responsible for the naviga-

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tion of the steamer, insurance, crew, and all other matters, same as when trading for their own account.

The plaintiffs had no notice of the charter-party. As stated in stipulation 25 of the charter party nothing in the charter-party is to be construed as a demise of the steamer to the times charterers. The master and the crew remained the servants of the owners. (Stipulation No. 1).

It was held in the case of the barge *David Wallace* v. *Bain* (1):—

Where, by the charter-party, the owner transfers the possession and control of the ship to a charterer and the latter appoints the master and crew and pays their wages and other expenses, the master in incurring a debt for necessaries is not the agent or servant of the owner. In such a case the owner is not the debtor, and an action for such necessaries cannot be maintained against the ship.

In the case of *Scheibler* v. *Furness* (2), Lord Herschell L.C., says:—

But there may be two persons at the same time in different senses not improperly spoken of as the owners of a ship. The person who has the absolute right to the ship, who is the registered owner, the owner (to borrow an expression from real property law) in fee simple, may be properly spoken of, no doubt, as the owner, but, at the same time, he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person who, during that time, may equally properly be spoken of as the owner. When there is such a person, and that person appoints the master, officers, and crew of the ship, pays them, employs them, and gives them their orders, and deals with the vessel in the adventure, during that time all those rights which are spoken of as resting upon the owner of the vessel, rest upon that person, who is, for those purposes during that time, in point of law, to be regarded as the owner. When that distinction is once grasped it appears to me that all the difficulties that have been raised in this case vanish. There is nothing in your Lordship's judgment, as I apprehend, which would detract in the least from any of the propositions which have been laid down with regard to the power of a master to bind an owner, or with regard to the liabilities which rest upon an owner. The whole difficulty has arisen from failing to see that there may be a person who, although not the absolute owner of the vessel, is, during a particular adventure, the owner for all those purposes.

Is there anything in the authorities which runs counter to the view which I have just expressed? I can find nothing. Not a single authority has been cited in which the owner of a vessel has ever been held liable on a bill of lading, or as for a tort in the improper navigation of or dealing with a vessel in any case in which the master of the vessel, or those who were guilty of the negligence, have not been properly described as the servants of the owner. *No doubt a vessel may be chartered, and the charterers may have, during its continuance, full power to deal with the vessel, to determine her voyage, and to direct the course that she*

(1) (1903) 8 Ex. C.R. 205, at p. 206.

(2) (1893) 1 The Reports 59, at p. 64.

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*shall take, where, nevertheless, the master and crew remain truly the servants of the owner. In that case I apprehend it is perfectly clear that by reason of the relationship still subsisting the owner becomes bound by such a contract as a bill of lading, and by all the contracts which a master can ordinarily make, and which persons, therefore, have a right to presume he is authorized to make, binding the owner.*

In the same case Lord Watson, at page 69, says:—

No doubt when a shipowner who enters into a charter without parting with the possession and control of his ship seeks to limit the powers assigned by law to his captain, the limitation will be altogether ineffectual in any question with shippers who are ignorant of the terms of the charter. That, however, is a question as to the limitation of the powers of an actual agent who has known powers according to law. Notice of any limitations must be given to those who deal with the agent upon the footing of fact that he is the agent; there must be such notice in order to disable them from contracting with him. But where you are dealing with a person who is not an agent, I know of no authority which requires that notice shall be given when a man parts with the possession and control, even temporarily, of a ship of which he is the registered owner.

It is not necessary to refer to several other cases which were cited at Bar, as in those cases the plaintiff had notice of charter-party and its stipulations.

In the present case, the plaintiff had no notice of the charter-party, the master and crew remained the servants of the owners, and there was no demise of the ship to the time charterers.

Applying the law as I find it in the above authorities, I am of opinion that the owner is bound to pay for the necessaries, and in this case plaintiff is entitled to judgment for the sum claimed.

*Judgment accordingly.*

Solicitors for plaintiff: *Brown, Montgomery & McMichael.*

Solicitors for defendant: *Meredith, Holden, Heward & Holden.*

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# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Nanaimo Harbour Link Corporation v. Abakhan & Associates Inc.,*** 2007 BCSC 109

Date: 20070129
Docket: B060890
Registry: Victoria

Between:

**Nanaimo Harbour Link Corporation**

Insolvent

And

**Abakhan & Associates Inc.**

Trustee

Before: The Honourable Madam Justice Garson

## Reasons for Judgment

| | |
|---|---|
| Counsel for 656925 British Columbia Ltd. | B.G. Baynham, Q.C. and R. Wu |
| Counsel for Allied Shipbuilders Ltd. and PSI Fluid Power Ltd. | T.S. Hawkins and P.D. Mooney |
| Counsel for Captain Lars Friis and other Crew Members of the Vessel "Harbourlynx" | D. Williams |
| Counsel for Kurt A. Henderson and Douglas A. Henderson (Crew Members) | G. Douvelos |
| Date and Place of Hearing: | December 11 and 12, 2006 |
| | Victoria, B.C. |

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## INTRODUCTION

[1] The applicants, Allied Shipbuilders Ltd. ("Allied") and PSI Fluid Power Ltd. ("PSI"), Captain Friis and other affected Crew Members, to whom I shall sometimes collectively refer to as the "Lien Claimants", apply for an order pursuant to s. 69.4 of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 ("***BIA***"), that the statutory stay of proceedings in s. 69.3 of the ***BIA*** shall not apply to Federal Court of Canada proceedings commenced by the applicants on the grounds that their claims are maritime liens (or equivalent to maritime liens) for goods and services provided to the vessel "Harbourlynx".

[2] These applications raise the issue of whether under Canadian maritime law, liens, when proven as maritime liens, are secured claims having priority to the ship's mortgage or if the claims are to be determined under the ***BIA*** as unsecured claims to debt, thereby ranking behind the ship's mortgage.

## FACTS

[3] The facts which form the background to this matter are contained in the Agreed Statement of Facts below. In summary, the Harbourlynx was a privately owned passenger ferry running between downtown Nanaimo and downtown Vancouver. In January 2006 the vessel underwent extensive repairs performed by Allied and PSI. In February the starboard engine of the vessel failed for reasons unrelated to any work performed by Allied and PSI. The vessel was not repaired. Its owner, Nanaimo Harbour Link Corporation, having tried unsuccessfully to restructure its financial affairs, was in March deemed bankrupt. The crew and

captain of the vessel were not paid wages owed to them. PSI and Allied were not paid for the January repairs.

**AGREED STATEMENT OF FACTS**

BACKGROUND

1. Nanaimo Harbour Link Corporation (the "Company") is a company incorporated under the laws of the Province of British Columbia.

2. The Company operated a passenger only ferry service in the Strait of Georgia between downtown Nanaimo, and downtown Vancouver, in the Province of British Columbia. The business of the Company was conducted solely in the Province of British Columbia.

3. The Company owned and operated one vessel which operated under the name "Harbourlynx", which is a passenger vessel with a registered length of 34.40 metres and a gross tonnage of 501 tonnes (the "Harbourlynx").

4. Some employees of the Company were land-based, while other employees were crew members on the Harbourlynx.

5. On January 9, 2006 and through to January 23, 2006, the Harbourlynx was in drydock at Allied Shipbuilders Ltd. ("Allied") in North Vancouver to conduct a complete overhaul of the vessel's Kamewa Rollsroyce water jets, complete drydock inspection and cleaning and painting of the hull, all of which is required for the continued operation of the Harbourlynx. Allied completed the work and the drydocking and the Harbourlynx was returned to service on or about January 30, 2006.

6. On or about February 2, 2006, the Harbourlynx lost its starboard engine due to what turned out to be a broken crankshaft. The Company was unable to provide the ferry service with only one engine, and ceased operations on or about February 2, 2006. The starboard engine failure was unrelated to any of the work performed by Allied.

COURT AND TRIBUNAL PROCEEDINGS

7. On February 17, 2006, the Company filed a Notice of Intention to make a Proposal ("NOI") under s. 50.4(1) of the *Bankruptcy and Insolvency Act.*

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8. On February 21, 2006, Allied filed an in rem Statement of Claim in Federal Court Action No. T-319-06 (the "Allied Action") claiming damages in the amount of $133,001.18, prejudgement interest, condemnation of the Harbourlynx or her bail, and costs. Allied also filed a Warrant to arrest the ship "Harbourlynx".

9. The Company was served with a copy of Allied's Statement of Claim on February 22, 2006. The vessel was arrested that same day.

10. By letter dated February 27, 2006, Abakhan & Associates wrote to the Federal Court of Canada with respect to the Allied Action to advise the Court that pursuant to section 69 of the *Bankruptcy and Insolvency Ac*t, all actions against Nanaimo Harbour Link are stayed upon the filing of the NOI.

11. On February 28, 2006, PSI Fluid Power Ltd. ("PSI") filed a Caveat Release in the Allied Action.

12. On March 2, 2006, PSI filed an in rem Statement of Claim in Federal Court Action No. T-380-06 (the "PSI Action"), claiming damages in the amount of $22,183.12, prejudgement interest, condemnation of the Harbourlynx or her bail, and costs.

13. On March 16, 2006, Captain Lars H. Friis filed a Caveat Release in the Allied Action, on behalf of himself as Senior Master of High Speed Passenger Vessel "Harbourlynx" and all affected crewmembers (as per Schedule "A" to the Caveat Release) (the "Crewmembers"), which list did not include any land based employees.

14. The Company did not prepare or file a Proposal under the Bankruptcy & Insolvency Act.

15. On March 21, 2006 the Company was deemed to have filed an assignment into Bankruptcy. Abakhan & Associates Inc. was named as Trustee in the Bankruptcy.

16. By proof of claim Allied filed as an unsecured creditor.

17. By proof of claim PSI filed as an unsecured creditor.

18. The Crewmembers did not file a Proof of Claim in the Bankruptcy.

19. 656925 British Columbia Ltd. is a secured creditor in the Bankruptcy. The Trustee has determined that the security interest of 656925 British Columbia Ltd. is valid and enforceable against the Trustee. 656925 British Columbia Ltd.'s security agreement against the vessel was valued at approximately $3,500,000.

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20. By Disclaimer dated April 24, 2006, the Trustee disclaimed, assigned, and abandoned in favour of 656925 British Columbia Ltd. all and any right, title, interest and claim that the Trustee or the bankrupt estate of the Company may have or hereinafter have in, *inter alia*, the Harbourlynx.. 656925 British Columbia Ltd. paid $2000.00 to the Trustee as consideration for this agreement.

21. On April 18, 2006, two of the Crewmembers, namely Kurt Henderson and Douglas Griffith, filed a Writ of Summons and Statement of Claim in B.C.S.C. Action No. S46924, Nanaimo Registry, claiming loss of wages, loss of holiday pay and non-payment of severance (the "Nanaimo Crewmembers Action").

22. On June 8, 2006, the balance of the Crewmembers filed a Writ of Summons and Statement of Claim in B.C.S.C. Action No. 06 2639, Victoria Registry (the "Victoria Crewmembers Action") seeking, *inter alia*, wages, holiday pay, overtime pay and severance pay for the Crewmembers. The Victoria Crewmember Action was discontinued on November 22, 2006.

23. On August 1, 2006, the Crewmembers (excluding the crewmembers named in the Nanaimo Crewmembers Action) filed a Statement of Claim in Federal Court Action No. T-1372-06 (the "Federal Crewmembers Action").

24. Pursuant to an Order dated August 30, 2006 made by Master Barber, bail was posted in the Supreme Court of British Columbia, with respect to the Nanaimo Crewmembers Action.

25. By way of a cash deposit held in a solicitor's trust account, supported by a Letter of Undertaking dated September 19, 2006, 656925 British Columbia Ltd. posted security for the Allied Action in exchange for the release of the Harbourlynx from arrest. The undertaking was given without prejudice to any claims, rights or defences which 656925 British Columbia Ltd. has or may have, none of which were to be regarded as waived. As a result of security being posted, the Harbourlynx was subsequently released from arrest. The members of the Victoria Crewmember Action consented to the release.

26. By way of a cash deposit held in a solicitor's trust account, supported by a Letter of Undertaking dated September 19, 2006, 656925 British Columbia Ltd. posted security for the PSI Action in exchange for the release of PSI's Caveat Release. The undertaking was given without prejudice to any claims, rights or defences which 656925 British Columbia Ltd. has or may have, none of which were to be regarded as waived. As a result of security being posted, PSI subsequently released its Caveat Release.

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27. On or about September 28, 2006, the Harbourlynx was purchased by a third party. The sale proceeds from that transaction are inadequate to cover the secured claim of 656925 British Columbia Ltd., as well as the claims of Allied, PSI, and the Crewmembers.

CLAIM OF ALLIED AND PSI

28. Allied is a company incorporated under the laws of the Province of British Columbia.

29. On or about November 22, 2005, Allied and the Company entered into a contract in regard to providing the following services to the Harbourlynx including but not limited to:

(a) Cleaning and painting the hull of the Harbourlynx;

(b) Overhauling the Harbourlynx's Kamewa (Rolls Royce) Water Jets (the "Water Jets");

(c) Determining if inspection and service of the sea valves was required;

(d) Removing all anodes and installing new anodes;

(e) Repairing the transom;

(f) Inspecting all gear cooling pipes; and

(g) Removing all load line marks (the "Services Agreement").

30. The Company moored the Harbourlynx at Allied's premises on or about January 9, 2006. Work on the Harbourlynx was commenced that same day and was completed on or about January 23, 2006.

31. Allied claims that the amount of $133,001.18 remains outstanding for the work performed by Allied, with interest charged at the rate of 1.5% per month.

32. PSI is an extra-provincial company registered under the laws of the Province of British Columbia.

33. PSI had an ongoing relationship with the Company whereby the Company would order parts and labour for the Harbourlynx from PSI and PSI would supply such parts and labour.

34. During the period from May 2005 to January 2006, the Company ordered parts and labour from PSI, largely in support of the drydocking work performed by Allied. All ordered parts were delivered

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to the Company by PSI and all ordered labour was performed on the Harbourlynx by PSI.

35. PSI claims that the amount of $22,183.12 remains outstanding for the goods and services provided by PSI, along with interest at a rate to be determined by the Court.

CLAIM OF THE CREWMEMBERS

36. There are two outstanding actions commenced by the various crewmembers, namely the Nanaimo Crewmembers Action and the Federal Crewmembers Action.

37. The Crewmembers were employed by the Company to act as master and crew aboard the Harbourlynx during portions or all of the period from October 1, 2003 to February 17, 2006.

38. Kurt Henderson, one of the Plaintiffs in the Nanaimo Crewmembers Action, stopped working for the Company on or about October 5, 2005. He was considered by the Company to be on layoff status as at that date. The B.C. Government and Service Employees' Union (the "Union) filed a complaint with the British Columbia Labour Relations Board, (the "Board") with respect to the demotion and layoff of Kurt Henderson. The date of the hearing was January 19, 2006. The Board's decision is dated February 17, 2006. The Board concluded that with respect to the Union's complaint that the layoff of Kurt Henderson is a violation of section 5(1) of the Code, the Union's complaint was upheld.

39. It was an express or implied term of the contract of employment that the Crewmembers would be paid:

(a) an hourly wage or a weekly salary for set hours;

(b) Amounts for overtime in compliance with Provincial legislation;

(c) Amounts for holiday pay in compliance with Provincial legislation;

(d) Amounts for severance in compliance with Provincial legislation and common law.

40. The Crewmembers claim, in their various actions, *inter alia*:

(a) damages for breach of contract of employment between the Company and the Crewmembers;

(b) a declaration that the Crewmembers have a maritime lien for seamens' wages pursuant to *Canadian Maritime Law*;

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(c) damages for unpaid wages including wages, holiday pay, and overtime pay;

(d) common law damages for wrongful dismissal;

(e) an Order that the Crewmembers be paid from the proceeds of sale of the Harbourlynx;

(f) interest pursuant to *Canadian Maritime Law*; and

(g) costs.

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**POSITION OF THE RESPONDENT MORTGAGEE**

[4] The "Mortgagee", 656925 British Columbia Ltd., argues that Canadian maritime law has no application in determining the priority of the claims by the Lien Claimants in the bankruptcy of the Company due to constitutional limitations concerning the federal power over navigation and shipping under s. 91(10) of the ***Constitution Act, 1867*** (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, "***Constitution Act***").

[5] The Mortgagee says that in particular, it is significant that the route of the vessel "Harbourlynx" was solely intra-provincial in British Columbia, between ports in downtown Vancouver and downtown Nanaimo. Consequently, the applicants' claims are in "pith and substance" a matter of local concern involving property and civil rights under s. 92(13) of the ***Constitution Act***. Furthermore, the Mortgagee says the Harbourlynx ferry was a "local work or undertaking" which is under provincial jurisdiction pursuant to s. 92(10) of the ***Constitution Act***. Accordingly, it says no maritime or statutory liens in Allied or PSI's favour have been created under Canadian maritime law.

[6] Second, the Mortgagee argues that even if the applicant's claims are properly considered maritime liens, the ***BIA*** is a complete code in respect to priorities of creditors in the bankruptcy context. The Lien Claimants are therefore limited in recourse to the priority afforded to them by parliament under s. 136(1)(d) of the ***BIA***, in which case their claims rank behind the claim of the Mortgagee.

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**POSITION OF THE APPLICANT LIEN CLAIMANTS**

[7] The Lien Claimants describe the interaction between the two regimes of law, that is bankruptcy law and Canadian maritime law, as a process of peaceful coexistence. The Lien Claimants contend that a maritime lien attaches *in rem* to a ship and is thus a secured claim. They argue that once a determination is made by the Federal Court of Canada that a claim is a secured claim under Canadian maritime law, the Bankruptcy Court will be bound by that determination. They say that the scheme of distribution under the ***BIA*** does not apply to secured claims which rank in priority to the claims that are administered under the ***BIA***

[8] The Lien Claimants say that the operation of a private ship is governed by the federal navigation and shipping powers. They contend that such operation includes the labour of the crew and the provision of necessaries by the repairers, all of which is essential to the navigation of the ship.

**APPLICATION OF THE *BANKRUPTCY AND INSOLVENCY ACT* TO MARITIME LIENS**

[9] In ***Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)***, [2001] 3 S.C.R. 907, 2001 SCC 90, Binnie J. explained the necessity for *in rem*

remedies to govern the claims of seamen, ship repairers and other suppliers of essential goods and services to ships. He commented, at paras. 25 to 27, as follows:

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> Shipping was one of the earliest activities that required international cooperation in the regulation of the rights and obligations of its participants. "For the cradle of our maritime law we must turn to the Mediterranean Sea where the sea commerce has had a continuous history for nearly five thousand years": *Benedict on Admiralty* (7th ed. (loose-leaf)), vol. 1, at p. 1-4; and see generally W. Tetley, *Maritime Liens and Claims* (2nd ed. 1998), at pp. 7-8. Maritime lawyers were forced to confront the need for rules to govern international commerce centuries before the "universalist approach" became a key issue in bankruptcy. Seamen, salvors, ship chandlers, repairers and other suppliers of essential goods and services to the ship in foreign ports required some assurance of payment. They looked to the ship. Common rules were essential because suppliers dealt with ships from many countries and the Masters found themselves in distant ports in an age when communications with ship owners were slow and unreliable. In maritime commerce, "rules of practical convenience commanding general assent are a virtual necessity": *Laane and Baltser v. Estonian State Cargo & Passenger Steamship Line*, [1949] S.C.R. 530, per Rand J., at p. 545. See also: *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683, at p. 695. Practicality required an *in rem* proceeding against the ship as distinguished from an *in personam* action against the shipowner. The need for predictability and uniformity was so strong that even the common law courts, ever protective of their own ways, ceded jurisdiction to specialized courts of admiralty applying a largely international law of maritime commerce. As Professor Tetley, *supra*, writes, at p. 56:
>
>> [M]aritime law as we know it today is civilian in nature, finding its source in the *lex maritima* (the law maritime) which is a part of the *lex mercatoria* (the law merchant). Maritime law was codified, international law and, in England, it was apart from, and opposed to, its nearly mortal enemy, the common law.
>
> The *in rem* interest in ships took many forms, some created by statute, others by mortgage, still others by possession. One of the most ancient and effective forms of security was (and is) the maritime lien. In this action, Holt claims a maritime lien for stevedoring services pursuant to the *U.S. Commercial Instruments and Maritime Liens Act*, 46 U.S.C. s. 31342. Broadly speaking, a maritime lien arises without registration or

> other formality when debts of a specific nature are incurred by or on behalf of a ship. The lien creates a charge which "goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages" (*The Tolten*, [1946] P. 135 (C.A.), *per* Scott L.J., at p. 150). It may be described, in that sense, as a "secret lien".
>
> The reason for this privileged status for maritime lien holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships (as indeed was the case here, where initially Holt named the wrong corporation as ship owner). Merchant seamen will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage. The Master may be embarrassed for lack of funds, but the ship itself is assumed to be worth something and is readily available to provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence. The appellant Trustees' claim to "international comity" in matters of bankruptcy must therefore be weighed against competing considerations of a more ancient and at least equally practical international system -- the law of maritime commerce.

[10] The Lien Claimants contend that maritime liens are secured claims. Section 136(1) of the ***BIA*** excludes secured claims from the scheme of distribution of the assets of the bankrupt party. Section 136(1) provides, in part, as follows:

> 1. <u>Subject to the rights of secured creditors</u>, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows: …. [emphasis added]

[11] Section 2 of the ***BIA*** defines a “secured creditors”, in part, as follows:

> … a person holding a mortgage, hypothec, pledge, charge, or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor ...

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[12] Consequently, the Lien Claimants say that the secured claims are not governed by the ***BIA***, but rather by the ranking of secured claims under Canadian maritime law.

[13] If the Lien Claimants are correct in their assertion, and if their claims are proven in the Federal Court of Canada, then those claims would rank in priority to the ship's mortgage under Canadian Maritime Law. If the Mortgagee is correct in its assertion, that the priority of claims falls to be determined under the ***BIA***, then the ship's mortgage ranks first and there will be no funds available for distribution to the Lien Claimants because the ship's mortgage will consume all the assets of the bankrupt Company.

[14] William Tetley, in ***Maritime Liens and Claims***, 2nd ed. (Montreal: International Shipping publications, 1998), describes the interaction between bankruptcy law and Canadian maritime law, at p. 1127, in the following way:

> The *Bankruptcy and Insolvency Act* defines "secured creditor" and recognizes *inter se* maritime liens at sect. 2:
>
> > …'secured creditor' means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or….
>
> By sect. 69.3(2), a secured creditor, as well, is permitted to realize on his security in the Admiralty Court and thus avoid the stay of proceedings called for by sect. 69.1(1)(a) of the *Bankruptcy and Insolvency Act*. Sect. 69.3(2) reads:
>
> > Subject to sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed …

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> The secured creditor therefore deals with his security in the same manner as if there were no bankruptcy and will be able to commence or continue proceedings in the [Federal Court]. This means that the secured creditor is entitled to realize his security before any amount is distributed to the mass of creditors. Maritime lienors and mortgagees may therefore enforce their claims in the [Federal Court] despite the bankruptcy.

[15] Professor Tetley's explanation of the interaction between the two bodies of law is supported by the Supreme Court of Canada's decision in ***Holt Cargo***, *supra*. In that case, a Belgium ship was arrested at Halifax by a U.S. company holding an *in rem* maritime lien for stevedoring services provided in the U.S. The ship's Belgium owner was subsequently adjudged bankrupt in Belgium. The Belgium bankruptcy order was registered and 'recognized' in Quebec. The U.S. lien claimants proceeded in the Federal Court of Canada to prove and enforce their *in rem* maritime lien, outside of the bankruptcy. The trustee in bankruptcy requested that the Federal Court stay its proceedings. The Federal Court declined to grant the stay. The Supreme Court of Canada held that the bankruptcy proceedings did not operate as a stay of the maritime lien claim proceedings in Federal Court.

[16] Binnie J., at para. 16, stated that a "maritime lien is a secured claim" within the meaning of s. 136 of the ***BIA.***

[17] At para. 52, Binnie J. noted that "the policy of the [***Bankruptcy and Insolvency Act***] in the case of bankruptcy is not to interfere with secured creditors except in so far as may be necessary to protect the estate as to any surplus on the assets covered by the security".

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[18] At paras. 65-66, Binnie J. went on to hold that the maritime lien claims should be adjudicated as secured claims outside of the bankruptcy. It is in this context that I will assess the applicant's claims in the case at bar.

[19] As concerns the applicant crew members, I do not believe it is in dispute generally that the claims of seamen for wages, if proven, are maritime liens under Canadian maritime law, and are considered secured claims.

[20] In this case, all of the applicants also assert statutory lien claims under ss. 22(2)(m), (n) and (o) of the ***Federal Courts Act***, R.S.C. 1985, c. F-7. Those subsections provide as follows:

> **22(1) Navigation and shipping**
>
> The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.
>
> **22(2) Maritime jurisdiction**
>
> Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:
>
> …
>
> (m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;
>
> (n) any claim arising out of a contract relating to the construction, repair or equipping of a ship;
>
> (o) any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his or her employment;

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[21] As noted by Professor Tetley in ***Maritime Liens and Claims***, *supra*, at p. 1128, statutory rights *in rem*, unlike maritime liens, do not have the status of secured claims. They are thus ordinary claims subject to the scheme of distribution under the ***BIA***. However, both Allied and PSI submit that they are entitled to prove their claims *in rem* against the ship, elevated to a status *pari passu* with a maritime lien, under equitable principles of Canadian maritime law. They say that such an elevation would rank their claims to a secured creditor status above the claim of the Mortgagee.

[22] The basis upon which Allied and PSI say they are entitled to elevated status in the Federal Court of Canada proceedings is that as a result of their supply of labour and materials to the ship, the value of the ship was enhanced, and it would be inequitable for the Mortgagee to be enriched by that enhanced value without credit to the supplier of the goods and materials: see ***Maritime Liens and Claims***, *supra*, at p. 656.

[23] The Mortgagee disputes the seamen's claim to priority in this case as secured creditors under s. 136 of the ***BIA*** on the grounds that <u>these</u> seamen were engaged in operating an intra-provincial ferry, a provincial undertaking, and therefore s. 22 of the ***Federal Court Act*** has no application to them. In the result, the Mortgagee argues that the seamen's wages should be given only the priority they would have under s. 136(1)(d) of the ***BIA***. It makes a similar argument against Allied and PSI. I will turn to this "constitutional argument", as termed by the parties, in a moment.

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[24] Therefore, in conclusion, I agree with the Lien Claimants' argument that, subject to the constitutional argument, if they are successful in the Federal Court in proving their claims to maritime liens, and the enhancement claim in the case of Allied and PSI, those liens would be secured claims within the meaning of s. 136(1) and s. 2 of the ***BIA***. They would therefore be entitled to an order pursuant to s. 69.4 of the ***BIA*** that the statutory stay of proceedings in s. 69.3 of the Act should not apply to their actions.

[25] I note that the statements of claim filed by Allied and PSI in the Federal Court do not include in their claim for relief a declaration of entitlement to either a statutory lien or an enhanced claim. I have construed their claims as they could be amended. The seamen's claims do include a claim for such declaratory relief.

[26] These findings do not, however, entirely dispose of these applications. I now turn to the issue raised by the Mortgagee that because the Nanaimo Harbour Link Ferry is a provincial undertaking, Canadian maritime law has no application to these claims. Insofar as this argument has some constitutional implications, the Mortgagee has given the appropriate notice under the ***Constitutional Question Act***, R.S.B.C. 1996, c. 68. Neither the Attorney General of Canada nor the Attorney General of British Columbia has intervened.

## APPLICATION OF CANADIAN MARITIME LAW TO AN INTRA-PROVINCIAL FERRY

[27] The Mortgagee argues that Canadian maritime law does not create a maritime lien for wages for crew members of a vessel travelling solely in intra-provincial waters. Similarly, it argues that no maritime lien is created for the

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provision of necessaries by Allied and PSI for the same reason. In his written submissions on behalf of the Mortgagee, Mr. Baynham argued:

> 5. The Secured Mortgagee submits that due to the division of powers under the *Constitution Act, 1867*, maritime law, to the extent that it establishes a maritime lien for wages, has no application to crewmembers of a vessel travelling solely in intra-provincial waters.
>
> 6. In *ITO- International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] S.C.J. No. 38, the Supreme Court of Canada confirmed that the ambit of Canadian maritime law is limited by the constitutional division of powers under the *Constitution Act, 1867*, at page 16, paragraph 20:
>
>> *In reality, the ambit of Canadian maritime law is limited only by the constitutional division of powers in the Constitution Act, 1867*. I am aware in arriving at this conclusion that a court, in determining whether or not any particular case involves a maritime or admiralty matter, *must avoid encroachment on what is in "pith and substance" a matter of local concern involving property and civil rights or any other matter which is in essence within exclusive provincial jurisdiction under s. 92 of the Constitution Act, 1867*. It is important, therefore, to establish that the subject-matter under consideration in any case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence. (emphasis added)
>
> 7. Under s. 91(10) of the *Constitution Act, 1867*, Parliament has legislative jurisdiction over "Navigation and Shipping". However, the "Navigation and Shipping" power is limited by the constitutional division of powers and does not extend to matters that are within provincial jurisdiction.
>
> 8. Under s. 91(13) of the *Constitution Act, 1867*, Parliament has legislative jurisdiction over "Ferries between a Province and any British or Foreign Country or between Two Provinces".
>
> 9. Under s. 92(10) of the *Constitution Act, 1867*, the provinces have legislative jurisdiction over Local Works and Undertakings other than:
>
>> (a) lines of steam or other ships and other works or undertakings connecting the province with any other or others of the Provinces, or extending beyond the limits of the province;

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> (b) lines of steam ships between the province and any british or foreign country; and
>
> (c) such Works, although wholly situate within the Province, are declared by the Parliament of Canada to be for the general advantage of Canada or for the Advantage of two or more of the Provinces.

…

13. In *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (S.C.C.) (the "Eastern Canada Stevedoring Case"), Rand J. stated as follows at p. 20 (QL) about the ships that operated exclusively within one province:

> In both s. 91(13) and s. 92(10) and (16) works, undertakings and local services within provincial authority are contemplated, and the scope of Shipping must similarly be accommodated to strictly provincial subjects. In the case of a local ferry or service on, say, a lake wholly within a province, its existence, the regulation of schedules, tariffs and matters <u>unrelated to marine features</u>, mark out a provincial control consistent with the general regulation of Shipping. The government and management of the ship, including qualifications and discipline of the crew, and all matters relating to navigation, remain with Parliament: <u>but the civil rights of crews must be considered.</u>
>
> <u>…. In these, as in strictly local undertakings, the local interest is paramount and the civil rights of the crews prima facie find their regulation in provincial law. (emphasis added)</u>

[28] The ***Federal Court Act***, *supra*, provides at s. 22 that the Federal Court has concurrent original jurisdiction in all cases in which a remedy is sought under Canadian maritime law relating to any matter coming within the subject of navigation and shipping.

[29] The Federal Court Trial Division has jurisdiction to arrest a ship to entertain a claim for debts incurred on the ship's behalf and to assess the validity of a maritime

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lien: ***Holt Cargo Systems***, *supra*, at para. 37. Mr. Baynham argued that the Federal Court has no jurisdiction to arrest a ship or exercise its admiralty jurisdiction in respect to a debt claim within provincial jurisdiction.

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[30] The question in this case is therefore whether, by virtue of the fact that the vessel plies only intra-provincial waters, that is, between two ports in British Columbia, the lien claims are, in pith and substance, related to navigation and shipping and a matter of federal jurisdiction, or property and civil rights and a matter of provincial jurisdiction.

[31] In the case of ***Reference re: Industrial Relations and Disputes Investigation Act (Canada)***, [1955] S.C.R. 529, [1955] 3 D.L.R. 721 (the "***Eastern Canada Stevedoring Case***"), referred to by Mr. Baynham in his submissions, the court was asked to determine whether federal labour relations legislation applied to the employees of a stevedoring company located in Toronto, and whether the legislation in question was *ultra vires* the Parliament of Canada. Part 1 of the legislation, which was in issue, stated, in part, that it applied:

> in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including but not so as to restrict the generality of the foregoing, (a) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada.

[32] The concern was that the legislation in question related to property and civil rights, an area of provincial jurisdiction.

[33] The majority of the court held that the legislation was *intra vires* the Parliament of Canada and that it applied to the stevedores, who performed work on ships that operated between ports in Canada and outside of Canada, an area of exclusive federal jurisdiction. Rand J., writing separate reasons, concluded that crews of vessels engaged in strictly local undertakings or services and locally organised stevedores were outside the scope of the legislation. Locke J., also writing separate reasons, similarly concluded that that legislation did not apply to shipping activities confined within a province.

[34] In ***Hawker Industries Limited v. Santa Maria Shipowning and Trading Company S.A.,*** [1979] 1 FC 183, 89 D.L.R. (3d) 699, the court held that a contract for repair of a ship that arrives in port after becoming disabled at sea is subject matter within the body of Canadian maritime law. Jackett C.J. held, at para. 9, that "… it is not an over-generalization to say that the doing of what is necessary to enable ships to carry on their navigation operations is something that falls within the field of activity regulated by Admiralty law."

[35] In ***Whitbread v. Walley***, [1990] 3 S.C.R. 1273, 77 D.L.R. (4th) 25, the appellant Whitbread sailed a federally registered pleasure craft from Vancouver to Indian Arm via Burrard Inlet, a body of water within provincial boundaries. Whitbread asked his companion to take over the helm and then fell asleep. The ship ran aground causing Whitbread to suffer a serious injury. The defendant applied for a declaration that he was entitled to rely on the limitation of liability provisions contained in the ***Canada Shipping Act***, R.S.C. 1985, c. 5-9. The court held that the

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defendant's liability was a matter of federal, not provincial, law regardless of whether the body of navigable water was inland or tidal. La Forest J., at p. 1295, stated:

> For it would be quite incredible, especially when one considers that much of maritime law is the product of international conventions, if the legal rights and obligations of those engaged in navigation and shipping arbitrarily changed as their vessels crossed the point at which the water ceased or, as the case may be, commenced to ebb and flow. Such a geographic divide is, from a division of powers perspective, completely meaningless, for it does not indicate any fundamental change in the use to which a waterway is put. In this country, inland navigable waterways and the seas that were traditionally recognized as the province of maritime law are part of the same navigational network, one which should, in my view, be subject to a uniform legal regime.

[36] In ***Ordon Estate v. Grail***, [1998] 3 S.C.R. 437, 166 D.L.R. (4th) 193 at para. 73, the Supreme Court of Canada stated that the question of whether a claim falls within the ambit of federal maritime law (i.e. navigation and shipping), involves an examination of the factual context of the claim and that "[t]he test for making this determination is to ask whether the subject matter under consideration in the particular case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence."

[37] In ***Isen v. Simms*** , 2006 SCC 41, Isen, the owner of a 17-foot pleasure craft, was preparing the boat for transport over Ontario highways when a bungee cord slipped from his grasp and injured Simms. Isen denied liability, and also obtained a declaration from the Federal Court that in the event he was found liable, his liability would not exceed $1 million pursuant to s. 577 of the ***Canada Shipping Act***, *supra*. The Federal Court of Appeal upheld the ruling, and Simms appealed to the Supreme Court of Canada.

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[38] Rothstein J., writing for the court, held that the allegedly negligent acts were not governed by federal maritime law, but rather, were governed by provincial law. Rothstein J. further held that the ***Canada Shipping Act*** was not constitutionally applicable to the appellants' action for damages, and thus the respondent could not claim the benefit of the limitation of liability. At para. 20, he commented as follows:

> The constitutional division of powers lies at the heart of this issue. Maritime law falls within Parliament's jurisdiction over navigation and shipping under s. 91(10) of the *Constitution Act, 1867*,: see [*ITO*]. … In *ITO*, McIntyre J. confirmed that the ambit of Canadian maritime law is limited by the constitutional division of powers under the *Constitution Act, 1867*.

[39] The Court held that Canadian maritime law did not apply and stated, at paras. 24 and 25, that:

> Parliament does not have jurisdiction over pleasure craft *per se*. The mere involvement of a pleasure craft in an incident is not sufficient to ground Parliament's jurisdiction. Rather, in cases such as this, a court must look at the allegedly negligent acts and determine whether that activity is integrally connected to the act of navigating the pleasure craft on Canadian waterways such that it is practically necessary for Parliament to have jurisdiction over the matter. …
>
> … A uniform federal law respecting the launching and removal of pleasure craft is practically necessary as such activities can pose a hazard to and interfere with the navigation of other vessels using the waterway. Moreover, the standard of care applicable to these acts, whether it arises from boating regulations or negligence law, is unique to the maritime context.

[40] At paras. 26 and 27, the court went on to hold that:

> The actions of the respondent had nothing to do with navigation of the boat on water and everything to do with preparing the boat to be transported on Ontario's highways …

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> … It would be anomalous that provincial law would apply to carriage of other goods on Ontario highways, but that maritime law would apply when the goods are a boat.

[41] At para. 28 Rothstein J. adopted the dissenting reasons of Décary J.A. in the court below, where he said:

> The accident occurred on land. The injury was caused on land by a person who was neither on the boat nor in the water. There is no contract for carriage of goods by sea. There are no goods at issue. Nothing has happened on water which could be said to be directly or even indirectly related to the accident. There is no issue as to the seaworthiness of the ship, the issue at best being one as to the roadworthiness of a boat being prepared on land for road transportation. There are no *in rem* proceedings. There are no concerns of good seamanship. *There are no specialized admiralty laws, rules, principles or practices applicable.* The accident has nothing to do with navigation nor with shipping. There is no practical necessity for a uniform federal law prescribing how to secure the engine cover from flapping in the wind when a pleasure craft is transported on land in a boat trailer. The sole factor possibly connected to maritime law is that the pleasure craft had just come out of the water and was still being secured on the trailer when the accident happened. This, clearly, is not enough to constitute an integral connection with navigation and shipping and an encroachment of civil rights and property. [Emphasis added]

[42] In this case there are *in rem* proceedings, and there is a practical necessity for uniform federal law prescribing the enforcement of claims for seamen's wages and repairer's liens as described above by Binnie J. in ***Holt Cargo***.

[43] The Mortgagee relies heavily on the case of ***Singbeil v. Hansen*** (1985), 19 DLR (4th) 48, 63 B.C.L.R. 332 (C.A.). This case concerned an application to set aside a garnishing order attaching wages due to a seaman employed by the British Columbia Ferry Corporation. The court held that the garnishment of a seaman's wages does not relate to navigation and shipping where he is employed by a local

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undertaking. Seaton J.A. relied on ***Eastern Canada Stevedoring*** case, *supra*, and quoted from the judgment of Rand J., at pp. 745-746, as follows:

> In both s. 91(13) and s. 92(10) and (16) works, undertakings and local services within provincial authority are contemplated, and the scope of Shipping must similarly be accommodated strictly to provincial subjects. In the case of a local ferry or service on, say, a lake wholly within a Province, its existence, the regulation of schedules, tariffs and matters [unrelated] to marine features, mark out a provincial control consistent with the general regulation of Shipping. The government and management of the ship, including qualifications and discipline of the crew, and all matters relating to navigation, remain with Parliament: but the civil rights of crews must be considered.
>
> Shipping is not confined to the larger sense of undertakings such as "lines of ships"; it may be fluid both in routes and functions. Single ships may be engaged in interprovincial or foreign commerce today, otherwise than incidentally; and local trade tomorrow: they may be carriers of goods for their owners or for the public: they may compose fishing fleets as in the Maritime Provinces and British Columbia with employees in incidental activities. They have their home port in a Province. In these, as in strictly local undertakings, the local interest [is] paramount and the civil rights of the crews prima facie find their regulation in provincial law.

[44] In his concurring reasons in ***Singbeil***, Lambert J.A. stated:

> My third comment is that laws that are truly laws in relation to matters coming within the class of subjects "navigation and shipping" in head 91(10) of the *Constitution Act, 1867* will apply to the British Columbia ferries. It is not necessary for me to deal further in this case with the legislative competence of the Parliament of Canada under head 91(10), or with whether "navigation" should be treated as a separate head from "shipping". The law has been settled by the Supreme Court of Canada that legislative competence over labour relations follows the legislature that has the power to regulate the particular undertaking. The legislative competence of the Parliament of Canada over "navigation and shipping" deals with many matters that impinge on the operations of the British Columbia ferries, but it does not encompass the regulation of the British Columbia ferries as an undertaking. The power to regulate the British Columbia ferries as an undertaking rests with the provincial Legislature.

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> This case illustrates the problems that may arise in the process of categorizing a law as being, on the one hand, in relation to a matter coming within the class of subjects, "navigation and shipping", or as being, on the other hand, in relation to the matter of employment relations and labour relations on a federal undertaking. I have looked at the history of para. 205(1)(a), in its context, and at its primary purpose and primary effect, and I have categorized that provision as coming within employment relations and labour relations on a federal undertaking. But if the provision had related more directly to the safety of the vessel, in its operations, such as a provision about consecutive working hours or the size of the crew, I would have had to consider whether the law came within "navigation and shipping", as well as, or instead of, employment relations and labour relations on a federal undertaking, and so would apply to provincial maritime undertakings.
>
> I have not considered any of the provisions of Part III of the *Canada Shipping Act*, other than s. 205, for the purpose of determining which, if any, of those provisions could be constitutionally upheld under head 91(10) as well as, or instead of, under the constitutional headings relating to federal undertakings.
>
> In my opinion, para. 205(1)(a) of the *Canada Shipping Act* is within the legislative competence of the Parliament of Canada; but it does not apply to permit the garnishment of the wages of James Hansen, in his service on the British Columbia ferry "Queen of Oak Bay", because that would be an unconstitutional application. Paragraph 205(1)(a) should be read down to prevent such an unconstitutional application.

[45] In ***Singbeil***, there were conflicting statutes. A federal law stated that seamen's wages could not be attached, while a provincial law stated that wages could be attached. The court found that the issue of attachment as between a third party and seaman was not sufficiently related to navigation and shipping to bring the matter into exclusive general federal jurisdiction.

[46] In this case, the Mortgagee's main argument is that the vessel is part of a provincial undertaking similar to the one in ***Singbeil***, which involved a claim concerning wages paid to an employee of the British Columbia Ferry Corporation. The provincial ferry system is considered an extension of the provincial highway

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system whereas in this case, the ship is a private passenger ferry. The vessel, as this case illustrates, is highly movable. In the event of a termination of the business by the owner, there is nothing preventing the vessel from suddenly and permanently leaving the province, thus leaving the seamen without security.

[47] Mr. Williams, counsel for Captain Lars Friis, distinguished ***Singbeil*** on the basis that the claim in that case was between a creditor and the seaman, and it was unrelated to the vessel. The claim was only related to the maritime employer because it was the conduit of attachment. Effectively, the claim was not a seaman's claim against a vessel for unpaid wages. In the case at bar, the unpaid seaman's claim arises as a result of the navigation and operation of the vessel. Thus, Mr. Williams argued that the crew's wages are integral to navigation and shipping.

[48] In my view, the fact that the business of the owner of the vessel "Harbourlynx" operated within provincial boundaries does not characterize the navigation and shipping aspects of the ship's operation as something outside the federal powers of navigation and shipping. I would distinguish ***Singbeil*** on the grounds suggested by Mr. Williams. Moreover, the *ratio* of ***Whitbread*** implicitly overrules the *dicta* in ***Singbeil***, if ***Singbeil*** is understood to stand for the proposition that ships plying intra-provincial waters are provincial undertakings.

[49] In the case at bar, the seamen operated the vessel in question. The Mortgagee's argument would require a court to segregate lien claims under s. 22 of the ***Federal Court Act***, *supra*, on the basis that the business of the owner of the vessel, at the time the seaman worked, operated wholly within the province. In my

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view, such an argument runs counter to Canadian and international maritime law, which states that a seaman's claim attaches to the vessel, not to the owner, because the vessel is a highly moveable object. In my view, the underlying rationale for this maritime legal proposition is applicable whether or not a boat plies intra-provincial waters or inter-provincial waters.

[50] Similarly, a supplier of materials and services that enable the vessel to operate should not have to enquire into the business of the owner to determine if its business is operated solely within provincial boundaries. Such an argument runs counter to the notion that navigation and shipping, even on inland waters, is a federal power: see ***Whitbread***.

[51] As an example, drawing an artificial distinction between the legal rights of a ship repairer employed on a ship running between Alaska and Vancouver, and one employed on a ship running between Prince Rupert and Vancouver, runs counter to long standing principles of maritime law that a ship repairer could look to the ship wherever located as security for his claim concerning labour and materials contributed to the operation of the ship.

[52] I conclude that the labour of the seamen and the supply of necessaries to repair the ship are integrally connected to the navigation of the ship on the sea. The ship cannot operate without the Lien Claimants' supply of goods and services.

**CONCLUSION**

[53] In summary, I conclude the following:

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- The claims of the seamen, Allied and PSI, are integrally connected to, and therefore, in pith and substance related to the operation and navigation of the ship. The fact that the ship at the time of the provision of the materials and services plied only intra-provincial waters does not change the character of those services to debt claims solely within provincial jurisdiction: ships plying navigable waters in Canada or even within a province are subject to one navigable network with uniform laws;

- The seamen's wages, if proven, constitute a maritime lien;

- The claims of Allied and PSI are statutory claims and Allied and PSI should have the opportunity to argue that the labour and material enhanced the value of the ship and therefore elevated all or part of their claim to rank *pari passu* with the maritime liens;

- The secured claims of the lien holders are secured claims within the meaning of s. 136 and s. 2 of the ***BIA*** and therefore the scheme of distribution under the ***BIA*** will not apply to the secured lien claims, if proven in Federal Court.

- The ranking of the priorities, and the proof of, the maritime claims is a matter for the Federal Court of Canada to determine pursuant to the principles of Canadian maritime law.

**DISPOSITION**

[54] The Mortgagee applied for:

(a) a declaration that Captain Lars Friis and all affected crew members, Kurt Henderson and Douglas Griffiths are unsecured creditors in the bankruptcy with preferred status under s. 136(d) with respect to their wage claims, that they are unsecured creditors in the bankruptcy with respect to any severance claims, and that the stay of proceedings under ss. 69 and 69.3 of the ***BIA*** remain in effect;

(b) a declaration that Allied Shipbuilders and PSI are unsecured creditors in the bankruptcy and that the stay of proceedings under ss. 69 and 69.3 of the ***BIA*** remain in effect.

[55] I believe the appropriate disposition of the Mortgagee's application is to adjourn it pending the resolution of the Federal Court proceedings. There may be portions of the Mortgagee's application which should be allowed depending upon the outcome of the Federal Court proceedings. Consequently, the Mortgagee's application is adjourned generally. As this issue was not canvassed at the hearing before me, counsel are at liberty to speak to the appropriate disposition of the terms of the adjournment of the Mortgagee's application if necessary.

[56] Allied and PSI applied for orders pursuant to s. 69.4 of the ***BIA*** that the statutory stay of proceedings in s. 69.3 of the ***BIA*** shall not apply to:

a) Federal Court Action No. T-319-06, admiralty action *in rem* against the Ship "Harbourlynx" and in Personam, with Allied Shipbuilders as Plaintiff and Nanaimo Harbour Link Corporation, the Ship

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"Harbourlynx" and the owners and all others interest in the ship "Harbourlynx" as Defendants; and

b) Federal Court Action No. T-380-06, admiralty action *in rem* against the Ship "Harbourlynx" and in Personam, with PSI as Plaintiff and Nanaimo Harbour Link Corporation, the Ship "Harbourlynx" and the owners and all others interest in the Ship "Harbourlynx" as Defendants.

[57] The application of PSI and Allied is granted on the terms applied for.

[58] Captain Lars Friis and other crew members of the vessel applied for a similar order in respect to admiralty action T-1372-06. That application is granted.

[59] The Lien Claimants are entitled to costs of this proceeding at Scale C.

"N. Garson, J."
The Honourable Madam Justice N. Garson

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Federal Court Cour fédérale

**Date: 20160526**

**Docket: T-1683-14**

**Citation: 2016 FC 570**

2016 FC 570 (CanLII)

**Montreal, Quebec, May 26, 2016**

**PRESENT: The Honourable Mr. Justice Harrington**

**BETWEEN:**

**BALLANTRAE HOLDINGS INC.**

**Plaintiff**

**and**

**THE OWNERS AND ALL THOSE INTERESTED IN THE SHIP "PHOENIX SUN" AND THE SHIP "PHOENIX SUN"**

**Defendants**

**JUDGMENT AND REASONS**

[1] If things seem too good to be true; they probably aren't good and probably aren't true. So it is with the schemes of Mengu Pasinli. His plan was to buy the Canadian ship, the PHOENIX SUN, then under arrest at the port of Sorel; render her sufficiently seaworthy for one last voyage; find a cargo to carry overseas and then sell her in Turkey for scrap. When all was said and done, he projected a profit in excess of $1,000,000.

[2] On November 26, 2013, he, through one of his companies, Goldrich Waters International Shipping Ltd. of Hong Kong, purchased the PHOENIX SUN from the acting marshal in admiralty for $1,050,000. The ship was then deleted from the Canadian registry. He had borrowed that entire amount from the plaintiff, Ballantrae Holdings Inc., which took out a mortgage and other security. Thereafter he hired a crew in Turkey, and a Canadian welder to work on the ship. He persuaded others to pay the crew's passage to Canada, and ship chandlers to provide necessaries on credit. Some of the crew's wages and some of the claims of the ship chandlers were paid by others. It seems that Mr. Pasinli is not out of pocket at all.

[3] It all came to nought. The PHOENIX SUN was never rendered seaworthy. In fact she never left her berth. Creditors refused to advance further sums. The crew was left penniless and hungry. They were fed by the good people of Sorel.

[4] On July 29, 2014, Ballantrae filed an action *in rem* and *in personam* in this court. The following day the PHOENIX SUN was arrested. She was later sold by the acting marshal on November 12, 2014, for $682,500.

[5] In addition to Ballantrae, various creditors had filed caveats and in accordance with directions of the Court have filed their claims. As is the practice the evidence consists of affidavits and cross-examinations. The only exception is the Master and crew whose evidence was taken *de bene esse*. Not everyone contested the claims of the other creditors. For instance, it was clear that there were sufficient funds available to pay in full the crew and the necessaries men who enjoyed a maritime lien. Unfortunately the proceeds of this sale do not nearly approach

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the amount of the claims, so the issues at the hearing in Montreal on April 7 and 8, 2016, were the validity of the claims and the ranking of priorities. I will set out the claims in order of the ranking the claimants assert, leaving aside claims which had been struck before the hearing and the claim of Jarud Corporation Limited which was discontinued during the hearing. The defendant owners did not participate.

[6] When there are insufficient funds to meet the claims of all the creditors they must persuade the Court that their claims enjoy priority. Otherwise valid claims rank *pari passu*.

[7] There is no statute or single case which establishes an exhaustive list of priorities. Limiting myself to this case there are four groups of claims. I need not deal with maritime liens *inter se* or possessory liens.

[8] The first group, enjoying the highest priority, are the claims for costs incurred in converting the ship into a fund available for distribution to the creditors. These are the Marshal's fees and disbursements and the costs of the party which brought the ship to sale.

[9] The second group consists of maritime liens and those liens created by statute which enjoy the same status.

[10] Mortgages came next. One complication is that Ballantrae's mortgage was not registered.

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[11] The rest of the claims consist of alleged equitable charges. Some of these claimants may simply be entitled to arrest the ship in an action *in rem* and do not enjoy priority. Some may have claims against the shipowner which do not sound in admiralty at all.

[12] Furthermore, on occasion when the interests of justice so require, our court in the exercise of its admiralty and equitable jurisdiction may alter the traditional ranking.

[13] This case also raises the issues of both pre-sale and post-sale interest. Some, but not all, of the claims carry with them an agreed contractual rate of interest. The fund on deposit in court earns interest, but at a paltry rate.

[14] These reasons are broken down as follows:


| | |
|---|---|
| Alleged Priorities | paragraphs 15 - 23 |
| Skylane Worldwide Ltd. | paragraphs 24 - 32 |
| The Marshal | paragraph 33 |
| Ballantrae's Costs of Sale | paragraphs 34-38 |
| The Twelve Seafarers | paragraphs 39 -61 |
| Mustafa Hakan Etiz | paragraphs 62 - 67 |
| La Ville de Sorel-Tracy | paragraphs 68 - 79 |
| The Necessaries Men | paragraphs 80 -83 |
| Ian Hamilton | paragraphs 84 - 97 |
| Ballantrae | paragraphs 98 - 103 |
| The Mortgage | paragraphs 104 - 121 |
| Ontario *Personal Property Security Act* | paragraphs 122 - 130 |
| Federal Court Jurisdiction | paragraphs 131 - 147 |
| Interest | paragraphs 148 - 154 |
| Costs | paragraphs 155 - 163 |
| *Official Languages Act* | paragraph 164 |


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Priorities

[15] The claim with the highest priority is without doubt the claim by the acting marshal for his fees and expenses in the amount of $39,106.37.

[16] The second ranking claim would be that of Ballantrae Holdings Inc. for its costs incurred in converting steel into cash. At the hearing its solicitors tentatively asserted $25,000, but were called upon to furnish better particulars. They have now come up with a claim of $42,419.37.

[17] The next ranking claims would be those of the Master and crew members of the PHOENIX SUN (the twelve seafarers) for wages and other remuneration or benefits arising out of their employment. Their best arguable case, converting the principal amount of their claim which is in US dollars to Canadian dollars as of the judgment date (assuming no difference in exchange between the hearing date and the judgment date), is $180,716.68.

[18] There is another alleged crew member, Mr. Mustafa Hakan Etiz, who entered into an employment contract with the owners as a fitter/duty officer. He also asserts a mariner's maritime lien in the amount of $50,875.

[19] The next ranking claim, if well founded, is that of la Ville de Sorel-Tracy for berthage in the principal amount of $75,460.01 and for the supply of electricity in the principal amount of $22,407.02. The interest claimed thereon shall be dealt with later in these reasons. It claims a high ranking statutory lien in accordance with section 122 of the *Canada Marine Act*. Failing

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that it claims a statutory lien in virtue of section 139 of the *Marine Liability Act*. Finally, if those provisions, on which more shall be said, do not apply, it submits that if it only has an ordinary right *in rem*, the Court in the exercise of its admiralty and equitable jurisdiction should grant it a higher priority.

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[20] Next follows the claims of three necessaries men, Blue Water Agencies Limited, Pronova Systems Limited, and 185888 Canada Inc. (formerly North Star Ship Chandler Inc.). The principal amount of their claims totals $59,571.63. As a result of the enactment of section 139 of the *Marine Liability Act*, all three enjoy a statutory lien, which carries with it the priority of a maritime lien.

[21] Mr. Ian Hamilton and his company, Through Logistics Corp, claim $240,578.47. Mr. Hamilton paid to get the crew from Turkey to Canada, paid some of their wages and paid some of the claims of the ship chandlers. They claim a lien pursuant to section 139 of the *Marine Liability Act* for part of the claim, and an equitable charge over the balance.

[22] Skylane Worldwide Limited asserted a registered Panamanian mortgage, and has claimed USD 1,350,000 which at the hearing, based on an exchange rate of 1.28, was CAD 1,728,000.

[23] The last and remaining creditor is Ballantrae. It lent Mr. Pasinli the $1,050,000 needed to purchase the PHOENIX SUN. It entered into security agreements including a mortgage which, due to a breach of contract on the part of the defendants, was never registered. It nevertheless asserts it has a security interest in virtue of the mortgage. It also asserts priority rights as the

holder of a registered personal property security interest pursuant to the Ontario *Personal Property Security Act*. At the heart of Ballantrae's claim is a loan agreement with Trenton Shipping and Trading Limited, of which Mr. Pasinli represented himself as the sole shareholder. The plan was that Trenton would buy the PHOENIX SUN. However, for reasons Mr. Pasinli did not fully disclose, he had the bill of sale made out to another company of which he claimed to be the sole shareholder, Goldrich Waters International Shipping Co. Ltd. Mr. Pasinli, Trenton, Goldrich, and other Pasinli companies were all *prête-noms*, one for the other, and no distinction should be drawn amongst them.

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[24] Thus, the principal amount of the claims asserted at the opening of the hearing on April 7, was $3,496,669.83 against a fund of $682,500.

Skylane's Claim Dismissed

[25] Skylane has prevented the orderly and timely development of this case. It constantly missed deadlines and obtained extensions. It was called upon to file evidence as to the validity of its mortgage under Panamanian law. Finally Prothonotary Morneau ordered it to file its evidence as to Panamanian law, failing which its claim would be struck. It failed to do so. Mr. Hamilton and his company thereafter moved that the claim be struck.

[26] A few days before the scheduled hearing on April 7, Skylane's solicitors stated that they should no longer be considered as Skylane's counsel of record. I pointed out that under Rule 125 they were required to make a formal motion. At the opening of the hearing a motion was ready, but had not been served. I declined to accept it for filing. The Court frowns upon last-minute

motions of this sort and in any event even if granted it could only have taken effect after Skylane was served in the British Virgin Islands. The hearing, which had been scheduled for some time, was not to be postponed.

[27] I then granted Mr. Hamilton's motion with costs against Skylane.

[28] As stated during the hearing there were at least two other reasons why Skylane's claim should be struck. The first was that the only evidence as to the validity of its mortgage under Panamanian law was the expert evidence of Eduardo Antonio Real Solis, a Panamanian attorney. His evidence, which in no way was contradicted, and which the Court accepts, is that for several reasons Skylane's alleged mortgage was null and void and of no effect.

[29] The third reason is that the alleged mortgage was entered into November 11, 2014. The PHOENIX SUN had been under arrest in this court since July 30, 2014, and had been advertised for sale by auction the following day, November 12, 2014.

[30] A shipowner cannot deal with a ship under arrest in such a way as to dissipate its value to the then existing creditors.

[31] I referred to the *obiter* remarks of Mr. Justice Forest of the Quebec Superior Court in *Security National Bank c Fournier* (24 February 1976), Montreal 05-000357-75. Peripheral to the claim in that action which was on loan guarantees, the ship in question, the *Atlantean I* had been sold by the Small Claims division of the Quebec Provincial Court while she was under

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arrest in this court. Mr. Justice Forest was of the view that the alleged sale was null and of no effect. In the circumstances he had no need to cite the cases which he said had been put before him.

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[32] Those authorities would have included the *Cella*, (1888) 13 PD 82, where Lopes L.J. said at page 88:

> From the moment of the arrest the ship is held by the court to abide the result of the action, and the rights of parties must be determined by the state of things at the time of the institution of the action, and cannot be altered by anything which takes place subsequently.
>
> (As quoted by Brandon J. as he then was, in *The Monica S.*, [1967] 3 All ER 740 at 754)

The Marshal's fees and disbursements

[33] The acting marshal's fees and disbursements of $39,106.37 have already been paid out by court order, without interest.

Ballantrae's costs

[34] It is well established that the costs of the moving party, usually, as in this case, the plaintiff, in bringing the ship to sale rank with Marshals' costs: McGuffie, Fugeman & Gray, *British Shipping Laws: Admiralty Practice*, vol 1 (London, UK: Stevens & Sons, 1964) at para 1574; Chircop et al, eds, *Canadian Maritime Law*, 2nd ed (Toronto: Irwin Law, 2016) at 263–265. The underlying philosophy is that all creditors benefit from a fund against which they can

claim, and hopefully receive payment. However, the costs of Ballantrae, and the others, in asserting their own claims and contesting the claims of others do not fall into this category.

[35] There is one caveat in this case. Long after the sale, Prothonotary Morneau ordered Ballantrae to prepare a "joint record for adjudication and ranking of claims". These three volumes were of great assistance to the Court, and I daresay to all parties, and so Ballantrae should receive some compensation.

[36] Ballantrae claims $42,419.37 on a solicitor-client basis. It points out that Mr. Justice MacKay ordered solicitor-client costs in *Holt Cargo Systems Inc v The Ship Brussel et al*, 185 FTR 1, 2000 FCJ No 197 (FCTD) (QL). However, it is rare for costs to be awarded on a solicitor-client basis. I see no reason why I should not apply the default provision of Tariff B, Column III, mid-range.

[37] Mr. Hamilton suggests that since Ballantrae is receiving some funds from a guarantor, the equitable doctrine of Marshaling should apply. I disagree. Such sums as it may receive from guarantors of the shipowners' debt simply reduce the capital amount of that debt. Any such payment does not relate to the costs of bringing the ship to sale.

[38] Ballantrae is entitled to the preparation of and filing of the statement of claim, affidavit to lead warrant, warrant of arrest, the motion to sell, appearances on motions including attending at the sale and preparing the joint record. I grant it 40 units at $140 per unit, or $5,600. I accept its

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disbursements in the amount of $5,819.60 – of which $5,252.74 is subject to Ontario HST of 13% – for a total of $12,830.46.

The Claim of the Twelve Seafarers

[39] The contracts of the Master and eleven crew members called for payment of wages and benefits in US dollars. Most of their claim is beyond doubt. However, there are three unresolved issues. They were promised a retainer or stand-by fee of one-third of a month's salary for not working on the ship. Although this claim is perfectly valid against the owners, does it benefit from a maritime lien? The second issue is the length of their employment contract. The third is the date on which their claim should be converted into Canadian dollars. They submit that in the circumstances the conversion should be at the date of judgment (or at the date of hearing) rather than on the date of breach. On the breach day rule, the US dollar was worth CAD 1.10. On the judgment day (or hearing day) the rate would be CAD 1.28.

[40] The Master and crew submit that they suffered a loss in the rate of exchange due to delays in obtaining a hearing date. In equity they should be compensated.

[41] As stated during the hearing, I am not prepared to depart from the breach day rule. This court is not a currency speculator. Our dollar goes up and our dollar goes down against the US dollar, the Euro and the Special Drawing Rights of the International Monetary Fund. At times the breach day rule will benefit claimants, other times not.

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[42] Furthermore the breach day rule is the rule set down by the Supreme Court (*Gatineau Power Company v Crown Life Insurance Company*, [1945] SCR 655). In *NV Bocimar SA v Century Insurance Co*, (1984) 53 NR 383, [1984] FCJ No 510 (FCA) (QL) (*The Hasselt*), Mr. Justice Hugessen, speaking for the Federal Court of Appeal, held it was not open to that court to change the rule adopted by the Supreme Court. That decision was reversed in the Supreme Court, but not on this point: [1987] 1 SCR 1247, [1987] SCJ No 39 (QL).

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[43] I am bound by the rule of *stare decisis*. In *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331, the Supreme Court set out the narrow circumstances in which a lower court might not follow the decisions of a higher court:

> [44] The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42).

[44] There is nothing new in this case. Currencies go up and currencies go down.

[45] It is unfortunate that there has been a delay in paying the crew members. That delay was attributable to parties who had departed the scene by the time of the hearing. It was clear that parts of the claim of the Master and crew were unassailable and so I ordered the immediate payment out of $62,775.54 in principal plus interest of $407.67. It should be noted that the other

parties were prepared to consent to a higher interlocutory payout, but I had to study the evidence with respect to the termination of the contract.

[46] Ballantrae, supported by Mr. Hamilton, contests two parts of the claim by the Master and the eleven crew members. Each claims a retainer or stand-by fee of one-third of a month's wages. The crew members were supposed to be dispatched to the ship earlier than they were. In consideration of their not seeking employment elsewhere, Mr. Pasinli promised this additional payment. The issue is not whether the promise was made; I accept that it was. The issue is whether this portion of the claim benefits from a maritime lien. In my opinion, it does not.

[47] The second issue is the date employment was terminated. Ballantrae submits that the cut-off date should be September 21, 2014, the date on which the crew left the ship and returned to Turkey. The twelve seafarers submit that under the terms of their contract they were entitled to further payment. I agree.

[48] It should be mentioned that neither they, nor anyone else, is claiming the cost of repatriation from Canada to Turkey. It appears that an unnamed Good Samaritan paid their way but does not seek compensation from the fund generated by the sale of the ship.

[49] Turning now to the retainer fees, they total some USD 11,766.69.

[50] The courts both here and elsewhere have been increasingly generous when it comes to crew wages, which include emoluments as set out in section 22(2)(o) of the *Federal Courts Act*

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and sections 2 and 86 of the *Canada Shipping Act, 2001*. See also Tetley, *Maritime Liens and Claims*, 2nd ed (Montreal: Yvon Blais, 1998), ch 8.

[51] Counsel for the seafarers submits that the retainer or stand-by fee was an integral part of their employment contracts, even though not reduced to writing. Reliance was placed on a general statement by Fisher J. in *Mobil Oil New Zealand Ltd v The ship "Rangiora" (No 2)*, [2000] 1 NZLR 82 (HC), that wages should include "any form of payment which has been promised in return for the seafarers' agreement to work on the ship". It was submitted that this New Zealand case is in line with Canadian jurisprudence particularly the decision of Madam Justice Snider in *Canadian Imperial Bank of Commerce v Le Chene No. 1*, 2003 FC 873. Madam Justice Snider accepted that the scope of the seamen's maritime lien has evolved and expanded to meet the ever changing nature of their employment.

[52] Both the *Rangiora* and *Le Chene No. 1* relate to termination of employment issues after the seamen joined the ship in question. There are many reasons why a seaman may be employed and paid before joining a specific ship. A prudent shipowner may well wish to provide training in its policies and procedures and alert the prospective crew to the intricacies and particularities of the ship in question. While I am prepared to accept that the Master and crew have a claim *in personam* against the owners and *in rem* against the ship, they do not benefit from a maritime lien arising from a promise that they not work elsewhere.

[53] Turning now to the length of employment, as noted by Madam Justice Snider in *Le Chene No. 1*, our law has evolved with respect to entitlements after the ship and crew have

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parted company. The owner may have gone into formal liquidation or wrongfully dismissed the crew.

[54] In this case, the first six crew members (Messrs. Karasu, Ergun, Cenik, Meral, Guray and Ucman) signed on the ship in Canada on April 6, 2014, four more (Captain Ozkan and Messrs. Kan, Ates and Kaan) on April 12, 2014 and the remaining two (Messrs. As and Gumusoz) on June 2, 2014. All signed a "Seafarer Employment Agreement" with Menpas Shipping and Trading Inc., a Pasinli company which acted, among other things, as the crewing agent. Each was "employed for a period of 2+2+2 months (at shipowner's option) commencing on the date of embarking to the ship at Sorel --".

[55] It was further provided that unless a notice of termination was given before the end of each two-month period, the contract was prolonged for another two months. The required notice if given by the shipowner was seven days; if given by the seafarers, fifteen days. No formal notice, so called, was ever given.

[56] The crew were paid through to the end of June 2014 and should have received their July wages by August 5th. Nevertheless, Mr. Pasinli assured them they would eventually be paid and so they continued to work the ship until they left on September 21, 2014.

[57] Mr. Pasinli was served with the seafarers' caveat and motion to have their evidence taken *de bene esse* on September 9, 2014. Both the notice of motion and the supporting affidavit of the Master, Semih Ozkan, stated that all twelve were scheduled to leave Canada and return to

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Turkey on September 21, 2014. In the circumstances, I find that the service of the motion upon Mr. Pasinli on September 9th served as constructive notice of termination of employment.

[58] On that basis, the contracts of the six crew members who arrived on April 6th and the four who arrived on April 12th were extended on August 6th and August 12th respectively. As no timely termination notice was given during the second term, the third two-month employment term came into play so that they are entitled to compensation to October 6 and to October 12, 2014. Based on *Le Chene No. 1*, it matters not whether compensation for the period after they left the ship on September 21, 2014 is characterized as severance pay, wrongful dismissal or simply completion of the contract.

[59] Unfortunately, the situation with respect to the remaining two crew members who joined on June 2nd is somewhat different. The initial two-month period ended August 2nd and the second on October 2nd. They gave notice within the required fifteen days and so are only entitled to four months' payment, all told, while the first ten crew members are entitled to six months' payment.

[60] I shall calculate the principal amount to which each is entitled, before subtracting the amounts in principal ordered to be paid out on April 11, 2016. I have also taken into account that each of the twelve members was paid $100.00 after July 1, 2014 by Mr. Hamilton and that, furthermore, Captain Ozkan is entitled to additional back pay, due to a change of position, of USD 818.67 and Mr. Ucman is entitled to back pay of USD 532.00.

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[61] On that basis, Captain Ozkan is entitled to $28,741.89 less the earlier payment out by the Court of $13,448.34 leaving a balance owing in principal of $15,293.55. Likewise the rest of the crew is owed, in Canadian dollars:

| Crew Member | Total Owed | - Already Paid | = Remaining Owed |
|---|---|---|---|
| Mr. Karasu | $26,246.77 | - $12,550.00 | = $13,696.77 |
| Mr. Ergun | $9,560.49 | - $4,538.50 | = $5,021.99 |
| Mr. Kan | $7,351.61 | - $3,273.50 | = $4,078.11 |
| Mr. As | $6,641.93 | - $3,273.50 | = $3,368.43 |
| Mr. Cenik | $5,169.35 | - $2,430.00 | = $2,739.35 |
| Mr. Gumusoz | $6,641.93 | - $3,273.50 | = $3,368.43 |
| Mr. Meral | $5,169.35 | - $2,430.00 | = $2,739.35 |
| Mr. Guray | $6,925.81 | - $3,273.50 | = $3,652.31 |
| Mr. Ates | $5,127.13 | - $2,261.50 | = $2,865.63 |
| Mr. Kaan | $12,754.03 | - $5,719.00 | = $7,035.03 |
| Mr. Ucman | $12,604.71 | - $6,304.20 | = $6,300.51 |

<u>Mustafa Hakan Etiz</u>

[62] According to his evidence, Mr. Etiz joined the PHOENIX SUN on December 7, 2013, and worked through until June 16, 2014. He signed a “Seafarer Employment Contract” in the same form as did the Master and the crew members. He was said to be employed as a “fitter/duty officer”. He claims unpaid wages of $50,875 and asserts a maritime lien.

[63] Mr. Etiz had no qualifications whatsoever which would allow him to serve as a duty officer. Furthermore, he was not going to sail with the ship if, as and when she ever departed Sorel. He was self-represented throughout and acted through a Turkish-English interpreter. His evidence was extremely vague. When there was no work onboard he carried out unspecified tasks ashore for Mr. Pasinli. He did not state what these tasks were and gave no breakdown as to how his time was divided between ship and shore.

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[64] He may possibly have served as a watchman from time to time before the Master and crew began to arrive in April 2014. On the other hand, he slept ashore, which detracts from his submissions.

[65] Nevertheless, he was a qualified welder and did some work on the ship's piping.

[66] I find he was not a crew member at all. It seems that only one crew member was even aware of his existence. He was shore labour. He has no maritime lien and does not benefit from section 139 of the *Marine Liability Act*. He was an employee. He was not carrying on business.

[67] Giving him every benefit of the doubt, I fix his onboard work at $25,000. He has a statutory right *in rem* for that amount with no priority. To the extent he was a watchman he was not a crew member (*Jorgensen v The Christina*, [1926] Ex CR 110). To the extent he was a welder he was shore labour (*MacBeth v Chislett*, [1910] AC 220). The balance of his claim could only be considered after all maritime claims are met. However by that time the fund will be exhausted.

Ville de Sorel-Tracy

[68] The city of Sorel-Tracy, through its organization La Société des parcs industriels Sorel-Tracy, claims $105,402.31 comprising unpaid berthage of $81,441.83 and unpaid electricity in the amount of $23,960.48. The claims in principal are for $75,460.01 and $22,407.02, respectively. I have no hesitation in finding that the owners and the ship are liable in that amount. What is in dispute is the ranking which should be given the city's claim. It asserts the

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priority of a maritime lien, only subservient to crew wages, in accordance with section 122(1) of the *Canada Marine Act* which provides:

| | |
|---|---|
| 122 (1) A port authority, the Minister or a person who has entered into an agreement under subsection 80(5), as the case may be, has at all times a lien on a ship and on the proceeds of its disposition for an amount owing to the port authority, the Minister or the person, and the lien has priority over all other rights, interests, claims and demands, other than claims for wages of crew members under the Canada Shipping Act, 2001, if the amount is owing in respect of | 122 (1) L'administration portuaire, le ministre ou la personne qui a conclu une entente en vertu du paragraphe 80(5) est toujours titulaire d'un privilège sur le navire et sur le produit de toute disposition qui en est faite, pour sa créance; ce privilège a priorité sur tous autres droits et créances, quelle qu'en soit la nature, à la seule exception des créances salariales des membres de l'équipage, visées par la Loi de 2001 sur la marine marchande du Canada, dans les cas suivants : |
| (a) fees and interest in respect of the ship or goods carried on the ship; or | a) pour défaut de paiement des droits et des intérêts exigibles à l'égard du navire ou de sa cargaison; |
| (b) damage to property caused by the ship or through the fault or negligence of a member of the crew of the ship acting in the course of employment or under the orders of a superior officer. | b) pour dommages causés à des biens par le navire ou par la faute ou la négligence d'un membre de son équipage agissant dans l'exercice de ses fonctions ou sous les ordres d'un officier supérieur. |

[69] Unfortunately the city it is not a "Port Authority" as defined in section 2, as it was not incorporated or continued under that Act. Section 80(5) gives the Minister certain powers to make agreements with respect to parts of the Saint Lawrence Seaway. However, Sorel is not within the Seaway.

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[70] The city also submitted, in the alternative, that it is entitled to a maritime lien in virtue of section 139(2) of the *Marine Liability Act* which provides:

| | |
|---|---|
| 139 (2) A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise | 139 (2) La personne qui exploite une entreprise au Canada a un privilège maritime à l'égard du bâtiment étranger sur lequel elle a l'une ou l'autre des créances suivantes : |
| (a) in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or | a) celle résultant de la fourniture — au Canada ou à l'étranger — au bâtiment étranger de marchandises, de matériel ou de services pour son fonctionnement ou son entretien, notamment en ce qui concerne l'acconage et le gabarage; |
| (b) out of a contract relating to the repair or equipping of the foreign vessel. | b) celle fondée sur un contrat de réparation ou d'équipement du bâtiment étranger. |

[71] Unfortunately for the city its claim does not fall within section 139 of the *Marine Liability Act* either. Mr. Hamilton submitted that the city was not carrying on business as it was a non-profit organization. I am not prepared to so find. Many not-for-profit organizations, such as mutual insurance companies, well known in marine insurance circles, carry on business.

[72] The next question is whether the city provided services for the PHOENIX SUN's operation or maintenance. I find it did not. Section 22(2) draws a distinction between necessaries and dock charges. Sections 22(2)(m) and (s) read:

| | |
|---|---|
| (m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance | m) une demande relative à des marchandises, matériels ou services fournis à un navire pour son fonctionnement ou |

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| | |
|---|---|
| of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage; | son entretien, notamment en ce qui concerne l'acconage et le gabarage; |
| (s) any claim for dock charges, harbour dues or canal tolls including, without restricting the generality of the foregoing, charges for the use of facilities supplied in connection therewith. | s) une demande de remboursement des droits de bassin, de port ou de canaux, notamment des droits perçus pour l'utilisation des installations fournies à cet égard. |

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[73] Section 139 of the *Marine Liability Act* was intended to put Canadian necessaries men such as ship chandlers, bunker suppliers and stevedores on equal footing with those, such as their American counterparts, who enjoy maritime liens under their own laws. Previously, necessaries men had a statutory right *in rem*, with no priority, if they had contracted with the shipowner. If they knew they were contracting with the charterer they had no action *in rem* and no right to arrest the ship (*Marlex Petroleum Inc v The Ship Har Rai and the Shipping Corp of India*, [1984] 2 FC 345 (FCA), affm'd [1987] 1 SCR 57; *Holt Cargo Systems Inc v ABC Containerline NV (trustee of)*, 2001 SCC 90, [2001] 3 SCR 907 (the *Brussel*).

[74] If there were any doubt at all about Parliament's intention, one need only read the House of Commons debates for February 25, 2009, as well as the Senate sponsor's speech.

[75] It is true that section 22(2)(s) of the *Federal Courts Act* is somewhat peculiar in that, like a maritime lien, port charges survive the sale of the ship (section 43(3) of the *Federal Courts Act*). However, Parliament would have had to have been much more direct and specific before granting ports a statutory lien equivalent to a maritime lien.

[76] Although it follows that under the traditional ranking the city has only a statutory right *in rem*, without priority, it is well recognized that this Court in the exercise of its admiralty and equitable jurisdiction, if the interests of justice so require, may alter the traditional ranking. For instance in *Osborn Refrigeration Sales and Service Inc v The Atlantean I*, [1979] 2 FC 661 (FCTD), Mr. Justice Walsh referred to fuel deliveries having been made after an arrest, which were essential to preserve the ship in severe winter conditions, and hence tended to preserve the security of the mortgage creditor. Furthermore, if upon the arrest, Ballantrae, or others, had moved to have the Marshal put in possession both berthage and the supply of electricity would have ranked as Marshal's costs.

[77] The authorities were reviewed in considerable depth by the late Prothonotary Hargrave in *Fraser Shipyard and Industrial Centre Ltd v Expedient Marine Co*, (1999) 170 FTR 1, 1999 FCJ No 947 (QL), varied but not on this point (1999), 170 FTR 57, [1999] FCJ No 1212 (FCTD) (QL). I also touched upon the issue in *Nordea Bank v The Kinguk*, 2007 FC 434.

[78] Prior to Goldrich's purchase of the PHOENIX SUN, berthage and electricity had been paid by the then acting marshal in admiralty under the previous arrest.

[79] While it could be argued that it was necessary for the PHOENIX SUN to lie alongside as she was a dead ship, and could hardly have gone to anchor, I am not prepared to go so far. In the circumstances I find it plain and obvious that the mass of creditors have benefitted from the supply of electricity. Consequently, I rank the city's claim for the supply of electricity in the amount of $22,407.02 immediately after the claims of the Master and crew. The balance of

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$75,460.01 benefits from a statutory right *in rem*, but enjoys no priority. Pre-sale interest will be dealt with later.

The Necessaries Men

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[80] Unlike the Ville de Sorel-Tracy, the three ship chandlers who filed claims do benefit from section 139 of the *Marine Liability Act*. The PHOENIX SUN had been deleted from the Canadian registry and so was not a Canadian ship. The principal amounts of their claims are not in controversy and they rank after the claims of the Master and crew, and that part of la Ville de Sorel-Tracy's claim referred to above.

[81] Blue Water Agencies Limited's claim is for the supply of necessaries being foodstuffs and provisions in the amount of $9,041.78. It was also claiming interest at the rate of 24% per annum from July 11, 2014, and administrative fees, bringing the claim to $12,511.44. However, it is no longer claiming pre-sale interest, which for reasons set out in another portion hereof, I would not have granted anyway. It is entitled to the principal amount of $9,041.78.Likewise Pronova Systems Inc. provided necessaries in the amount of $28,182.15. It also claimed, but is now waiving, interest at 24% per annum from December 29, 2013, which included administrative fees. Furthermore, it acknowledges that Mr. Hamilton had paid $2,000.00 against one of the invoices. I fix its claim in the principal amount of $26,182.15.

[82] The third ship chandler is 185888 Canada Inc. (formerly North Star Ship Chandler Inc.), currently in bankruptcy. The principal amount of its claim, which is not contested, is $24,347.70. However, unlike the other two chandlers it is claiming the invoice interest rate of 24% per

annum from April 11, 2014, including administrative fees. I fix the principal amount of its claim at $24,347.70, without interest prior to the date on which the funds deposited in Court on the purchase of the PHOENIX SUN began to earn interest. I disallow its claim for pre-sale interest payable from the fund.

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Ian Hamilton and Through Logistics Corp.

[83] Mr. Hamilton had a business relationship with Mr. Pasinli and his many companies. He incorporated Through Logistics Corp. to give partial effect to that relationship. In the circumstances I draw no distinction between Mr. Hamilton and his company.

[84] The claim falls into four categories:

a) Rental of Mr. Hamilton's van to transport crew and spare parts. $13,250 is claimed in principal, supported by the lien at section 139 of the *Marine Liability Act*;

b) Advances directly to the PHOENIX SUN's crew and service providers in the amount of $130,963.71. Priority under section 139 is again claimed;

c) Advance of monies to Mr. Pasinli and his companies for the specific purpose of paying for the supply of goods, materials and services to the PHOENIX SUN. $48,244.76 is claimed. Mr. Hamilton asserts an equitable charge which he submits outranks a statutory right *in rem*; and

d) General payments to Mr. Pasinli and his companies in the amount of $48,120.00 to be used to assist in the maintenance and upkeep of the PHOENIX SUN and expenses relating to the crew. Again an equitable charge is asserted.

[85] Interest is claimed at the rate of 4.9% per annum.

[86] Ballantrae does not contest the amounts owing. However, it asserts that Mr. Hamilton was in a joint venture with Mr. Pasinli and his companies and therefore is only entitled to payment out of the fund after all third party creditors have been paid. Nothing will be left over and so Mr. Hamilton is out of luck, and remains out of pocket.

[87] At the heart of Ballantrae's submissions is a written agreement dated May 2, 2013, between Menpas Shipping and Trading Inc. and Mr. Hamilton. Menpas was another one of Mr. Pasinli's companies which appears to have acted as ship manager and crewing agent. It was specifically agreed "that the project is a joint venture between Ian Hamilton and Mengu Pasinli". Decisions were to be made jointly. The ship would be purchased, repaired to a suitable standard for a last voyage, registered under the Panamanian flag, carry an eastbound cargo to the Mediterranean and then be sold for scrap, all at a total profit estimated to be in excess of $1,000,000. The profit was to be divided equally.

[88] Mr. Hamilton signed the agreement but says he never returned it to Mr. Pasinli as it was evident that he could not fulfill his part of the bargain. The sums he advanced were really by way of loans at the interest rate of 4.9% per annum.

[89] In February 2014, Mr. Hamilton e-mailed Mr. Pasinli under the subject "Ian Hamilton investments to date", which were some $85,000.00. Mr. Pasinli replied "cash investments are o.k.". Notice the word "investments".

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[90] In August 2014, (which is after Ballantrae arrested the PHOENIX SUN) Mr. Hamilton e-mailed Mr. Mengu to say "the total amount I have loaned to date --".

[91] Mr. Hamilton submits that in determining whether or not there was a partnership or joint venture, one must not only consider the documentary evidence but also the surrounding facts including what the parties actually did (*Backman v Canada*, [2001] 1 SCR 367 at para 25).

[92] Mr. Hamilton never knew the ship was purchased in the name of Goldrich, had never heard of Ballantrae until after the arrest and was not privy to joint financial records or a joint bank account. What Mr. Hamilton is really saying is that he did not insist upon his rights.

[93] I am afraid all of this is wishful thinking on Mr. Hamilton's part. He was hoodwinked by Mr. Pasinli, as were all the other creditors. What he did was lend money to the joint venture. Had the venture been fruitful, after taking care of expenses, including funds advanced by Mr. Hamilton, the profits would be split 50/50. There was nothing in the record to indicate that the relationship was changed by mutual agreement and that Mr. Hamilton renounced the profit motive which got him into this arrangement in the first place. Mr. Pasinli's breach of contract did not convert the joint venture into a series of loans.

[94] The Court did not benefit from seeing Mr. Hamilton, or any of the other witnesses (apart from Mr. Etiz), but this does not prevent me from making adverse credibility findings. Although Mr. Justice O'Halloran, speaking for the British Columbia Court of Appeal in *Faryna v Chorny*, [1952] 2 DLR 354, [1951] BCJ No 152 (QL), was dealing with the assessment by the Trial Judge

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of a witness who had actually appeared before him, his remarks still hold true. The test of credibility is this:

> 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.

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[95] In the *Hasselt*, above, the Court of Appeal was of the view that it was in as good a position to assess expert witnesses as the trial judge, as the evidence was in written form. However the Supreme Court disagreed: [1987] 1 SCR 1247, 1987 SCJ No 39 (QL).

[96] Thus Mr. Hamilton is equated with the owner and is only entitled to claim against such funds as would be left over after third party creditors were paid (the *Kinguk*, above). Unfortunately, there is nothing left for Mr. Hamilton, which, of course, does not prevent him from pursuing Mr. Pasinli and his companies *in personam*.

Ballantrae Holdings Inc.

[97] Ballantrae, an investment company and lender of funds, entered into a loan agreement with Trenton Shipping and Trading Limited to finance its purchase of the PHOENIX SUN. The principal amount of the loan was $1,050,000.00, with interest at 20% per annum, compounded monthly. The operative loan agreement was dated November 22, 2013, superseding earlier loan agreements of October 21, 2013 and November 8, 2013. The loan was guaranteed by Goldrich International Shipping Co., and by Mr. Pasinli. For reasons not stated, although Trenton, a Canadian company, was originally designated to purchase the ship, the bill of sale was taken out

in the name of Goldrich. In addition, Trenton was to obtain a guarantee and general security agreement from Goldrich.

[98] Other security took the form of a marine vessel mortgage-collateral to loan agreement and the registration of a financing statement under the Ontario *Personal Property Security Act*.

[99] The loan was supposed to be short term, seventy-five days. No payments were made and so Ballantrae took action *in rem* and *in personam* for the amount owing, including interest and costs. I will only deal with the principal amount of the claim under this heading.

[100] The ship was deleted from the Canadian registry and was supposed to be registered in Panama, along with the mortgage. It did not turn out that way. Ballantrae filed the uncontested affidavit of a Panamanian attorney, Eduardo Antonio Real Solis. His opinion is that the procedures for registering the PHOENIX SUN under the Panamanian flag, as well as the Skylane mortgage, were never correctly and timely completed and therefore have no legal effect. All that happened is that the PHOENIX SUN was "flagged" under a special temporary registry for ships which undertake a single voyage, such as a voyage to a scrapyard. No steps were ever taken to register Ballantrae's mortgage. Indeed, it appears that it could not have been registered in Panama. After her deletion from the Canadian registry, the PHOENIX SUN was an unregistered ship.

[101] Ballantrae nevertheless claims a security interest in virtue of the mortgage, and via registration under the Ontario *Personal Property Security Act*.

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[102] Counsel for Mr. Hamilton suggested that at best Ballantrae has an equitable charge in virtue of the unregistered mortgage and that this Court cannot take cognizance of security registered under the Ontario *PPSA*. Furthermore, even if that provincial statute forms part of Canadian Maritime Law, on the facts of this case it does not give Ballantrae any advantage over other creditors.

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The Mortgage

[103] The Court is first called upon to determine the nature of Ballantrae's security under the mortgage contract. Is it a legal mortgage, although unregistered, or is it an equitable mortgage? Does it outrank or is it outranked by statutory rights *in rem* or rank *pari passu*?

[104] Counsel for Mr. Hamilton submitted that Ballantrae benefits from an equitable mortgage which will rank *pari passu* with that portion of the Hamilton claim which is not secured by section 139 of the *Marine Liability Act*, and that both those claims outrank ordinary creditors *in rem* (such as Mr. Etiz). He referred to the decision of Mr. Justice Cullen in *Lewmar Marine Limited v C & C Industries Ltd* (1991), 44 FTR 49 (FCTD), and more particularly the opinion of Professor William Tetley referred to therein. Paradoxically, the case had also been cited by Ballantrae to support its proposition that this Court has jurisdiction to entertain claims by provincially secured creditors.

[105] The *Lewmar* decision is not really on point, but Mr. Justice Cullen referred to the first edition of Professor Tetley's *Maritime Liens and Claims* (London, UK: *Business Law Communications*, 1985), where he said at page 213:

> Equitable mortgages (including unregistered mortgages) rank after registered mortgages even if the existence of the equitable mortgage was known to the registered mortgagee at the time of registration.
>
> The equitable mortgage will however rank ahead of a necessaries man who brings an action *in rem* after the date of the mortgage.

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[106] As authority Professor Tetley cited the decision of Mr. Justice Langton in first instance in the *Zigurds*, [1932] P 113, also reported at (1932) 43 Ll LR 387.

[107] With the greatest respect, I do not think that a non-registered mortgage is necessarily an equitable mortgage, although it will rank after a registered mortgage.

[108] The *Zigurds* has to be read with great care. It dealt with three distinct judicial sales, the sale of the ship, the sale of pending freight and the sale of demurrage. Each had its own set of creditors. Clamoring for the freight were Casper Edgar & Co., an English ship agent and necessaries man and Alfred Harris Smith, the holder of a registered legal mortgage. Both claimed to be assignees of the freight. Mr. Justice Langton held that the mortgage creditor properly laid claim to the freight because its equitable assignment pre-dated Casper Edgar's equitable assignment.

[109] However, Mr. Justice Langton was reversed in appeal [1933] P. 87, (1933) 45 Ll LR 1. The Court held that the notice given by Casper Edgar to the receivers of the cargo had constituted sufficient notice of the assignment. They were the first to give actual notice and so were entitled to the freight. That decision was affirmed by the House of Lords, [1934] AC 209,

(1933) 47 Ll LR 267. The case relating to the freight had nothing to do with the relative rankings of mortgage creditors and necessaries men.

[110] There was a separate contest for payment out of the proceeds of the ship between the same mortgage creditor and a German necessaries man, Kohlen Co., who claimed a maritime lien under German law and submitted that at the very least in equity it should be given priority over the mortgagee. Mr. Justice Langton ranked the mortgage creditor ahead of the necessaries man as a matter of procedure. That dispute did not proceed further. An English ship repairer also submitted the traditional ranking should be altered, but did no better ((1932) 43 Ll LR 156).

[111] The result with respect to the German necessaries man may well have been different in Canada. On this point, the *Zigurds* was completely in line with the English position that a claim is characterized in accordance with the law of the forum, not the proper law of the transaction. This point was clearly reiterated by the Privy Council in *Bankers' Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle)*, [1981] AC 221, [1982] 2 Lloyds' Rep 325.

[112] On the contrary, in Canada, if under the proper law a necessaries man enjoys a maritime lien he will be given that priority (the *Har Rai* and the *Brussel*, above). I had occasion to review the authorities in *World Fuel Services Corp v Nordems (The)*, 2010 FC 332, 366 FTR 118, aff'd 2011 FCA 73, [2012] 4 FCR 183. In Canada a necessaries man only enjoyed a statutory right *in rem*, with no priority, and had no action *in rem* at all if it knew it was dealing with a charterer, rather than a shipowner. As discussed above, it was this unfairness which led to the enactment of section 139 of the *Marine Liability Act*.

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[113] Although the *Zigurds* is not helpful, a case which is very much on point is the *Shizelle*, [1992] 2 Lloyd's Rep 444, a decision of the English Admiralty Court. The plaintiffs financed the purchase of the yacht *Shizelle* on the terms of a loan agreement and marine mortgage. The yacht and mortgage were to be registered. However neither was.

[114] The purchaser then sold the *Shizelle* to the defendants allegedly free and clear of liens and encumbrances. The issue was whether the purchasers, who were innocent purchasers for value without notice, held the yacht free and clear of the mortgage.

[115] Deputy Judge Hamilton referred to doctrine to the effect that an unregistered mortgage was equivalent to an equitable mortgage, and referred to the view expressed by Professor Tetley. On that basis, the purchasers would have prevailed.

[116] However the learned judge disagreed. He was of the view that a mortgage of chattels at common law, before the intervention of any statute, did not require any formality, such as registration. The mortgage was a legal mortgage, not an equitable mortgage, even though it was not registered. It was opposable to a *bona fide* purchaser for value without notice.

[117] In this case, the PHOENIX SUN was not registered in any country. If the *Shizelle* mortgage is opposable to a *bona fide* purchaser for value without notice, it certainly follows that a non-registered legal mortgage outranks equitable charges and statutory rights *in rem*.

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[118] In the second edition of his *Maritime Liens and Claims*, from 1998, Professor Tetley reiterated his view that a non-registered mortgage constitutes an equitable mortgage. At p 481, in a footnote, he referred to the *Shizelle* as a "controversial decision". It may be but I agree with it.

[119] In my opinion, Ballantrae holds an unregistered legal mortgage on the PHOENIX SUN. Although it would face difficulties in ranking against a subsequently registered legal mortgage, that is not the case here as Skylane's mortgage has been struck. Ballantrae's claim outranks equitable charges, if any, the claims of holders of statutory rights *in rem*, as well as Mr. Hamilton's claims.

[120] Ballantrae was called upon to report which sums, if any, it has, or will, recover from the various guarantors. It appears likely it will recover $199,500 from one of the guarantors. This does not affect its entitlement to the balance of the fund generated by the sale of the PHOENIX SUN. It would of course be relevant if it pursues the *in personam* portion of its action to judgment.

Ontario *Personal Property Security Act*

[121] In addition to the execution of mortgage documents, Ballantrae was given security under the Ontario *Personal Property Security Act* which, it submits, also gives it priority over ordinary creditors *in rem*. Mr. Hamilton has mounted a vigorous challenge to this proposition. He emphasizes that Canadian Maritime Law is federal law, not provincial law, and is uniform throughout Canada. The Federal Court may only apply such provincial law as is incidentally relevant. The cornerstone of this submission is the decision of the Supreme Court in *ITO* –

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*International Operators v Miida Electronics*, [1986] 1 SCR 752 (the *Buenos Aires Maru*). The Ontario *PPSA* is a provincial statute of general application applying to marine and non-marine property alike. Since it creates security interests in property it can hardly be considered incidental.

[122] Mr. Hamilton adds that even if this Court could take cognizance of and apply the *PPSA* Ballantrae would gain no benefit as the requirements of that Act were never met.

[123] The PHOENIX SUN was never in Ontario at any relevant time and was never intended to be brought into Ontario. The unwavering intention of her owners was to sail her from Sorel, Quebec, to Turkey and there sell her for scrap.

[124] The short answer is that Mr. Hamilton is right. The *PPSA* contains conflict of law provisions. In order for the perfection and priorities provisions of that Act to apply, the collateral, such as the PHOENIX SUN being tangible personal property, must have been in Ontario, or have recently arrived in Ontario and then be perfected. For the purposes of this case it is sufficient to say that the rules relating to the perfection of the security are based on the location of the property, and not on the debtor's or creditor's residence (RSO 1990, c P.10, ss 5–7). If any provincial statute were relevant it would have been the provisions of the *Civil Code of Quebec* relating to hypothecs on moveable property (Articles 2714, 3012). There was no registration under Quebec law.

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[125] However the point raised is so important to this Court's jurisdiction and was so well argued on behalf of Ballantrae and Mr. Hamilton that I am compelled to comment.

[126] Section 22(3)(d) of the *Federal Courts Act* provides:

| | |
|---|---|
| 22. (3) For greater certainty, the jurisdiction conferred on the Federal Court by this section applies | 22. (3) Il est entendu que la compétence conférée à la Cour fédérale par le présent article s'étend : |
| (d) in relation to all mortgages or hypothecations of, or charges by way of security on, a ship, whether registered or not, or whether legal or equitable, and whether created under foreign law or not. | d) à toutes les hypothèques ou tous les privilèges donnés en garantie sur un navire — enregistrés ou non et reconnus en droit ou en equity — , qu'ils relèvent du droit canadien ou du droit étranger. |

[127] The Ontario *PPSA* is capable of creating a charge by way of security on a ship. For present purposes, it is not necessary to consider federal paramountcy or interjurisdictional immunity.

[128] In *Tropwood AG et al v Sivaco Wire & Nail Co et al*, [1979] 2 SCR 157 (the *Tropwood*), the Court was dealing with a cargo claim arising on a shipment from France to Montreal governed by the *Hague Rules* as in force in France. The issue was whether the Federal Court could apply French law. The *Hague Rules* as in force in Canada only applied to bill of lading shipments from Canadian parts. Chief Justice Laskin stated at pages 166–167:

> What is raised by the appellant, shortly put, is whether it is open to the Federal Court, in exercising its jurisdiction in the matter brought before it, to determine, pursuant to conflict of law rules of the forum, a choice of law rule to govern the determination of the suit. In the present case, the Federal Court has jurisdiction over the appellant and over the cause of action and there is a body of law which it can apply. It is my opinion that this body of law embraces

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> conflict rules and entitles the Federal Court to find that some foreign law should be applied to the claim that has been put forward. Conflicts rules are, to put the matter generally, those of the forum. It seems quite clear to me that section 22(3) of the *Federal Courts Act*, which I have already referred to, envisages that the Federal Court, in dealing with a foreign ship or with claims arising on the high seas may find it necessary to consider the application of foreign law in respect of the cause of action before it.

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[129] If this Court may take into account foreign law, it certainly may take into account provincial law.

Federal Court Jurisdiction

[130] The greater question still remains. Is the Ontario *PPSA* incidental? I can only conclude it is and thus, even absent section 23, may be applied by this Court. This is the only way the *Buenos Aires Maru* can be reconciled with the later Supreme Court decisions in *Ordon Estate v Grail*, [1998] 3 SCR 437, and *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53 (the *Ryan's Commander*).

[131] In *Ordon*, the Supreme Court enumerated four factors to take into consideration in determining whether a provincial statute is applicable in a maritime negligence action;

a) Does the subject matter of the action fall within the exclusive federal power over navigation and shipping?

b) If yes, is there a counterpart under existing Canadian Maritime Law?

c) If not, should the *lex non scripta* of Canadian Maritime Law be changed?

d) If the *lex non scripta* should not be changed, a provincial law of general application is inapplicable if it indirectly regulates Canadian Maritime Law in that it alters rules which Parliament has exclusive competence to amend. This is interjurisdictional immunity. The provincial statute must be read down.

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[132] This leads us to the *Ryan's Commander*. The Ryan brothers were Newfoundland fishermen who died in a maritime accident. Their heirs brought suit in the Supreme Court of Newfoundland and Labrador against the employer. Section 6(2) of the *Marine Liability Act* specifically provides that a dependant may bring a claim "under circumstances that would have entitled the person, if not deceased, to recover damages". However the Newfoundland and Labrador's *Workplace Health, Safety and Compensation Act*, like other provincial statutes, bars a fault-based negligence action in favour of a no-fault compensation scheme. The Supreme Court, in overturning the Court of Appeal, held that the Newfoundland statute trumped the federal statute.

[133] Unfortunately, the Supreme Court offered no guidance as to whether or not the result would have been the same had the heirs taken action in the Federal Court which, after all, has concurrent jurisdiction. Mr. Hamilton submits that a provincial statute which bars a federal cause of action is hardly "incidental". Since the Federal Court may only apply provincial law in limited circumstances, the result could vary depending upon the choice of forum. This is a scenario simply too shocking to contemplate!

[134] The Supreme Court considered *Ordon* in great detail. On the first point it held that *Ryan's Commander* was also a maritime negligence action, in pith and substance, a federal matter.

[135] On the second point, there was no federal counterpart. There is a federal *Merchant Seamen Compensation Act*, but it specifically does not cover fishermen.

[136] On the third point, the *lex non scripta* of the Canadian Maritime Law could hardly be changed because the *lex scripta* specifically gave the heirs a cause of action.

[137] *Ordon* was distinguished on the fourth point. In *Ordon*, it was held that a provincial law of general application was not applicable if it indirectly regulated Canadian Maritime Law. The provincial statute had to be read down based upon interjurisdictional immunity.

[138] In *Ryan's Commander* the Supreme Court, like in *Ordon*, stated at para 53 that "the present appeal involves reliance on provincial law in relation to a maritime negligence action".

[139] The Court then focussed on interjurisdictional immunity. Subsequent to *Ordon*, the Court had developed a two-pronged test. The first is to determine whether a provincial law trenches on the protected "core" of federal competence. If so, rather than just "affect" the core, as suggested in *Ordon*, the provincial law must "impair" it for interjurisdictional immunity to apply (*Ryan's Commander* at paras 54 and following; *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3; *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536).

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[140] The Supreme Court went on to hold that the Newfoundland statute did indeed trench on the core of federal power over navigation and shipping. However it concluded that the statute did not "impair" the exercise of federal power over navigation and shipping. At para 63 it pointed out that workers' compensation schemes have been applied in the maritime context for close to a century.

[141] I can only conclude that the application of "incidental" provincial law in the maritime context is much broader than I, for one, had thought.

[142] I revert back to the words of Mr. Justice McIntyre in the *Buenos Aires Maru* at p 782:

> The Federal Court is constituted for the better administration of the laws of Canada. It is not, however, restricted to applying federal law in cases before it. Where a case is in "pith and substance" within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties; see *Kellogg Co. v. Kellogg*, [1941] S.C.R. 242, where, in a case involving a dispute over patent rights, the effect of an employment contract had to be considered in the Federal Court, and see as well: *McNamara Construction (Western) Ltd. v. The Queen, supra*, where Laskin C.J. suggested that the provincial law of contribution indemnity may be applied by the Federal Court where jurisdiction is otherwise founded on federal law.

[143] Post *Buenos Aires Maru* the Supreme Court did not find it necessary to apply provincial contributory negligence statutes as it "incrementally" changed the *lex non scripta* of Canadian Maritime Law (*Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210).

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[144] If I am right in this interpretation and the Federal Court would have applied provincial law in *Ryan's Commander* notwithstanding section 6(2) of the *Marine Liability Act*, how can the *Ryan's Commander* be reconciled with *Quebec North Shore Paper v CP Limited*, [1977] 2 SCR 1054? That case taught us that it is not enough that the subject matter of an action fall within a federal legislative power and that jurisdiction has been given to the Federal Court. In addition there must be actual applicable federal law at the core of the dispute. *Quebec North Shore* was characterized as a case based on interprovincial trade and commerce. There was no federal law. However, because of the definition of Canadian Maritime Law in section 2 of the *Federal Courts Act*, there is federal maritime law which includes the law which would have been administered by our predecessor court, the Exchequer Court, had it had unlimited jurisdiction in maritime and admiralty matters, co-extensive with Parliament's legislative power over navigation and shipping. Thus, if as in *Ryan's Commander*, and in this case, the dispute is one which in its pith and substance is based on Canadian Maritime Law, the Federal Court may apply provincial law. Obviously, "incidental" does not mean unimportant.

[145] I conclude that this Court may take cognizance of the Ontario *PPSA* not only under section 23 of the *Federal Courts Act* but also in virtue of the *Buenos Aires Maru* and the *Ryan's Commander*.

[146] After deducting the Marshal's costs of $39,106.37, Ballantrae's costs of $12,830.46, the crew claims of $132,935.00, la Ville de Sorel-Tracy's claim of $22,407.02, Blue Water's of $9,041.78, Pronova's of $26,182.15, and 185888 Canada's of $24,347.70, which total $266,850.48, Ballantrae is entitled to the balance of the $682,500.00 being $415,649.52.

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Interest

[147] Section 36 of the *Federal Courts Act* speaks to prejudgment interest, but subsection 7 thereof specifically provides that this section does not apply to cases which arise under Canadian Maritime Law. Post-judgment interest is covered by section 37 of the Act. If the cause of action arose in a province, then the provincial law is incorporated and applied. Otherwise, the Court applies an interest rate it considers reasonable in the circumstances. Some of the claims, such as that of la Ville de Sorel-Tracy and the ship's necessaries men appear to have arisen in Quebec. Others, such as the claims of the crew and Ballantrae did not, at least not in their entirety. In the circumstances, and taking into account the great wealth of jurisprudence relating to interest on the funds generated by the sale of a ship, I shall apply what I consider to be reasonable.

[148] In Canadian Maritime Law prejudgment interest is a function of damages, left to the discretion of the Court (*Bell Telephone Company of Canada v The Mar-Tirenno*, [1974] 1 FC 294 (FCTD); *Kuehne + Nagel Ltd v Agrimax Ltd*, 2010 FC 1303). The Court in its discretion may decide not to apply the contractual rate agreed between the parties (*Mount Royal/Walsh Inc v The Jensen Star*, 17 FTR 289, [1988] FCJ No 141 (FCTD) (QL), varied but not on this point [1990] 1 FC 199, 1989 FCJ No 450 (FCA) (QL), leave to appeal to SCC refused, 21593 (23 November 1989) (QL)).

[149] The Court more often than not applies a commercial rate but, given that commercial rates are very low at the moment, sometimes applies the legal rate of 5%. Any award of prejudgment interest would, in effect, be taken out of Ballantrae's pocket, as I have ordered that it shall

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receive whatever is left over after payments out to the Marshal, Ballantrae as to costs, the Master and crew, la Ville de Sorel-Tracy, and the necessaries men.

[150] In the circumstances, I consider it appropriate that no prejudgment interest be awarded. It must be borne in mind that none of the claimants has actually obtained a judgment *in personam* against the shipowners. In such a case they certainly would have been entitled to prejudgment interest, but not against the fund.

[151] As to post-judgment interest, it is customary to award interest at the rate paid by the Court on funds on deposit. The *Kinguk*, above, is but one example. This is exactly what I did on the first payment to the crew.

[152] Interest on the deposit in court accumulates monthly. Since it is not clear when payments out will be made, payment of interest should be at the same proportion the award in principal bears to the amount on deposit, factoring in the fact that the payment out to the Marshal of $39,106.37 carried no interest with it. For example, Ballantrae's claim in principal is $415,649.52. By dividing that sum by $643,393.63 (the $682,500.00 deposit minus the $39,106.37 paid to the Marshal), it should be awarded 64.603% of the total accumulated interest. To take another example, Captain Ozkan's claim in principal is $28,741.89. That is 4.467% of the principal balance of the proceeds of sale, and thus Captain Ozkan shall receive 4.467% of the accumulated interest. The $87.33 of interest he was awarded on April 11, 2016, shall have to be deducted therefrom, as will the previous payments of interest to the rest of the crew.

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[153] On that basis payment of accumulated interest is as follows:

| | | |
|---|---|---|
| (a) | The Marshal | nil |
| (b) | Ballantrae's costs | 1.994% |
| (c) | The Twelve Seafarers: | |
| | (i) Captain Ozkan | 4.467% less $87.33 |
| | (ii) Mr. Karasu | 4.079% less $81.50 |
| | (iii) Mr. Ergun | 1.486% less $29.47 |
| | (iv) Mr. Kan | 1.143% less $21.26 |
| | (v) Mr. As | 1.032% less $21.26 |
| | (vi) Mr. Cenik | 0.803% less $15.78 |
| | (vii) Mr. Gumusoz | 1.032% less $21.26 |
| | (viii) Mr. Meral | 0.803% less $15.78 |
| | (ix) Mr. Guray | 1.076% less $21.26 |
| | (x) Mr. Ates | 0.797% less $14.69 |
| | (xi) Mr. Kaan | 1.982% less $37.14 |
| | (xii) Mr. Ucman | 1.959% less $40.94 |
| (d) | La Ville de Sorel-Tracy | 3.483% |
| (e) | Blue Water | 1.405% |
| (f) | Pronova | 4.069% |
| (g) | 185888 Canada Inc (North Star) | 3.784% |
| (h) | Ballantrae | 64.603% |

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Costs

[154] The only party seeking payment of costs from the fund on deposit in Court is Ballantrae, for well-founded reasons. The only other claim with respect to costs is by Mr. Hamilton, who seeks costs from Jarud, which only discontinued its claim on the first day of the hearing.

[155] Jarud had filed a claim through counsel. It then gave notice that it intended to represent itself through its president, Mr. Rudnick. This notice was meaningless as Rule 120 of the *Federal Courts Rules* provides that a corporation shall be represented by a solicitor unless the Court, in special circumstances, grants it leave to be represented by an officer. Jarud made no such motion.

[156] Nevertheless, its claim was still in the record and would have had to have been considered by the Court absent the discontinuance. Jarud was a middle man which essentially claimed a finders fee. However, it also asserted that it was entitled to priority pursuant to section 139 of the *Marine Liability Act*. Consequently it was in the interests of both Mr. Hamilton and Ballantrae to contest the claim, which they did.

[157] Mr. Hamilton's motion was in writing pursuant to Rule 369. It is customary to give the respondent 10 days to reply. As nothing had been heard from Jarud I directed the Registry to communicate with its President, Mr. Rudnick. This resulted in a letter from Mr. Rudnick, not served upon the other parties, and which he asked to be kept confidential. Naturally, I directed the Registry not to accept the letter for filing.

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[158] I might have been open to allow Jarud to respond through its President with respect to a claim against it, as opposed to its claim against the fund. However, the Court does not deal with "confidential" letters which in any event was hardly responsive to the Hamilton claim for costs.

[159] Rule 402 provides that unless otherwise ordered or agreed when a motion has been abandoned the other party is entitled to costs. On the other hand, the Court is somewhat loathe to put roadblocks in the way of discontinuances.

[160] A small portion of Mr. Hamilton's efforts did relate to Jarud's claim. However, the main focus was asserting his own claim, and defeating the claims of others, or submitting that they were not entitled to priority.

[161] It is somewhat ironic that Mr. Hamilton's claim was dismissed outright. Yet Ballantrae is not seeking costs as against it.

[162] In the circumstances, I award Mr. Hamilton $1,000.00 against Jarud, all in.

*Official Languages Act*

[163] La Ville de Sorel-Tracy's written and oral submissions were in French. The other parties pleaded in English. Section 20 of the *Official Languages Act* provides that final judgments should be issued simultaneously in both English and French when the proceedings were conducted in whole or in part in both official languages. However the section goes on to provide that a judgment may be first issued in one language if simultaneous publication would, among

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other things, result in an injustice or hardship to any party. The twelve seafarers were in dire straits. Given that it will probably take a few months for a translation, their counsel moved that judgment be first issued in one language, with a translation to follow. Counsel for the other parties, particularly la Ville de Sorel-Tracy, kindly agreed.

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## JUDGMENT

For reasons given;

**UPON MOTION** for payment out of the sum of $682,500, being the proceeds of the sale of the PHOENIX SUN together with accumulated interest thereon;

**TAKING INTO ACCOUNT THAT** the acting Marshal, by order dated December 16, 2014, has already been paid his fees and expenses in the amount of $39,106.37, without interest and that, by order dated April 11, 2016, the twelve seafarers have already been paid a total amount in principal of $62,775.54 with accumulated interest of $407.67;

**THIS COURT ORDERS** the following payments:

1. To Ballantrae Holdings Inc. by way of costs $12,830.46 with 1.994% of accumulated interest;

2. To the twelve seafarers:

| | | |
|---|---|---|
| i. | Captain Oskan | $15,293.55 + 4.467% of accumulated interest less $87.33 |
| ii. | Mr. Karasu | $13,696.77 + 4.079% of accumulated interest less $81.50 |
| iii. | Mr. Ergun | $5,021.99 + 1.486% of accumulated interest less $29.47 |
| iv. | Mr. A. R. Kan | $4,078.11 + 1.143% of accumulated interest less $21.26 |
| v. | Mr. As | $3,368.48 + 1.032% of accumulated interest less $21.26 |
| vi. | Mr. Cenik | $2,739.35 + 0.803% of accumulated interest less $15.78 |
| vii. | Mr. Gumusoz | $3,368.48 + 1.032% of accumulated interest less $21.26 |
| viii. | Mr. Meral | $2,739.35 + 0.803% of accumulated interest less $15.78 |
| ix. | Mr. Guray | $3,652.31 + 1.076% of accumulated interest less $21.26 |
| x. | Mr. Ates | $2,865.63 + 0.797% of accumulated interest less $14.69 |
| xi. | Mr. A. Kaan | $7,035.03 + 1.982% of accumulated interest less $37.14 |
| xii. | Mr. Ucman | $6,300.51 + 1.959% of accumulated interest less $40.94 |

3. To Ville de Sorel-Tracy $22,407.22 + 3.483% of accumulated interest

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4. To Blue Water Agencies Ltd. $9,041.78 + 1.405% of accumulated interest

5. To Pronova Systems Inc. $26,182.15 + 4.069% of accumulated interest

6. To 185888 Canada Inc. $24,347.70 + 3.784% of accumulated interest

7. To Ballantrae Holdings Inc. $415,649.52 + 64.603% of accumulated interest

Payments may be made to the Solicitors of Record, in trust.

"Sean Harrington"

Judge

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**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-1683-14 |
| **STYLE OF CAUSE:** | BALLANTRAE HOLDINGS INC v THE OWNERS AND ALL THOSE INTERESTED IN THE SHIP "PHOENIX SUN" AND THE SHIP "PHOENIX SUN" |
| **PLACE OF HEARING:** | MONTREAL, QUEBEC |
| **DATE OF HEARING:** | APRIL 7-8, 2016 |
| **JUDGMENT AND REASONS:** | HARRINGTON J. |
| **DATED:** | MAY 26, 2016 |

**APPEARANCES:**

| | |
|---|---|
| David G. Colford | FOR THE PLAINTIFF |
| Vanessa Major | Blue Water Agencies Limited, Pronova Systems Inc. and 185888 Canada Inc. |
| Gary H. Waxman, Lionel Lieber | Semih Ozkan, Akpinar Kaan, Serdar Recep Karasu, Ufuk Ucman, Ersin Ergun, Ali Riza Kan, Zekai As, Serhat Cenik, Mehmet Gumusoz, Mesut Meral, Seydi Guray and Umut Ates |
| William M. Sharpe, Marcos Cervantes-Laflamme | Ian Hamilton and Through Logistics Corp. |
| Christian Crevier | Ville de Sorel-Tracy |
| Shahzad Siddiqui | Skylane Worldwide Limited |
| Mustafa Hakan Etiz | (on his own behalf) |
| No one appeared | FOR THE DEFENDANT |

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**SOLICITORS OF RECORD:**

| | |
|---|---|
| BRISSET BISHOP<br>Montreal, Quebec | FOR THE PLAINTIFF |
| DE MAN, PILLET<br>Montreal, Quebec | Blue Water Agencies Limited, Pronova Systems Inc. and 185888 Canada Inc |
| GARY H. WAXMAN<br>Montreal, Quebec | Semih Ozkan, Akpinar Kaan, Serdar Recep Karasu, Ufuk Ucman, Ersin Ergun, Ali Riza Kan, Zekai As, Serhat Cenik, Mehmet Gumusoz, Mesut Meral, Seydi Guray and Umut Ates |
| WILLIAM M. SHARPE<br>Toronto, Ontario | Ian Hamilton and Through Logistics Corp. |
| FRAPPIER CREVIER TREMPE<br>Sorel-Tracy, Quebec | Ville de Sorel-Tracy |
| ABRAHAMS LLP<br>Toronto, Ontario | Skylane Worldwide Limited |

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## Appendix U

Inaminka Marine Services Limited – Monitor's Determination of Claim

Grant Thornton

**January 23, 2024**

**Grant Thornton Ltd**
Nova Centre, North Tower
Suite 1000, 1675 Grafton Street
Halifax, NS
B3J 0E9

T +1 902 421 1734
F +1 902 420 1068

Inaminka Marine Services Limited
130 LeMarchant Road, Suite 301
St. John's, NL A1C 2H2
Attention: Richard Spellacy
*via email:* dspellacy@nf.aibn.com; deborahljhutchings@gmail.com

Dear Mr. Spellacy

**Re: *Companies' Creditors Arrangement Act* proceedings of 92834 Newfoundland and Labrador Inc. – Claims Identification Process**

Pursuant to the Claims Identification Order, dated October 25, 2023 issued by the Supreme Court of Newfoundland and Labrador (the "**Court**"), Grant Thornton Limited, in its capacity as the Court-appointed monitor (the "**Monitor**") of 92834 Newfoundland and Labrador Inc. was authorized to administer a claims identification process (the "**Claims Identification Process**") to identify creditor(s) and amount of claims that have a priority to the first secured creditor Bridging Finance Inc. and Bridging Income Fund LP (formerly Sprott Bridging Income Fund LP) (collectively, "**Bridging**"). The Claims Identification Order governed the filing and identification of all claims against 92834 Newfoundland and Labrador Inc., Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., CFI Newspar Holdings Inc. and Newspar (a General Partnership) (collectively, "**CFI**").

Paragraph 28 of the Claims Identification Order empowers the Monitor to, among other things, accept, revise, or disallow each claim and determine the priority asserted by the claim, subject to further determination by the Court if the claimant disputes the Monitor's determination.

The Monitor hereby confirms receipt of the claim of Inaminka Marine Services Limited ("**IMSL**) dated November 22, 2023 for a Pre-Filing Secured Claim of $146,870.02.

You have claimed a maritime lien in connection with consultation services that IMSL provided CFI with respect to CFI's barge. The Monitor **DISALLOWS** your priority claim. No actual repairs were performed or the barge nor was CFI provided any equipment. Consulting services of this nature do not constitute a maritime lien.

The Monitor will **NOT** be including this amount in the proposed distribution in its next Court application set for January 25, 2024.

The Monitor is applying to the Court for, among other things, a distribution of available proceeds to Bridging and CFI's accepted priority creditors on January 25, 2024. Should you wish to dispute the Monitor's determination of your claim, the Monitor requests you provide the Monitor with notice of such objection by January 30, 2024

Grant Thornton

Application materials for the January 25, 2024 Court appearance and the Monitor's Eleventh Report will be posted on the Monitor's website at www.GrantThornton.ca/CFI once available.

Yours truly,

**GRANT THORNTON LIMITED**
In its Capacity as Court-appointed Monitor of
92834 Newfoundland and Labrador Inc.

Per:
Phil Clarke, CPA, CA, CIRP, LIT
Senior Vice President

## Appendix V

Inaminka Marine Services Limited - Notice of Appeal

**DEBORAH L.J. HUTCHINGS LAW**
**Deborah L.J. Hutchings, K.C.**
**Barrister, Solicitor and Notary**
61 Parsonage Drive
St. John's, NL A1A 0J6

(709) 726-3082 (Home) – (709) 682-3278 (Mobile)

February 14, 2024

By Email: CanadaFluorspar@ca.gt.com

Grant Thornton Limited – The Court Appointed Monitor of
92834 Newfoundland and Labrador Inc.
Nova Centre, North Tower
1675 Grafton Street, Suite 1000
Halifax, Nova Scotia B3J 0E9

Dear Sir:

**Re: Our Client – Inaminka Marine Services Limited ("Inaminka")**
**The Debtor – 92834 Newfoundland and Labrador Inc./Canada Fluorspar (NL) Inc.**
**Notice of Appeal – Assessment of Claim by Monitor**

In connection with the above noted matter, on behalf of Inaminka we enclose herewith and in compliance with the Order of Justice A. MacDonald dated January 25, 2024, our client's Notice of Appeal.

Since the Supreme Court of Newfoundland and Labrador, General Division (St. John's) is closed today due to a winter storm, we shall file the same with the Court tomorrow. In the event that the Court is closed as well tomorrow, we shall advise you, accordingly.

Trusting that all of the foregoing is found to be in order.

Yours very truly,

Deborah L. J. Hutchings Law
Per: Deborah L.J. Hutchings, K.C

cc. Geoffrey L. Spencer, McInnes Cooper

**2023 01G 0841**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an Appeal of the Assessment of Grant Thornton Limited, as Court-appointed Monitor (the "**Monitor**") of Canada Fluorspar (NL) Inc. ("**CFI**") and of 92834 Newfoundland and Labrador Inc. ("**92834**" or the "**Company**") denying the Priority Claim and Maritime Lien of Inaminka Marine Services Limited ("**Inaminka**") against CFI

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

**NOTICE OF APPEAL**

**TAKE NOTICE THAT** pursuant to the Order dated January 25, 2024 of the Honourable Justice A. MacDonald in proceedings before this Honourable Court bearing number 2022 01G 0709, Inaminka hereby appeals from the Assessment/Decision of the Monitor dated January 23, 2024 wherein the Monitor disallowed Inaminka's priority claim and maritime lien, and disallowed the inclusion of Inaminka's said claim in the Monitor's proposed distribution of the proceeds from the sale of the assets/shares of CFI pursuant to the CCAA proceedings in the within matter.

**AND THAT** the grounds of the proposed appeal are:

1. The Monitor erred in fact and law in failing to find that Inaminka has met its burden of proving that it has an *in personam* priority claim against CFI and an *in rem* claim against the Barge H-404 (the "**Barge**"), giving rise to a maritime lien against the Barge, the resulting proceeds therefrom, and a priority claim;

2. The Monitor erred in fact and in law by finding that consultation services, as provided by Inaminka, does not constitute a maritime lien under maritime law;

3. The Monitor erred in fact and in law in finding that no actual repairs were performed upon the Barge by Inaminka nor was there any equipment supplied by Inaminka to the Barge, and concluding in error that such were necessary pre-requisites to give Inaminka a maritime lien and/or a priority claim against the Barge and CFI, respectively;

4. The Monitor erred in fact and law by dismissing Inaminka's priority claim against CFI and maritime lien upon the Barge; and

5. Such further grounds as the evidence and law may indicate and this Honourable Court may permit.

**AND THAT** Inaminka will ask that the Assessment/Decision appealed from be reversed, rescinded or varied as follows:

1. That the Assessment/Decision of the Monitor disallowing Inaminka's priority claim and maritime lien against CFI and the Barge be set aside in its entirety and an order from this Honourable Court be entered, accordingly; and

2. Inaminka shall have its costs of this Appeal and in the proceedings below; and

3. Such just and equitable relief that this Honourable Court deems appropriate in the circumstances.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 14th day of February, 2023.

**DEBORAH L.J. HUTCHINGS LAW**

Per: _____

DEBORAH L. J. HUTCHINGS, K.C.
Solicitor for the Appellant, Inaminka
*Whose address for service is*
61 Parsonage Drive
St. John's, NL A1A 0J6

**TO:** Phil Clarke, CPA, CA, CIRP, LIT
**GRANT THORNTON LIMITED**
in its Capacity as Court-Appointed Monitor of
92834 Newfoundland and Labrador Inc.
Nova Centre, North Tower
Suite 1000, 1675 Grafton Street
Halifax, NS B3J 0E9

**AND TO:** Geoffrey L. Spencer
**MCINNES COOPER**
Solicitor for GRANT THORNTON LIMITED
in its Capacity as Court-Appointed Monitor
5th Floor, Baine Johnston Centre
10 Fort William Place,
St. John's, NL A1C 5X4

**AND TO:** Supreme Court of Newfoundland and Labrador
General Division
Registry, St. John's
Duckworth Street
St. John's, NL A1C 6C9

**Appendix W**

Richard A. Spellacy – Proof of Claim

**DEBORAH L.J. HUTCHINGS LAW**
**Deborah L.J. Hutchings, K.C.**
**Barrister, Solicitor and Notary**
61 Parsonage Drive
St. John's, NL A1A 0J6

(709) 726-3082 (Home) – (709) 682-3278 (Mobile)

November 24, 2023

By Email: CanadaFluorspar@ca.gt.com

Grant Thornton Limited – The Court Appointed Monitor of
92834 Newfoundland and Labrador Inc.
Nova Centre, North Tower
1675 Grafton Street, Suite 1000
Halifax, Nova Scotia B3J 0E9

Dear Sir:

**Re: Our Client – Richard A. Spellacy, Master Mariner**
**The Debtor – 92834 Newfoundland and Labrador Inc.**
**Presentation Of Claim for Richard A. Spellacy in the Claims Identification Process Pursuant to CCAA Proceedings**

In connection with the above noted matter, on behalf of Richard A. Spellacy, Master Mariner, we enclose herewith and in compliance with the Claims Identification Order of Justice A. MacDonald dated October 25, 2023, the following:

1. Proof of Claim of and signed by Richard A. Spellacy;
2. Supporting materials, being the Memorandum Respecting the Secured Priority Claim of Richard A. Spellacy with copies of documents, case law, and legislation included therewith; and
3. Signatory page of the Memorandum signed by the undersigned.

We shall provide the copies of the attachments to the Memorandum by way of a series of emails to follow.

Trusting that all of the foregoing is found to be in order.

Should you have any questions on the attached, please do not hesitate to contact the undersigned.

Yours very truly,

Deborah L. J. Hutchings Law
Per: Deborah L.J. Hutchings, K.C

**2023 01G 0841**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an application of Grant Thornton Limited, as Court-appointed Monitor of 92834 Newfoundland and Labrador Inc. ("**92834**" or the "**Company**");

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

---

## PROOF OF CLAIM

---

Please read carefully the enclosed Instruction Letter for completing this Proof of Claim. All capitalized terms not defined herein have the meanings ascribed to them in the Claims Identification Order dated October 25, 2023.

**I. PARTICULARS OF CLAIMANT:**

1. Full Legal Name of Claimant:

   Richard A. Spellacy, Master Marnier (the "Claimant")

2. Full Mailing Address of the Claimant:

   130 LeMarchant Road, Suite #201

   St. John's, NL

   A1C 2H2

3. Telephone Number: (709) 739-4714

4. E-Mail Address: dspellacy@nf.aibn.com

5. Facsimile Number: (709) 739-0317

6. Attention (Contact Person): Richard A Spellacy

7. Have you acquired this Claim by assignment?

   Yes; ☐ No: ☒ (if yes, attach documents evidencing assignment)

   If Yes, Full Legal Name of Original Claimant(s): N/A

## II. PROOF OF CLAIM:

1. I, Richard A. Spellacy, Master Mariner

(name of Claimant or Representative of the Claimant), of St. John's,

Newfoundland and Labrador do hereby certify:
(city and province)

(a) that I [check (✓) one]

☒ am the Claimant; OR

☐ am _____ (state position or title) of

_____
(name of Claimant)

(b) that I have knowledge of all the circumstances connected with the Claim referred to below; and,

(c) that complete documentation in support of the Claim referred to below is attached;

| Debtor | Pre-Filing Claim Amount | Whether Claim is Secured, Priority Unsecured, or Unsecured | Value of Security Held, if any: |
|---|---|---|---|
| Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., CFI Newspar Holdings Inc. and Newspar | $68,000 | Secured by virtue that the claim is a maritime lien for unpaid master's wages | |

| Debtor | Restructuring Claim Amount | Whether Claim is Secured, Priority Unsecured, or Unsecured | Value of Security Held, if any: |
|---|---|---|---|
| Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., CFI Newspar Holdings Inc. and Newspar | $46,350 | Secured by virtue that the claim is a maritime lien for unpaid master's wages | |

## III. PARTICULARS OF CLAIM

The particulars of the undersigned's total Claim (including Pre-Filing Claims and Restructuring Claims) are attached.

*(Provide full particulars of the Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) or legal breach(es) giving rise to the Claim, name of any guarantor(s) which has guaranteed the Claim, particulars and copies of any security and amount of Claim allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed.)*

## IV. FILING OF CLAIM

**For Pre-Filing Claims, this Proof of Claim MUST be received by the Monitor before 5:00 p.m. (Newfoundland Time) on November 25, 2023 (the "Pre-Filing Claims Bar Date").**

**For Restructuring Claims, this Proof of Claim MUST be received by the Monitor before the later of (i) the Pre-Filing Claims Bar Date and (ii) 5:00 p.m. (Newfoundland Time) on the date that is thirty (30) days after the date on which the Monitor sends a Claims Package to you with respect to a Restructuring Claim (the "Restructuring Claims Bar Date").**

In either case, completed forms must be delivered by prepaid ordinary mail, registered mail, courier, personal delivery or email addressed:

Grant Thornton Limited - The Court Appointed
Monitor of 92834 Newfoundland and Labrador Inc.,
1675 Grafton St Suite 1000
Halifax, NS, B3J 0E9
Canada
Telephone: 902-421-1734
Email: CanadaFluorspar@ca.gt.com

**Failure to file your Proof of Claim as directed by the Pre-Filing Claims Bar Date or Restructuring Claims Bar Date, as applicable, will result in your Claim being extinguished and forever barred and in you being prevented from making or enforcing a Claim against 92834.**

DATED at St. John's, NL this _____ day of November, 2023.

_____
Signature of Claimant

**2022 01G 0709**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** the
*Bankruptcy and Insolvency Act*,
R.S.C. 1992, c-27 ("**BIA**") in respect
of Canada Fluorspar (NL) Inc.

**AND IN THE MATTER OF** the
*Companies' Creditors Arrangement*
*Act*, R.S.C. 1985, c-36 ("**CCAA**") in
Respect of Canada Fluorspar (NL) Inc.

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**MEMORANDUM RESPECTING THE**
**SECURED PRIORITY CLAIM**
**OF**
**RICHARD A. SPELLACY, Master Mariner**

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## Introduction

1. The creditor Richard A. Spellacy, Master Mariner, ("**Spellacy**") claims against Canada Flurospar (NL) Inc. ("**CFI**") for unpaid master's wages for work he carried out on the ship "Barge H-404" (the "**Barge**"). Accordingly, Spellacy claims a maritime lien against the Barge. By virtue of the nature of a master's lien, and pursuant to Canadian maritime law, Spellacy has a priority lien and claim against the proceeds from the sale (the "**Proceeds**") of the Barge and/or of the corporate shares of CFI (the "**Shares**"). The total of Spellacy's claim is $114,350. Of that amount, $68,000 was accrued before the restructuring, and the remaining $46,350 accrued after the restructuring.

## Statement of Facts

2. By way of background to Spellacy's claim, an *in personam* and *in rem* action was commenced by Inaminka Marine Services Limited ("**Inaminka**") in the Federal Court on February 16, 2022 (the "**Action**"), which Action is identified as Court File No. T-279-22. Inaminka is a body corporate, incorporated under the laws of the province of Newfoundland and Labrador ("**NL**") and is in good standing as of the date hereof. Spellacy

is the sole shareholder, officer, and director of Inaminka and he is the sole employee of Inaminka.

3. Inaminka's claims arose prior to the commencement of the insolvency proceeding under the BIA and the restructuring proceeding under the CCAA. For completion of the record, attached hereto as **Exhibit "B"** are true copies of the Statement of Claim, Affidavit to Lead Warrant of Spellacy, and documents from the High Sheriff of Newfoundland and Labrador (the "**Sheriff**") verifying that the Statement of Claim was effected upon the named Defendants of the Action and that a Warrant of Arrest was effected upon the Barge. No Defence has been filed in the Action.

4. The Barge was registered in Panama on December 12, 2012 and identifies CFI as the owner thereof. Attached hereto as **Exhibit "A"** is a true copy of the proof of Registration of the Barge (the "**Registration**").

5. On September 2, 2022, Spellacy filed a *Caveat Release* under the Action to preserve his master's lien against the Barge (the "**Caveat**"). Attached hereto as **Exhibit "C"** is a true copy of the Caveat.

6. As noted above, Spellacy is a master mariner, having attained his designation in September, 1968. Attached hereto as **Exhibit "D"** is a true copy of Spellacy's Resume.

7. Inaminka, through Spellacy, provides consultation and brokerage services to the marine industry in various areas, such as, marine transportation; operation of vessels, including rigs, barges and tug boats, in general; advice on operations and safe movement of rigs and barges; advice on the use of tugs in the movement of rigs and barges; consultation and oversight in the construction, conversion and/or modification, and repair of ships (including barges). Inaminka and Spellacy are well known and respected in the marine industry and their services are sought after worldwide.

8. CFI obtained the Barge to use at its terminal near the mine, which terminal is known as Blue Beach terminal (the "**Terminal**"). CFI wanted the Barge to facilitate the loading of fluorspar onto ships carrying the cargo to CFI's customers. CFI intended that the Barge

would enable ships to dock at the Terminal to take on cargo of fluorspar. Without the use of the Barge, the fluorspar would have to be trucked to awaiting cargo ships at a marine terminal at Spanish Room, near Marystown, NL, at a considerable expense to CFI. The use of the Barge at the Terminal would make the mining and marketing of the fluorspar at St. Lawrence a viable venture.

9. Further, during inclement weather, the Terminal and the Barge were exposed to high winds and seas and, as a consequence, the Barge could not be used in its then present state at the Terminal. In fact, CFI had to engage tugs to move the Barge to safety before impending storms approached the area. This, too, was costly for CFI.

10. During the Fall of 2021, CFI sought the advice, consultation and services of Inaminka (the **"Services"**) to address these issues.

11. Accordingly, on or about October 12, 2021, Inaminka was retained by CFI for the following, and other, services respecting the Barge and the Loading Pier, but not limited to the following Services: to provide consultation to CFI on the manner in which the Barge could be protected from inclement weather and how the Barge could be moved safely away from the Loading Pier to safety from the approaching inclement weather without the need of tugs; to design a system and/or process which would enable CFI to move the Barge on and off the Loading Pier, as needed; to design a set of storm moorings, equipped with storm anchors, where the Barge would be moored safely during inclement weather; to enable CFI to safely move the Barge on and off the storm moorings, as needed, and return the Barge safely to the Loading Pier after the inclement weather had passed; to assess the moorings and continuing safe operation of the Barge in its present state; to complete sketches/drawings for each component of this system, including for the Loading Pier, storm moorings, storm anchors, and the necessary modifications to the Barge to accommodate the Loading Pier and storm moorings; to budget the cost for completing the foregoing and timeline and budget for the construction of this system; to source all contractors, sub-contractors to manufacture, fabricate, and install the various components for the Loading Piers, storm moorings, storm anchors, and the modification to the Barge, itself, to facilitate its movement between the Loading Pier and storm moorings and to secure the Barge safely to the Loading Pier and the storm moorings, as needed; to contract surveyors, engineers and other professional to facilitate inspections and surveys;

to conduct an inspection of the Barge to determine whether any work was required to it before starting the work noted above, and to provide a full assessment of such work. These activities were then supplemented with finalizing the location of the anchors and chains, adding two extra winches and reviewing a complete ballast plan as approved by Transport Canada.

12. It was intended that an inspection or investigation of the Barge be carried out to ensure that preliminary plans could be implemented in respect of the damage to the Barge's starboard side aft which occurred during a previous storm while moored at the Terminal.

13. Subsequent to a meeting held on November 12, 2021, Inaminka proceeded to the implementation stage. The primary part of that stage was to carry out an in-depth inspection of the Barge and also obtain measurements of the internal strength members to determine if they were affected by the damage to the starboard side aft. This part of the project was initiated on November 21, 2021 with a trip to Marystown by Spellacy, on behalf of Inaminka, who participated in the physical inspection of the Barge. This inspection was carried out in conjunction with Adaptive Marine Solutions Inc. ("**AMS**"), an engineering consultant firm that operates out of Ottawa, Ontario, but has a local office situate in St. John's.

14. On December 15, 2021, Inaminka (Spellacy) and naval architect, Anthony Barclay, who Inaminka sub-contracted, travelled to Marystown to participate in an in-depth inspection of the internals of the Barge with AMS. The Barge was duly inspected, with Inaminka (Spellacy) and Anthony Barclay present. On December 16, 2021 a follow up inspection of the internals and, also an inspection of the ballast system of the Barge were conducted. Given his qualifications as well as being a master mariner, Spellacy attended with AMS to inspect the Ballast System and was able to explain and operate the Ballast System for the AMS inspectors.

15. To facilitate the ongoing inspection of the Ballast System's internals, ballast water had to be transferred internally and as the ballast water was and still under the control of Transport Canada. The operation, therefore, had to be monitored by a licensed person, such as Spellacy. It was Jason Flood of CFI who, at that time, asked Spellacy, and then appointed Spellacy, to act in the capacity of master of the Barge for the purpose of signing

off on the transfer of ballast in the Barge's Ballast Water Record Book. This appointment has never been rescinded by CFI or anyone else. In fact, Spellacy still has the physical possession of the Ballast Water Record Book, as master of the Barge. The Ballast Water Record Book shows that Spellacy signed off on the transfer of ballast water as master of the Barge. Attached hereto as **Exhibit "E"** are copies of the Ballast Water Record Book wherein Spellacy made his entries. Spellacy notes that no one has ever asked him for the return or handover of the Ballast Water Record Book. He is not deliberately keeping the said Ballast Water Record Book or refusing to hand it over to CFI or the Monitor. Very simply, no one has asked him for it.

16. In terms of the Ballast System, itself, it was found to be totally inoperable, with one pump down and, what Inaminka suspected, was corrosion damage to the main suction lines. Due to the condition of the Ballast System, the ballast transfer had to be conducted manually, thus, requiring its oversight and operation to be carried out by a master mariner, being Spellacy, as noted above.

17. Attached hereto as **Exhibit "F",** as aforesaid, are Daily Logs or time notes which show the work performed by Spellacy, in his capacity of master of the Barge, for the period commencing December 16, 2021 to February 21, 2022.

18. It is noted that even after the arrest of the Barge, Spellacy was called upon to carry out the function of the master of the Barge. Spellacy, as master of the Barge, was contacted by a local shipowner who expressed an interest in purchasing the Barge. Spellacy, accordingly, contacted the Monitor and spoke with and emailed to Phil Clarke of Grant Thornton, on several occasions, about this interest in the Barge. The Monitor requested Spellacy provide to him (Clarke) specific information respecting the Barge and further requested Spellacy to introduce the interested buyer to Phil Clarke, all of which Spellacy did. Please see **Exhibit "G"** attached hereto which contains a series of emails between Spellacy and the Monitor to this effect.

19. Spellacy was never asked to stand down as master of the Barge. He continued to act as master and maintains that since between December 16, 2021 and February 21, 2022, he was told by Jason Flood to charge CFI a rate of $1000 per day when acting in the capacity of master. After the commencement of the receivership, I considered this rate to be

reasonable considering my experience. Attached hereto as **Exhibit "H"** are copies of emails to this effect. After CFI went into receivership, Spellacy reverted to his rate outlined under the Purchase Orders, which was $220 per hour.

**Master's Lien for Unpaid Wages**

20. On or about September 2, 2022, Spellacy submitted to the Monitor his Proof of Claim, being his personal claim for master's wages, as creditor of CFI.

21. Spellacy, in his capacity of master mariner of the Barge, provided marine consultation and other services, such as master mariner services, to CFI respecting the Barge during the same time period that Inaminka provided the Services. Those services performed by the master mariner related to the transfer of ballast water.

22. Spellacy's claim would not overlap with the claim of Inaminka, which shall be explained below.

23. Inaminka was initially appointed by CFI on Tuesday October 12, 2021, to assess the mooring and continuing safe operation of the Barge at CFI's facility at Blue Beach. As part of any activities undertaken by CFI, Spellacy kept and submitted Daily Log Sheets, as noted above, wherein all of the activities performed by Inaminka, him personally, and those of Inaminka's subcontractors were detailed. Attached hereto as **Exhibit "F",** as aforesaid, are true copies of Spellacy's personal Daily Logs of his activities performed for and at CFI's request, commencing October 13, 2021 through to and inclusive of January 31, 2022.

24. From October 12, 2021 to February 1, 2022, any work that Spellacy performed purely as master of the Barge, his master's wages were charged to CFI, pursuant to the purchase orders between CFI and Inaminka and were then invoiced by Inaminka to CFI and included as part of the $220.00 per hour rate. Inaminka would then pay the master's wages directly to Spellacy as required**.**

25. Attached hereto as **Exhibit "I"**, are copies of Inaminka's Purchase Orders. Attached hereto as **Exhibit "J"**, are copies of Inaminka's Invoices.

26. The actions or tasks described hereinbefore by Spellacy, particularly for ballast transfers and on stand-by for any movement, indicated that he continued to act as master of the Barge, as he was obligated to do so, until such time when he would be told to stand down. Email documentation to this effect is attached hereto as **Exhibit "K"**.

27. In summary, since December 15, 2021, Spellacy has acted in the capacity of master of the Barge without interruption. Until CFI went into receivership, the compensation for his actions as master of the Barge were invoiced through Inaminka and were included in the terms of the flat rate of $220.00 per hour, as aforesaid. At the request of CFI, and as noted above, Spellacy's compensation exclusively for master's work, Spellacy would charge $1000 per day for master's wages, as aforesaid. This continued up to February 21, 2022 (68 days).

28. The period between February 23, 2022 and September 26, 2022, Spellacy, as master of the Barge, worked 210 hours and at a master's rate of $220 per hour (which is the rate reflected in the Purchase Orders).

29. Therefore, Spellacy's claim to September 26, 2022 is $114,350.00.

30. The plan or system as designed by Inaminka, pursuant to its execution of the Services and under the instructions of CFI, would have made it possible for CFI to use the Barge at the Terminal, eliminating the need to hire tugs to move the Barge off the Loading Pier.

31. The particulars of Spellacy's work as master included the supervision and operation of the transfer of the ballast water and his sign off respecting the completion of the same as required by Transport Canada; and, through his particular knowledge of the Barge, itself, which he obtained through Inaminka's Services for CFI, as noted above, the consultation which he provided to the Monitor respecting potential purchaser(s) of the Barge and facilitating the Monitor's duty in assessing a possible stand-alone sale of the Barge. Spellacy, who is entitled to be paid for such work, was never paid. Attached hereto as **Exhibit "L"** are true copies of Spellacy's invoices issued to CFI.

32. Spellacy's work is related to the Barge and is pursuant to section 22(2)(o) of the Federal Courts Act ("**FCA**"), which states "any claim by a master, officer or member of the crew of

a ship for wages, money, property or other remuneration or benefits arising out of his or her employment". This not only gives Spellacy a claim under Canadian maritime law, but gives him a maritime lien as against the Barge and the proceeds from its sale. Spellacy's claim for the work he performed is a maritime lien.

**Reference**: Section 22(2)(o), FCA [**TAB 1**]

Canadian Imperial Bank of Commerce v. "Chene No. 1" (Le) [2004] 1 F.C.R. 120 [**TAB 2**]

33. Spellacy claims that the work he performed for CFI on the Barge is a maritime lien as security for his unpaid wages. Spellacy adopts the same legal argument submitted by Inaminka insofar as his maritime lien ranks ahead of secured mortgagees. Spellacy, however, refers to those cases that emphasize the priority position of the master's (maritime) lien.

34. It is noted that statutory liens are liens created by a validly enacted statute. They have the priority given to them by the statute that created them. There are many such liens, including, but not exclusive of, the following:

- claims by the Master and crew for wages which rank in priority to all but marshall's costs and salvage claims;
- claims by the Master for disbursements which rank in priority to all but wage claims, marshall's costs and salvage claims;
- claims by a carrier for any amounts due which must be perfected by notice and gives a right of sale; and
- claims in respect of goods, materials or services supplied to the foreign vessel and claims arising out of a contract for the repair or equipping of a foreign vessel by a person carrying on business in Canada which are given the status and priority of a "maritime lien".

**References**: Sections 86(1) to (5), 86(2.1), 248, and 249, CSA [**TAB 3**]
Section 139, Marine Liability Act ("**MLA**") [**TAB 4**]

35. Therefore, the priority of claims against a ship are ranked generally as follows:

1. Marshall' Costs and expenses, being the costs and expenses of the sale of the ship;
2. Possessory liens that attach prior to a traditional maritime lien;
3. Maritime liens (traditional maritime liens and MLA, s. 139 claims)
4. Possessory liens that attach subsequent to a maritime lien;
5. Registered mortgages; and
6. Unregistered mortgages.

36. The maritime lien constitutes a distinctive feature of maritime law. It has been described by the Supreme Court of Canada as follows:

> Broadly speaking, a maritime lien arises without registration or other formality when debts of a specific nature are incurred by or on behalf of a ship. The lien creates a charge which "goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has certain ranking with other maritime liens, <u>all of which take precedence over mortgages</u>" (citation omitted) (Our emphasis added).
>
> The reason for this privileged status for maritime lien holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships … Merchant seaman will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage. The Master may be embarrassed for lack of fund, but the ship itself if assumed to be worth something and is readily available to provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence.

**Reference**: See *Holt Cargo Systems Inc. v. Abc Containerline N.V. (Trustee of),* [2001] 3 S.C.R. 907 [**TAB 5**]

37. Maritime lien and ship mortgage holders are considered secured creditors under the BIA. Secured creditors are not subject to the stay under the bankruptcy provisions of the BIA, and, therefore, are entitled to realize on their security as in the same manner as if there was no bankruptcy, including commencing of an *in rem* action in Federal Court.

38. Reference is made specifically to the following case which is relevant to the issues as described above.

39. In the case of *Ballantrae Holdings Inc. v. The Ship "Phoenix Sun"* 2016 FC 570, the "Phoenix Sun" was purchased while under arrest by a person who intended to repair her, find a cargo and sail her to Turkey where she would be sold for scrap at a profit. The ship was purchased for $1 million which was borrowed from the plaintiff, Ballantrea, and secured by a mortgage on the ship. The mortgage was never registered in a ship registry but it was registered as a charge under the Ontario Personal Property Security Act ("**PPSA**"). The purchaser hired a crew and persuaded other chandlers and repairers to provide goods and services to the vessel. The purchaser also obtained some additional funds from a Mr. Hamilton. Eventually, the funds ran out and the ship was again arrested in the proceeding commenced by Ballantrae. The ship was subsequently sold for $680,000. Pursuant to the normal procedure established by the Federal Court, claimants to the proceeds of sale filed their claims with the court. The court was called upon to adjudge and rank the claims. The claimants and claims included:

- The Marshall for the fees and expenses of bringing the ship to sale;
- Ballantrae for its costs of bringing the vessel to sale;
- The Master and crew of the vessel for the amounts due to them under their employment contracts;
- The City of Sorel for berthage and the costs of supplying electricity, which it claimed had a priority under either the *Canada Marine Act*, the *Marine Liability Act* or in equity;
- Various necessaries supplier who claimed lien rights under s. 139 of the *Marine Liability Act*;
- Mr. Hamilton, who also claimed lien rights under s. 139 of the *Marine Liability Act* or in equity;
- Ballantrae for the amount due under the mortgage; and
- Skylane, who also claimed to have a valid mortgage registered in Panama.

**Reference**: *Ballantrae Holdings Inc. v. The Ship "Phoenix Sun"* 2016 FC 570 [**TAB 6**]

40. The court held that generally, the highest priority claims are the Marshall's fees and expenses and the costs of the creditor that brought the ship to sale. Thereafter come maritime liens and liens created by statute, which enjoy the same status. Next in ranking are mortgages followed by *in rem* creditors. On occasion, when the interests of justice require, equity will permit the court to alter this traditional ranking, as well as elevate a claim to that of a maritime lien. (Our emphasis added)

41. The City of Sorel claimed for berthage ($75,000) and for the supply of electricity ($22,000) and argued it is entitled to priority under s. 122 of the CMA or s. 139 of the MLA or, alternatively, on an equitable basis. Section 122 of the CMA gives priority to a Port Authority or to "a person who has entered into agreement under s. 80(5)". The court held that the City of Sorel is not a Port Authority and is not "a person who has entered into agreement under s. 80(5)" since s. 80(5) relates to parts of the Saint Lawrence Seaway and Sorel is not within the Seaway. Sorel, therefore, had no priority under s. 122 of the *Canada Marine Act*. Neither did the City's claim fall under s. 139 of the MLA. The claim of the city, as noted by the court, is not for "goods, materials or services" supplied to a vessel. This follows from the distinction in s. 22 of the FCA between necessaries and docking charges and from the purpose of s. 139 of the MLA which was to give Canadian necessaries supplier a priority to that enjoyed by foreign suppliers. In the traditional ranking, the claims of the City of Sorel would have no priority; however, the court recognized that it does have an equitable jurisdiction to vary the traditional ranking if the interests of justice so require and held that it was appropriate to alter the traditional ranking in respect of the claim for supply of electricity to the ship since this did benefit all of the creditors. The claim for the costs of electricity ranked immediately after the claims of the Master and crew and the claims of necessaries suppliers with lien claims under s. 139 of the MLA ranked after the claim of the City of Sorel for the supply of electricity. (Our emphasis added)

**Conclusion and Remedy Sought**

42. In conclusion, Spellacy is entitled to a priority maritime lien against the Barge, or the proceeds thereof, for its unpaid invoices for the Services. Since the Barge has been sold with the assets or shares of CFI, Spellacy is entitled to a priority claim against that portion of the sale equivalent to it claim being $114,350, plus interest thereon and reasonable costs in having to pursue his claim under the BIA and CCAA.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**DATED** this 24st day of November, 2023

Deborah L. J. Hutchings, K.C.
**Deborah L.J. Hutchings Law**
Solicitor for
Inaminka Marine Services Limited
61 Parsonage Drive
St. John's, NL  A1A 0J6
Telephone:  709-682-3728
Email: deborahljhutchings@gmail.com

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**DATED** this 24st day of November, 2023

Deborah L. J. Hutchings, K.C.
**Deborah L.J. Hutchings Law**
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Inaminka Marine Services Limited
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St. John's, NL A1A 0J6
Telephone: 709-682-3728
Email: deborahljhutchings@gmail.com

# Exhibit “A”

Registration of Barge

REPÚBLICA DE PANAMÁ | REPUBLIC OF PANAMA
AUTORIDAD MARÍTIMA DE PANAMÁ | PANAMA MARITIME AUTHORITY

PANAMA MARITIME AUTHORITY

DIRECTORATE GENERAL OF MERCHANT MARINE / DIRECCION GENERAL DE MARINA MERCANTE
INTERNATIONAL SERVICE / SERVICIO INTERNACIONAL

| IMO NUMBER<br>Número OMI | REGISTRATION No<br>Número Oficial | CALL SIGN<br>Distintivo de Llamada |
|---|---|---|
| ********** | 19557-91-I | S/R |

Issued under Law No. 57 dated August 6th, 2008 / Expedido bajo Ley No. 57 de 6 de agosto de 2008

## NAVIGATION STATUTORY REGISTRY / PATENTE REGLAMENTARIA DE NAVEGACION

### Vessel's Information / Información de la Nave

| Name of Vessel / Nombre del Buque | Type Vessel / tipo de Buque |
|---|---|
| CFI PONTOON 1 | BARCAZA |

Registered Owner / Propietario
CANADA FLUORSPAR NL INC

| Resident Agent / Agente Residente | Radio Accounting Authority / Autoridad de Cuentas de Radio |
|---|---|
| ALEMAN, CORDERO, GALINDO & LEE | SIN RADIO |

| Previous Name / Nombre Anterior | Previous Flag / Nacionalidad a la que Renuncia |
|---|---|
| 40 | INGLATERRA |

| Built in / Construido en | Builders / Constructores | Hull Material / Material del casco | Keel Laid / Puesta de Quilla | Construction Date / Año de Construcción |
|---|---|---|---|---|
| SUNDERLAND, INGLATERRA | AUSTIN & PICKERSGILL, LTD. | ACERO | 1986 | 1987 |

| Lenght / Eslora | Breadth / Manga | Depth / Puntal | GRT / TB | NRT / TN | Dead Weight / Peso Muerto |
|---|---|---|---|---|---|
| 117.12 MTS | 36.60 MTS | 7.60 MTS | 9,638.00 | 2,891.00 | ********* |

PROPULSION SYSTEM / SISTEMA DE PROPULSION

| Type of Engines / Tipo de Máquina | Vessel Speed / Velocidad del Buque | Manufacture & Cylinders / Fabricantes y Cilindros | Engines Power / Potencia de la Máquina |
|---|---|---|---|
| S/Propulsión Propia<br>S/Propulsión Propia | ---------- | ----------<br>---------- | ---------- |

| Issuance Date / Fecha de Expedición | Expiration Date / Fecha de Expiración |
|---|---|
| DECEMBER 12th, 2017<br>DOCE (12) de DICIEMBRE de 2017 | DECEMBER 11th, 2022<br>ONCE (11) de DICIEMBRE de 2022 |

| Place of Issuance / Lugar de Emisión | Fees / Derechos |
|---|---|
| PANAMA | R.O 1142529/ 18-8-17 |

Renmarks / Observaciones

LIC. FERNANDO SOLORZANO
OFFICER SIGNATURE / FIRMA DEL FUNCIONARIO

PANAMA

**This is Exhibit** A **referred to in the Affidavit of** Richard A. Spellacy
**Sworn or affirmed before me this** 24th
**day of** ~~November~~ October, **20** 2022.

M. RCM-ENMT

REPÚBLICA DE PANAMÁ | REPUBLIC OF PANAMA
AUTORIDAD MARÍTIMA DE PANAMÁ | PANAMA MARITIME AUTHORITY

PANAMA MARITIME AUTHORITY

DIRECTORATE GENERAL OF MERCHANT MARINE / DIRECCION GENERAL DE MARINA MERCANTE
INTERNATIONAL SERVICE / SERVICIO INTERNACIONAL

| IMO NUMBER<br>Número OMI | REGISTRATION No.<br>Número Oficial | CALL SIGN<br>Distintivo de Llamada |
|---|---|---|
| ********** | 19557-91-I | S/R |

Issued under Law No. 57 dated August 6th, 2008 / Expedido bajo Ley No. 57 de 6 de agosto de 2008

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| Resident Agent / Agente Residente | Radio Accounting Authority / Autoridad de Cuentas de Radio |
|---|---|
| ALEMAN, CORDERO, GALINDO & LEE | SIN RADIO |

| Previous Name / Nombre Anterior | Previous Flag / Nacionalidad a la que Renuncia |
|---|---|
| 40 | INGLATERRA |

| Built in / Construido en | Builders / Constructores | Hull Material / Material del casco | Keel Laid / Puesta de Quilla | Construction Date / Año de Construcción |
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| Lenght / Eslora | Breadth / Manga | Depth / Puntal | GRT / TB | NRT / TN | Dead Weight / Peso Muerto |
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PROPULSION SYSTEM / SISTEMA DE PROPULSION

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|---|---|---|---|
| S/Propulsión Propia<br>S/Propulsión Propia | ---------- | ----------<br>---------- | ---------- |

| Issuance Date / Fecha de Expedición | Expiration Date / Fecha de Expiración |
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| DECEMBER 12th, 2017<br>DOCE (12) de DICIEMBRE de 2017 | DECEMBER 11th, 2022<br>ONCE (11) de DICIEMBRE de 2022 |

| Place of Issuance / Lugar de Emisión | Fees / Derechos |
|---|---|
| PANAMA | R.O.1142529/ 18-8-17 |

Renmarks / Observaciones

LIC. FERNANDO SOLORZANO
OFFICER SIGNATURE / FIRMA DEL FUNCIONARIO

PANAMA

000275735

RCM-FNMT

**Court File No. T-**

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.**, a body corporate

**Defendant**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

## AFFIDAVIT TO LEAD WARRANT

## (RULE 481)

I, Richard A. Spellacy, of the City of St. John's, in the Province of Newfoundland and Labrador, being duly sworn, do depose and say that:

1. I am the sole shareholder and director, and the President of the Plaintiff, Inaminka Marine Services Limited, and, as such, I am aware of the matters relating to the arrest of the ship "BARGE H-404" (the "Barge"), except where stated to be based upon information and belief.

2. The Plaintiff provides consultation and other services in the marine industry in the Province of Newfoundland and Labrador (the "Province") and elsewhere.

3. The claim of the Plaintiff is for the recovery of money owed by the Defendants for the Plaintiff's consultation and design services, as will be further described below, relating to the protection of the Barge from damage caused by inclement weather. The claim is presently due and owing to the Plaintiff by the Defendants. Accordingly, this will invoke

the *in rem* jurisdiction of the Federal Court pursuant to section 22(2) (m) and (n), and section 23 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

4. At all times material to this matter, Canada Fluorspar (NL) Inc. ("CFI") docked the Barge at its loading piers situate at its Blue Beach terminal (the "Terminal") at or near St. Lawrence, Burin Peninsula, in the Province. The Barge typically cannot be moved without the assistance of tugs. On the occasions of approaching inclement weather, CFI would be required to engage tugs to move the Barge from the Terminal to a safer and more protected location to avoid damage to the Barge from the inclement weather. It is my understanding from those I dealt with at CFI that engagement of tugs to move the Barge for this purpose was a great expense for CFI. Also, there were occasions when tugs were not immediately available, and the Barge would often sustain damage if left at the Terminal to ride out the inclement weather.

5. Therefore, in or about late summer or early fall of 2021 the Plaintiff was approached by CFI to provide a solution, through its consultation and design services, for the protection of the Barge from damage caused by inclement weather and without relying upon the tug service (the "Services").

6. On behalf of the Plaintiff, I completed a vendor registration with CFI on or about October 28, 2021 (the "Vendor Registration") wherein it was stated that the Plaintiff's terms for payment for its Services was 30 days of issuing its invoices (net 30 days). It was agreed to between the Plaintiff and CFI that the Plaintiff would provide the Services to CFI. Attached hereto as Exhibit "A" is a true copy of the Vendor Registration.

7. Through me, the Plaintiff provided the specific Services: consultation to CFI on the manner in which the Barge could be moved to safety from approaching inclement weather without the use of tugs; designed a system or process which would allow CFI to move the Barge on and off the loading piers; designed a set of storm moorings to facilitate the movement of the Barge on and off the loading piers; sourced all contractors for manufacturing the various components in the process of moving the Barge and for the installation of such components, respectively.

8. On or about November 5, 2021 the Plaintiff received from CFI one purchase requisition dated for November 5, 2021 in the amount of $90,000. Then on December 14, 2021, by which time the Plaintiff had delivered approximately 70% of the Services to the Defendants and most of the initial requisite amount for the Services had been used up, CFI provided the Plaintiff with two purchase orders of the same date. The Plaintiff states that the aggregate amount of the two purchase orders dated December 14, 2021 was approximately $143,000 plus tax. Contrary to the Plaintiff's terms, as noted above, the purchase orders stated that terms were 60 days net. Attached hereto as Exhibit "B" are true copies of the purchase orders.

9. The Services were completed and presented in its final form to CFI on or about January 20, 2022. The final budget was completed by the Plaintiff on January 30, 2022 and presented to CFI on the afternoon of January 31, 2022. Attached hereto as Exhibit "C" are true copies of the invoices issued by the Plaintiff to CFI for the Services rendered, which invoices total the sum of $146,870.02. I note that the invoices dated January 15, 2021 and February 1, 2021 should be January 15, 2022 and February 1, 2022, respectively.

10. The amount of $146,870.02, at the time of execution of this my Affidavit, remains owing by the Defendants to the Plaintiff, with interest accruing thereon as of today's date. In addition, expenses for legal fees have been incurred by the Plaintiff to proceed with this action plus additional expenses Which are expected for the issuance and service of the Statement of Claim and the Warrant for the arrest of the Barge. The Plaintiff's claim remains unsatisfied.

11. The nature of the property to be arrested is a ship, being a barge named H-404 and identified as CFI Pontoon 1. I am advised and do verily believe that the beneficial owner of the Barge is the Defendant Canada Fluorspar (NL) Inc. and that the Barge is currently tied up at the Marbase (the former Marystown Shipyard) in Marystown in the Province.

12. The Plaintiff's claim and action are to secure payment of the outstanding debt related to the Services it has provided to the Defendants for the benefit of protecting and preserving the Barge from damage resulting from inclement weather, which Services are described above in this my Affidavit.

13. All facts deposed above in this my Affidavit I believe to be true.

**SWORN** before me at the City of St. John's, in the Province of Newfoundland and Labrador, this 15th day February, 2022, before me:

Commissioner for Oaths / Barrister /Notary Public

**RICHARD A. SPELLACY**

# VENDOR REGISTRATION APPLICATION

## Canada Fluorspar (NL) Inc.

St Lawrence Newfoundland

**Notes to vendors :** Vendor registration is essential for procurement and payment purposes.
Please answer all questions fully so that your application may proceed without delay
INFORMATION PROVIDED REMAINS CONFIDENTIAL IN PERPETUITY

| Date of Application | Prepared by | Title |
|---|---|---|
| 28-Oct-21 | Richard Spellacy | President |

Full company name *: Inaminka Marine Services Ltd.

Currency *: Canadian Dollars

Business Address *: Suite 202, 130 Lemarchant Road

| City * | Province/State * | Country * |
|---|---|---|
| St. Johns | Newfoundland and Labrador | Canada |

| Postal/Zip Code | Company registration number * | Payment Terms * |
|---|---|---|
| A1C 2H2 | 38557 | Net 30 days |

**Contacts**

| | Phone Number | Email Address |
|---|---|---|
| Operations Contact Name: Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |
| PO Contact Name: Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |
| A/R Contact Name: Richard Spellacy | 709 685 1725 | richardspellacy@hotmail.com |

VOLUNTARY: Is your business owned by a member of an underrepresented group (mark X in all that apply)

| | | | |
|---|---|---|---|
| | Women | | Disability |
| | Aboriginal | | Visible Minority |

**Banking information**

Name to appear on cheques or wire transfers *: Inaminka Marine Services Ltd

| Name of bank | Address of bank |
|---|---|
| CIBC | 215 Water Street, St. Johns, NL, A1C6C9 |

| Institution # (3 digits) * | IBAN/Account Number * | Swift * |
|---|---|---|
| 390 | 00063-010-4811410 | CIBCCATT |

| Transit # (5 digits) * | Country |
|---|---|
| 63 | CANADA |

**Mailing Address for Cheque (If applicable)**

Full company name *: Inaminka Marine Srvices Ltd.

Business Address *: Suite 202, 130 Lemarchant Road

| City * | Province/State * | Country * |
|---|---|---|
| St. Johns | NL | CANADA |

Postal/Zip Code: A1C 2H2

**Internal use Only (CFI)**

Entered in Sage date: _____ /_____ /_____ Entered By: _____

This is exhibit A referred to in the affidavit of Richard A. Spellacy sworn or affirmed before me this 15th day of February, 2022

_____

Canada Fluorspar (NL) Inc.

# Purchase Requisition

| Date | Page |
|---|---|
| 2021-11-05 | 1 |
| Purchase Requisition Number | |
| RQN0012966 | |

| Reference | Description | Required Date | | Requested By |
|---|---|---|---|---|
| Blue Beach | Review BB barge mooring away f | | CAP2021-001 | Serena Hickey |

| Ship To | Bill To | Ship Via | FOB Point |
|---|---|---|---|
| | | | |

| Item | Description | Vendor | Expected Arrival | GL Account | Quantity | UOM | Unit Cost | Extended Cost |
|---|---|---|---|---|---|---|---|---|
| CAPDC | Review BB barge mooring away from cribs | | | 18343-505-033 | 60.00 | EA | 1,500.00 CAD | 90,000.00 |

This is exhibit "B" referred to in the affidavit of Richard A. Spellacy sworn or affirmed before me this 15th day of February, 2022.

Comment:
Vendor Richard Spellacy

Total Cost: 90,000.00

Approver Name: Approver Position / Title:

# Purchase Order

| Date | Page |
|---|---|
| Dec 14, 2021 | 1 |
| **Purchase Order Number** | |
| PO00021012 | |

Canada Fluorspar (NL) Inc.
P.O. Box 337
St. Lawrence, NL A0E 2V0

01/19/2022
7:27:52AM

REQUISITION # **RQN0012966**

**Vendor Address:**

Inaminka Marine Services Ltd.
Suite 202
130 Lemarchant Rd
St. John's, NL A1C 2H2
Canada

| Reference | Contact | Vendor Number | PO Date | Terms | Ship Via | Expected Arrival |
|---|---|---|---|---|---|---|
| Blue Beach | | INAMAR | Dec 14, 2021 | NET60 | | |

| Qty. Ordered | Vendor Item Number | Description | CFI Item Number | Unit Cost | UOM | Extended Price |
|---|---|---|---|---|---|---|
| 0.0000 | CAPDC | Review BB barge mooring away from cribs $220.00 PER HOUR<br>**Instructions:** Requisitioner: SHICKEY RQN0012966 | CAPDC | 1.000000 | EA | 0.00 |
| 0.0000 | CAPDC | MILELAGE .60 PER KM<br>**Instructions:** Requisitioner: SHICKEY RQN0012966 | CAPDC | 1.000000 | MT | 0.00 |
| 50,000.0000 | RQN13616 | Review BB Barge Mooring Away from Crib (220.00 per hr) | CAPDC | 1.000000 | EA | 50,000.00 |
| 3,000.0000 | CAPDC | MILELAGE | CAPDC | 1.000000 | EA | 3,000.00 |

**Comments:**
Richard Spellacy to SUBMIT DAILY RECORD OF WORK DONE WITH INVOICE

**Tax Summary:**
HSTGST 7,950.00

| | |
|---|---|
| **Less:** included tax | **0.00** |
| **Subtotal** | **53,000.00** |
| **Total tax** | **7,950.00** |
| **Total purchase order** | **60,950.00** |

CFI
CANADA FLUORSPAR INC.

# Purchase Order

| Date | Page |
|---|---|
| Dec 14, 2021 | 1 |

Purchase Order Number
PO00021012

12/14/2021
8:14:19AM

REQUISITION # RQN0012966

**Vendor Address:**

Inaminka Marine Services Ltd.
Suite 202
130 Lemarchant Rd
St. John's, NL A1C 2H2
Canada

Contact : Richard Spellacy
Phone: 7096851725
Email: richardspellacy@hotmail.com

**Ship To/Billing address**

**Canada Fluorspar (NL) Inc**
**141 Director Drive**
**P.O. Box 337**
**St. Lawrence, NL**
**A0E 2V0**
**Phone: (709) 873-3331**
**Fax: (709) 873-3335**

| Reference | Contact | Vendor Number | PO Date | Terms | Ship Via | Expected Arrival |
|---|---|---|---|---|---|---|
| Blue Beach | | INAMAR | 12/14/2021 | NET60 | | |

| Vendor Item Number | Description | CFI Item Number | Qty. Ordered | Expected Arrival | Unit Cost | UOM | Extended Price |
|---|---|---|---|---|---|---|---|
| GL ACCT: | Review BB barge mooring away from cribs $220.00 PER HOUR 18343-505-033 | CAPDC | 87,000.00 | | 1.000000 | EA | 87,000.00 |
| GL ACCT: | MILELAGE .60 PER KM 18343-505-033 | CAPDC | 3,000.00 | | 1.000000 | MT | 3,000.00 |

**Comments:**
Richard Spellacy to SUBMIT DAILY RECORD OF WORK DONE WITH INVOICE

**Tax Summary:**
HSTGST 13,500.00

| | |
|---|---|
| **Subtotal** | **90,000.00** |
| **Total tax** | **13,500.00** |
| **Total purchase order** | **103,500.00** |

**Approver Name:** **Approver Position / Title:**

Bill Dobbs
Jason Flood
Patrick Gannon
Ron Milmine
Serena Hickey
Terry Fleming

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #301
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

November 30th 2021

**Canada Fluorspar (NL) Inc.**
**PO Box 337**
**St. Lawrence, NL**
**A0E2V0**

This is exhibit "C" referred to in the affidavit of Richard Spellacy sworn or affirmed before me this 1st day of February, 2022.

RQN #N0012966
Inaminka 20209

Attention: Jason Flood

Re Consulting on loading Barge

| | |
|---|---|
| 27.5 days @ C$1,500.00 per day | $41,250.00 |
| HST @15% | $6,187.50 |
| Expences as attached | $894.00 |
| **Total** | **$48,331.50** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
**130 LeMarchant Road, Suite #301**
**St. Johns, Newfoundland, A1C 2H2**
**(709) 739-4714**
**Fax: (709) 739-0317**
**email;dspellacy@nf.aibn.com**
**HST#88690 8235 RT0001**

December 12th 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 20210

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 64.5 hours @$220.00/hour | $14,190.00 |
| A. Barclay 24 hours @$200.00/hour | $4,800.00 |
| HST @15% | $2,848.50 |
| Expences as attached | $539.17 |
| **Total** | **$22,377.67** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

December 31st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202111

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 140.0 hours @$220.00/hour | $30,800.00 |
| A. Barclay 30 hours @$200.00/hour | $6,000.00 |
| HST @15% | $5,520.00 |
| Expences as attached | $606.85 |
| **Total** | **$42,926.85** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
**130 LeMarchant Road, Suite #202**
**St. Johns, Newfoundland, A1C 2H2**
**(709) 739-4714**
**Fax: (709) 739-0317**
**email;dspellacy@nf.aibn.com**
**HST#88690 8235 RT0001**

January 15th. 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202201

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 65.0 hours @$220.00/hour | $14,300.00 |
| HST @15% | $2,145.00 |
| **Total** | **$16,445.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

February 1st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202202

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 66.0 hours @$220.00/hour | $14,520.00 |
| Expences as attached | $91.00 |
| HST @15% | $2,178.00 |
| **Total** | **$16,789.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

Court File No. T - 279-22

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.**, a body corporate

**Defendants**
*(In Personam)*

**AND:** **THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

**WARRANT**
**(RULE 481)**

TO The High Sheriff of the Province of Newfoundland and Labrador or as the case may be:

YOU ARE DIRECTED to arrest the ship **"Barge H-404"** and to keep the same under arrest until further order of this Court.

DATED this 16th day of February, 2022.

ORIGINAL SIGNED BY
MICHAEL KOWALCHUK
ORIGINAL SIGNÉ PAR

Issued By: _____
(Registry Officer)

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the 16 day of February A.D. 20 22

Dated this 16 day of February 20 22

M. Kowalchuk
Registry Officer
Agent du greffe

4865-5723-0607, v. 1

E-MAILED Oct 17/2022

OFFICE OF THE HIGH SHERIFF Newfoundland & Labrador

# JUDGMENT REGISTRATION FORM

(THIS AREA FOR OFFICE USE ONLY)

COURT NO: _____ *Date Received:* _____ *Registration Fee:* _____

ORDER DATE: _____ *Registration #:* _____ *Receipt/Req.#:* _____

*Processed By:* _____ *Small Claims Reg. Fee:* $15.00

**REGISTRATION TYPE**

☐ Notice of Judgment ☐ Recovery Order ☐ Attachment Order ☐ Wage Claim ☐ Appraisal & Sale

☐ Small Claims Judgment ☐ Possession Order ☐ Support Order ☑ Ship Arrest ☐ Other Order

**CREDITOR:** ☐ Individual ☑ Enterprise

Enterprise/Last Name: Inaminka Marine Services Middle Name: _____

First Name: _____ Telephone: _____

Address: Suite 202 130 LeMarchant Rd. St. John's NL A1C 2H2 Facsimile: _____

**Creditor Enterprise Contact:**

Law Firm: Benson Buffett PLC Telephone: 570-7256

Representative: Debnah Hutchings Q.C. Facsimile: 579-2647

**DEBTOR:** ☐ Individual ☑ Enterprise

Enterprise/Last Name: Canada Fluorspar (NL) Inc. Middle Name: _____

First Name: _____ Enterprise Contact: _____

Address: 1 Clarke's Pond Road St Lawrence NL A1E 2V0 Telephone: _____

Facsimile: _____

**Identifying Information for Individuals**

Alternate Names: _____ D.O.B: _____ Day _____ Month _____ Year

Driver's Licence: _____

SIN: _____ MCP: _____

**Identifying Information for Serial Numbered Goods**

Type/Description: _____ Serial Number: _____

**Debtor Enterprise Contact:**

Law Firm: _____ Telephone: _____

Representative: _____ Facsimile: _____

Original Order: $146,870.02 Costs: $512.50 Pre-Judgment Interest: _____

Current Order Balance: _____

Post-Judgment Interest: ☐ None ☐ Judgment Interest Act ☐ Interest Rate/Schedule (attach details)

**Attach Certified Copy of Court Order**

**CREDIT CARD AUTHORIZATION**

**Card Holder:** _____

**Card Number:** _____

**Bank:** _____

**Expiry date:** _____ **Amount:** _____

**Signature:** _____ **Phone:** _____

_____

**Creditor/Agent Signature**

*Revised June 26, 2013*

**Court File No. T -**

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED.**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC.,** a body corporate.

**Defendants**
*(In Personam)*

**AND:** **THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"**

**Defendants**
*(In Rem)*

## STATEMENT OF CLAIM

**TO THE DEFENDANTS:**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a Solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Court Rules, 1998*, serve it on the Plaintiff's solicitor or, where the Plaintiff does not have a solicitor, serve it on the Plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served in Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty (40) days. If you are served outside Canada and the United States of America, the period for serving and filing your defence is sixty (60) days.

Copies of the Federal Court Rules, 1998, information concerning the local offices of this Court and other necessary information may be obtained on request by the Administrator of this Court at Ottawa (613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

**DATED** at St. John's, Newfoundland and Labrador, this day of February, 2022.

Issued by: _____
**(Registry Officer)**

**TO:** Canada Fluorspar (NL) Inc.
P.O. Box 337
1 Clarke's Pond Road
St. Lawrence, NL A1E 2V0

**AND TO:** The Ship "Barge H-404", the Owners and All Others Interested in the Ship "Barge H-404" Their Solicitors or Agents

1. The Plaintiff, Inaminka Marine Services Limited, claims against the Defendants for consultation and design services provided by the Plaintiff to the Defendants at their request (the "Services"). By contract the Services were performed by the Plaintiff for the Defendants and the cost of same is due and owing from the Defendant, Canada Fluorspar (NL) Inc. ("CFI").

2. The Plaintiff is a body corporate duly incorporated under the laws of the Province of Newfoundland and Labrador (the "Province"), whose registered office is Suite 202, 130 LeMarchant Road, St. John's, NL A1C 2H2.

3. CFI is a body corporate duly incorporated under the laws of the Province, whose registered office is P.O.Box 337, 1 Clarke's Pond Road, St. Lawrence, NL A0E 2V0. At all times material hereto, CFI was the beneficial owner of the Barge H – 404 (the "Barge") which is typically moored at CFI's loading piers at its Blue Beach terminal, at or near the Town of St. Lawrence, in the Province (the "Terminal").

4. The Services supplied by the Plaintiff included, but were not limited to, consultation to CFI on the manner in which the Barge could be moved to safety from approaching inclement weather without the use of tugs; designed a system or process which would allow CFI to move the Barge on and off the loading piers; designed a set of storm moorings to facilitate the movement of the Barge on and off the loading piers; sourced all contractors to manufacture the various components in the process of moving the Barge and to install such components, respectively; and drafted a budget and timeline for the completion of the process.

5. The Plaintiff states that the amount of $146,870.02 is the outstanding debt due and owing to it from CFI and the Defendants for the supply by the Plaintiff of the Services, aforesaid. Despite repeated requests to CFI and the Defendants for payment, the outstanding amount has not been paid.

6. The Plaintiff pleads breach of contract and the provisions of the *Federal Court Act*, R.S.C. 1985, c.F-7.

7. The Plaintiff claims against CFI and the Defendants the sum of $146,870.02 which is due and owing to the Plaintiff, plus interest thereon and costs.

8. The Plaintiff requests that the hearing in this matter take place in St. John's, Newfoundland and Labrador.

**DATED** at St. John's, Newfoundland and Labrador, this 16th day of February, 2022.

**BENSON BUFFETT PLC INC.**

Per: _____
**DEBORAH L.J. HUTCHINGS, QC**
Solicitors for the Plaintiffs
*Whose Address for Service is:*
Suite 900, Atlantic Place
St. John's, NL A1C 5N8

**TO:** Canada Fluorspar (NL) Inc.
P.O. Box 337
1 Clarke's Pond Road
St. Lawrence, NL A1E 2V0

**AND TO:** The Ship "Barge H-404", the Owners and All Others Interested in the Ship "Barge H-404" Their Solicitors or Agents

**Court File No. 279-22**

**FEDERAL COURT**
**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**INAMINKA MARINE SERVICES LIMITED**, a body corporate

**Plaintiff**

**AND:**

**CANADA FLUORSPAR (NL) INC. ("CFI")**, a body corporate

**Defendant**
*(In Personam)*

**AND:**

**THE OWNERS AND ALL INTERESTED IN THE SHIP "BARGE H-404" (the "Barge") (the "Action")**

**Defendant**
*(In Rem)*

**CAVEAT RELEASE**

**(Rule 493)**

**TAKE NOTE THAT I**, Richard A. Spellacy, MM, of Suite 202, 103 LeMarchant Road, St. John's, NL A1C 2H2, apply for a caveat against the release of the ship Barge H-404, now under arrest pursuant to the warrant issued February 16, 2022 without notice first being given to me.

**MY ADDRESS FOR SERVICE** is: MacNab, Fagan & Murphy, Prince Charles Building, 120 Torbay Road, Suite W240, St. John's, NL A1A 2G8 Attention: Deborah L. J. Hutchings, Q.C.

Dated September 2, 2022 at St. John's, NL.

**Richard A. Spellacy, MM**

# RESUME

## RICHARD A. SPELLACY

**PERSONAL DATA:**

| | |
|---|---|
| **Name:** | Richard Alfred Spellacy |
| **Date of Birth :** | April 19, 1943 |
| **Nationality:** | Canadian |
| **Health** | Excellent |
| **EDUCATION:** | Lithgow High School, NSW, Australia.<br>Various Marine Colleges resulting in the issuing of a foreign-going Masters Certificate in September of 1968. August 1970 to July 1971, Extra-Masters course, South Shields Marine College.<br><br>February 1987 to March 1987 extensive training in the use of Macintosh computers vis-a-vis desktop publishing. Now competent in both Mac and Ms/Dos based computers.<br>October 1998. DNV Internal ISM Auditors course at St. Johns Marine College |
| **CERTIFICATES HELD:** | Master Foreign Going - British #106713<br>Master Foreign Going - Canadian #67104Z<br>Radio Operator third Class - Australian #S114<br>DNV Internal Auditor for ISM<br>HUET Valid until 4/02/09<br>WHMIS Complete 20/2/06 |

## EMPLOYMENT HISTORY

**As the detailed work history below illustrates, since 1979, I have been involved with almost every aspect of ship owning and operating in Eastern Canada. In particular, from 1979 to 1985, I directed all the affairs of a large and diverse shipping group and was deeply involved in the day to day details of the chartering and broking of many types of vessels. From 1996 until 2001 when I was the founding and managing partner of Cape Harrison Marine, I was responsible for the sale and purchase of a number of vessels and in particular, was responsible for the specifications, ordering construction supervision and delivery of two new high powered tugs. These duties involved sourcing and obtaining the finance for these activities and raising and completing all financial documentation to complete the transactions. This background, allows me to accept further assignments of this type secure in the knowledge that I have the necessary experience and background to ensure that the job is done properly.**

## DETAILED HISTORY

**1996-Present**
Founded and directed the operations of Inaminka Marine Services. Inaminka functions as a consultant and broker in the East Coast Offshore Industry. Current clients include Seadrill, Interocean & Trident Offshore, (Rig moving world wide) Cape Harrison Marine, C-Mar Canada, JLA of Houston, (warranty and rig moving - world wide) Noble Denton, (rig mover off Newfoundland, Trinidad and Congo) BMT of Ottawa, (operational and safety review of the Newfoundland ferry system) Canadian Shipbuilding and Engineering of Port Weller, Ontario and Offshore Marine rescue Corporation of St. Johns (Marine Consultant.

**1996 - 2001**
Operations Manager and Founding Partner, Cape Harrison Marine. President and CEO of Comtug Ltd. President and CEO of North Atlantic Towing Ltd. Took company from a one man start up to a position where the company now owns and operates three seismic chase vessels and manages two new tractor tugs for NARL. During that time, The company oversaw the construction of the two tractor tugs, the conversion of the three owned vessels and constructed and implemented a complete ISM system. Left company in December 2001 to concentrate on developing Inaminka.

**1989 - 1995**
Operations Manager Nautech Marine Services.
Responsible for all contract negotiations and project supervision.
Marketing and Operations Manager for Marine Management Ltd of Mount Pearl. Recent projects include the retrieval and repair of a thirty five year old 25KV cable in 185 ft of water offshore Newfoundland.

Responsible for the formation of a joint venture that located and placed a tug on contract with HMDC for the period June '94 to June'95. Responsible for finding and mobilising the equipment, as well as all contract negotiations with owners and HMDC.

**1986 - 1988**
Founded and ran with partners The Copy Network, a desktop publishing franchise in Toronto. Became heavily involved with Mac computers and their use in Desktop Publishing

**1979 – 1985**
Founded and ran Crosbie Offshore Services (COSL) of St.Johns NF. Acted as Vice-President and later as President and CEO. Duties included sourcing, operating and marketing a fleet of up to 11 supply vessels. During the period 1979 to 1985, COSL supplied 98% of the marine needs of Mobil Canada in Newfoundland in such a fashion that Mobil did not experience any equipment delays due to supply vessel breakdowns. As part of my duties, I directed an in house marine superintendent in approximately 60 field moves of the Zapata Ugland, Sedco 706, West Venture, John Shaw and the Ocean Ranger. This process involved meeting with the client and the rig management and planning the move in every detail, directing my marine superintendent and serving as back up rig mover when necessary

During this time I also co-founded, together with Davies Shipbuilding of Quebec, Aker Engineering of Oslo and Keydrill of Houston, and acted as President of, the DAC group. DAC was a company formed to construct Aker H3.2 semi submersible drilling rigs in Newfoundland . The proposed operation eventually involved building the deck section in Quebec and the pontoons in Norway. The two sections were to be towed to our projected facility in Newfoundland and the two sections mated. The project was eventually shelved due to the decline in the Canadian Offshore industry but before being shelved we had done all the costing and engineering for the operation and were in a position to bid.

**1975 – 1978**
Acted as consultant to Lloyds, Principal Surveyor and manager of ML &Johnston, a survey company based in Bermuda and Houston and later as an independent consultant to the same company.

My duties included managing a team of surveyors shifting rigs and carrying out ocean tows on a world wide basis and also acted as the risk controller for these same rig moves. During this time I monitored and directed the moves for the entire Sedco fleet on a world wide basis and personally directed the more difficult moves such as the re-location of the Sedco K from Scotland to South Africa and the re-commissioning of the Sea Quest as the Sedco 135C and positioning and mooring of this rig in the Frigg field. I also supervised on behalf of underwriters, the commissioning and initial positioning of the Sedco Phillips SS fire fighting and rescue semi-submersible on the Ekofisk Field in the North Sea.

I acted as adjustors surveyor on Frigg DP 1, Ekofisk Alpha and Brent damage claims. This activity involved inspecting the site of the accidents, compiling reports to the adjustors as to the cause and eventual cost of the loss and regular meetings with the assured to inspect and approve bills for payment by the underwriters.

In 1978/79 I purchased, assembled and installed the marine components of a complete offshore production system for Ghana. This system consisted of a 70,000 DWT. tanker and associated support vessels and the alterations included converting that vessels power plant to burn crude oil from the well head as well as extensive modifications to the structure of the vessel.

**1974 - 1975**
Master and Port Captain for Federal Commerce and Navigation based in St. John's, NF. Duties included managing and operating three offshore supply vessels working off the East Coast of Canada and acting as Tow master on the Sedco J working for Mobil Canada. During this period I commanded the first ever placement of floating rig in the Bay of Fundy and increased the efficiency of the ships to a point where we were able to pull anchors in seas up to 20ft.

My duties as rig-mover on the Sedco J included preplanning of the move with Sedco and Mobil. This process involved designing the mooring spread, setting out the actual movement path, directing the activities of the survey crew and finally acting as tow-master and pilot. All anchor handling and towage operations were directly under my control and during this period we managed to increase the average tow speed of the rig from 2 to 4.5 knots. The moves

included a number of field moves of up to 300 miles and twice annually, relocations of 800 miles from the Scotian Shelf to the Northern Grand Banks.

**1969 - 1974**
Master and Tow Master with Smit-Lloyd Australia, Zapata, Tidewater, OIL and Federal Commerce in Bass Strait, Timor Sea, North Sea, Nigeria, Brazil and Canada. Commanded vessels up to 7,200 BHP. For a brief period in 1973 I acted as the instructor master for OIL teaching their new masters the arts of anchor handling and towing.

**1968-1969**
Third and Second Officer Australian Merchant Marine.

**1967 - 1968**
Second Officer on VLCC with Trident/P&O Tankers.

**1963 - 1967**
Second and Third Officer with Bank Line on geared tramp ships trading world wide.

**1959 - 1963**
Cadet in the Australian Merchant Marine (Eastern and Australian Shipping, Australian branch of P&O). Served in geared general cargo / passenger ships and a product tanker

Maritime &
Coastguard
Agency

# Ballast Water Record Book

INTERNATIONAL CONVENTION FOR THE CONTROL AND MANAGEMENT OF SHIPS' BALLAST WATER AND SEDIMENTS

| | |
|---|---|
| Name of ship: | SFI Pontoon -1 |
| IMO ship identification number: | ~~9732838 OA.~~ N/A ** |
| Gross tonnage of ship: | 6615.61 t |
| Flag: | PANAMA |
| Total ballast water capacity (m³) | * 25658 @ 85% |
| This ship is provided with a ballast water management plan | ✓ |
| Period from: | 16/12/2021 to: |

* See inside
** Two Numbers Given

London: TSO

Maritime &
Coastguard
Agency

# Ballast Water Record Book

INTERNATIONAL CONVENTION FOR THE CONTROL AND MANAGEMENT OF SHIPS' BALLAST WATER AND SEDIMENTS

| | |
|---|---|
| Name of ship: | CFI PONTOON -1 |
| IMO ship identification number: | ~~9732838 OA~~ N/A ** |
| Gross tonnage of ship: | 6615.61 t |
| Flag: | PANAMA |
| Total ballast water capacity (m³) | * 25658 @ 85% |
| This ship is provided with a ballast water management plan | ✓ |
| Period from: | 16/12/2021 to: |

* SEE INSIDE
** TWO NUMBERS CITED

London: TSO

Maritime & Coastguard Agency

# Ballast Water Record Book

INTERNATIONAL CONVENTION FOR THE CONTROL AND MANAGEMENT OF SHIPS' BALLAST WATER AND SEDIMENTS

| | |
|---|---|
| Name of ship: | CFI PONTOON 1 |
| IMO ship identification number: | N/A |
| Gross tonnage of ship: | 6515.61 |
| Flag: | PANAMA |
| Total ballast water capacity (m³) | ~~N/A~~ 26688 @ 85% |
| This ship is provided with a ballast water management plan | ✓ |
| Period from: | 16/12/2021 to: |

~~N/A~~: TWO CAPACITIES GIVEN 26658 & 24359

London: TSO

# RECORD OF BALLAST WATER OPERATIONS

Name of ship: BARGE # CFI PONTOON I

Distinctive number or letters:

| Date | Item (number) | Record of operations/signature of officer in charge |
|---|---|---|
| 16/12/21 | (1) | TRANSFER B/W FROM 6S TO 4P |
| | 1200/1800 | |
| | 1800/2400 | " " " 5S TO 4C |
| | | |
| 17/12/21 | 0000/0730 | TRANSFERING B/W FROM 5S TO 4C |
| | 0800/1100 | " " " 6S TO 4P |
| | 1100/1238 | " " " 7S TO 4S |
| | | |
| 20/12/21 | 0905/2400 | TRANSFER 7S TO 4S |
| | | |
| 21/12/21 | 0000/0730 | TRANSFER 7S TO 4S // ~~#5~~ 5S, 6S, 7S MT |
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R. Sparacy

Signature of Master

## Initial activities

Day 1, Monday November 15, 2921.

John Norman survey team down to barge and test and run all bilge system components including pumps, Effect repairs on unserviceable pump, run and test anchor winch, list all tanks with blanked off air vents and propose a plan to rectify defects or nominate alternate venting arrangements. Total 7days

Day 1 Appoint engineer from ORMI to inspect winches and report, total of 7 days. Jason/Dick

Day 1 Compile safety plan with possible bridging document to anchor handling vessel operator. CFI safety department, John, Dick

Day2 to Day 15, November 13 Receive full inspection proposal from AMS, seek approval from Management and initiate, proposal to take a total of 8 days from day of mobilization. Jason

Day 2 to 4 Approach Horizon and Atlantic Towing for indicative quote to pick up, run and test anchor spread, explore both time and fixed sum approach and consider the test pull contained in the Baird report.

**Day 10, Enough information regarding the structural condition of the barge to assemble a final cost and submit the plan to management for go/no go decision**

**Day 11 Commence any structural work necessary to set barge up for work necessary to go forward**

**Day 28 Mobilize AHTS vessel to pick up chain and proceed to St. Lawrence**

## Parallel Activities

Approach Paul Antle regarding use of welders on barge while in shipyard. Dick

Obtain quote from suitable agent for time and price to mobilize winches to barge. Jason??

Determine whether a sea bed ROV survey is necessary. Jason, Dick

Review issues raised by John and determine if drilling in a pile anchor for the starboard bow is an option, Jason, Dick, John.

Obtain quotes for installation of winches, have survey team check for structural suitability. Jason, John and Dick

Obtain firm price for anchors and chain from Pennecon also quote for flaking chain out and assist with loading onto the vessel and also quote for loading the anchors on to the vessel. Jason

Day 15 Review AMS report and determine structural integrity of barge Jason Dick John and Pat

Obtain quotes from local suppliers for anchor handling jewelry such as Kenter links, pennants and shackles.

DESCRIPTION OF THE WORK ON THE BARGE h404

In October 2021, Inaminka was contacted by CFI to assist them in resolving the difficulties surrounding the condition and usage of the above barge at the port of Blue Beach outside of St. Lawrence. Initial meetings revealed that Cfi had imported the barge to act as a loading facility at the CFI facility at Blue Beach. The initial meeting at Blue Beach revealed that CFI had actually conducted a small number of cargo movements during the late spring and summer months but during periods of adverse weather, found it was impossible to leave the barge alongside as the prevailing swell was producing adverse movement of the barge alongside culminating in significant damage to its starboard making it impossible to leave barge in situ after cargo operations.

IMS was asked to

1) Assess the condition of the barge both externally and internally to ensure that the existing structure was sufficient to continue as planned. To accomplish this, it was agreed by all parties that a physical inspection, both internal and external, of the barge where she was currently moored in Marystown was necessary. As this inspection meant entry into confined spaces (the tanks), it was decided to retain a local inspection company to perform the inspection of the internals while IMS made and assessment of the externals. This was a complex procedure as the protocol for confined space entry meant that we had to have the tanks to be investigated ventilated beforehand and during the inspection, two people had to be at the tank's entry manhole at all times, one suited up with breathing apparatus at hand in case a rescue was needed, and one person manning the winch in case a recovery was required. At the same time, CFI in the form of myself and our naval architect Mr. Anthony Barclay, conducted a physical assessment of the barges external structure as well as fixtures and fittings on the deck as well as a preliminary inspection of the barge's machinery spaces.

2) Once these actions had been completed, the following documents were presented to CFI management;

   i) A report from the inspection company, (attached)
   ii) Repair options (attached)
   iii) Repair cost estimates, (attached)
   iv) Preliminary mooring plan for year round operations (attached)
   v) Modifications to the barge necessary to achieve the mooring plans specified in (iv) above including the equipment that had to be fitted to the barge to achieve the foregoing.
   vi) Detailed designs of the deck strengthening necessary to accommodate the two new tugger winches that would be required.

vii) A detailed list of the cost and location of the equipment necessary to achieve these moorings.

viii) The barge has some 3,000 tonnes of untreated ballast water on board and an assessment of the proposed treatment plan was also completed as part of this process.

ix) On December 15th, another visit was made to the barge to ascertain the veracity of all the plans and to initiate the ballast transfer plans

x) **At the December 15th meeting Richard Spellacy was appointed master of the barge and as such supervised the transfer of the ballast. This appointment was never rescinded and as a matter of course Captain Spellacy then continued to function as the barge master during the period up to and including January 31st, reporting directly to CFI as needed. From January 31st. There was no structured management however Richard Spellacy continued to act as master of the barge for the month of February, maintained contact with the Receiver while away on another job during March and For the month of April and most of May attempted to locate alternative moorings for the barge and also facilitated a potential sale of the barge by putting the potential purchaser in touch with the Monitor and then maintaining contact with the purchaser to ensure that all the conditions required by each party were met. Subsequent to that, contact was maintained with the Monitor and occasionally the mine Manager.**

3. Once all of the above had been submitted and approved, IMS worked with the CFI management to compile a detailed plan, schedule and cost of the process. This was a quite complex document (attached) comprising as it did the engagement of a high powered anchor handling vessel to lay the mooring, the location and cost of the anchors and chains as well as two new tugger winches in addition to various shackles chains buoys and pennant wires.

These activities were then supplemented with finalizing the location of the anchors and chains, the two extra winches and reviewing a completed ballast plan as approved by Transport Canada.

In the afternoon of January 6th, a Teams meeting was called to discuss the current condition and status of the barge 404 as it lay alongside Marbase in Marystown. A review of all of the data available from various internal inspections in tank numbers 7S, 6S and 5S as well as the result of extensive monitoring of both the draft marks and the internal water levels of the three tanks that were opened lead to agreement between all parties in that while there was a fairly significant indentation in the side of tank 5S, that damage had not impaired the barges watertight integrity.

A detailed inspection of this indentation this tank revealed that there was significant damage and wastage in the way of frame number 14 and although the transverse strength of the barge has been impaired in this area, this impairment did not affect the proposed usage of the barge as a dock. To offset this localized impairment. it was generally agreed that after the installation of the cargo loading system on the deck, the barge could be moved some 10/15m to the south on the berth and this would bring the transverse bulkhead between tanks number 5 and 6 onto the pier and that this would make up for the lack of transverse strength in the way of frame 14. Further on this matter, it was also agreed that the fendering arrangements in this area would be reviewed with a view towards installing either flat tires or one of the inflatable rubber fenders from the barges port side in that area.

Once this discussion had been held, I expressed the opinion which seemed to be supported by all parties that while we have received some high-level estimates on three courses of repair of that structural damage, at this point in time, spending money on repairs of this type would not be appropriate. Should CFI elect to proceed with the moorings as proposed, then the barge will be on site for between two and three years and if it was felt that the barge needed to be brought back into class as a precondition of sale then there would be ample time available to carry out that work.

Given that these activities were occasioned by some doubts as to the watertight integrity of the barge and also some concerns regarding the barge's structural integrity in that area, my recommendation is that the barge as is with the addition of the two winches, is fit for purpose and that the addition of the storm mornings as proposed in the attached documentation would resolve the issue of tug availability during times when inclement weather threatens to set in.

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **CFI St. Lawrence Barge Moorings**

**Page 1**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Week of Wednesday October 13 to Tuesday October 19** |
| 0800/1700 | Chase down data to assemble plan for barge, liaise with Ron Milmine on acceptability of CPE Express, procure charts for area, meet with Pat Gannon, Leo Power and Naval Architect Anthony Barclay re acceptability of plans, answer questions from management team on orientation of barge<br>**Total of 7 days** |
| | |
| | **Week of Wednesday October 20 to Tuesday October 26** |
| | Review concerns of project engineers and respond,<br>**total of 1.0 days** |
| | |
| | **Week of Wednesday October 27 to Tuesday November 02** |
| | Teleconference call with project staff out west devise new mooring plans and Liaise with Jason Flood et al<br>**Total 7.0 days** |
| | |
| | **Week of Wednesday November 03 to Tuesday November 09** |
| | Chasing down winches, chain etc. revising mooring plans to suit meeting in St. Lawrence with project staff and Consultant Norman, proceed to Bay Bulls and inspect anchors and chain<br>**Total of 7.0 Days** |
| | |
| | **Week of Wednesday November 10 to Sunday November 14 (part week)** |
| | Project meeting with all hands at St. Lawrence, review schedule, mooring plan, revise as appropriate<br>**Total of 5.5 Days** |
| | |
| | **Total days for period 27.5 days** |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 4** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy, Time sheet for balance of November**

| Time & Date | Description of Event |
|---|---|
| | **Friday November 19th** |
| 4 Hours | 1500/1900 Working with AMS on barge inspection plan |
| | |
| | **Sunday November 21st** |
| 4 hours | 1600/2000 Working with Naval Architect Barclay on inspection procedure |
| | |
| | **Monday November 22nd** |
| 13.5 hours | 0530/1900 Drive to Marystown and St. Lawrence and return, assist with preliminary inspection procedures on barge, inspect barge deck layout, Chase potential anchor handling jewellery sites. |
| | |
| | **Tuesday November 23rd** |
| 8.0 hours | 0800/1700 Meet with Naval architect and go over potential winch sites and further inspection procedures. Liaise with Jason and AMS rep re ongoing inspection work on barge |
| | |
| | **Wednesday November 24th** |
| 4 hours | 0800/1200 Review project documentation, emails etc., push for winch Review barge inspection report, note hole in #4Stbad, discuss same with jason |
| 3 hours | 1500/1800 Push for winch inspection quote, liaise with winch provider to get extra quote for winch wires |
| | |
| | **Thursday November 25th** |
| 4 hours | 0800/1200 Review winch inspection quote, pass on to Jason commence design of anchor winch pattern. |
| | |
| | **Friday November 26th** |
| 5 hours | 0800/1300 Reviewing anchor pattern details with Jason also discussion with John Norman regarding procedures and potential shore mooring legs |
| | |
| | **Monday November 29th** |
| 4 hours | 0900/1300 Liaise with winch supplier re winch lines, work with Kevin Doyle re Global Maritime proposal. Discuss potential ballast system issues with Jason. |
| 8 hours | 1400/2000 Do complete high level job list and pas to jason in preparation for tomorrow's meeting |

| | |
|---|---|
| | **Tuesday November 30th** |
| 3 hours | 0900/1200 review AMS correspondence and reports with Naval architect |
| 2 hours | 1200/1400, Conference call with Global Maritime U/K, |
| 3 hours | 1500/1800 Review results of conference call, assemble list of files to pass on to support quote Review barge mooring plan |
| | |
| | **Total of 65.5 hours** |
| | |
| | |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 5** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy December Time Sheet**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Wednesday December 1st.** |
| 4 hours | 1900/1200 Reviewing Global Maritime discussion with Tomas Serafinavicius of Global Aberdeen, reviewing tasks for tomorrow's meeting. |
| 3 hours | 1300/1600 Reviewing task list for upcoming meeting |
| | |
| | **Thursday December 2nd** |
| 4 hours | 0800/1200 Reviewing job list and preparing for PM teams meeting |
| 6 hours | 1300/1900 Teams meeting and working on upcoming task lists |
| | |
| | **Friday December 3rd** |
| 4 hours | 0900/1300 Receive and review Global Maritime proposal, send on to Jason for further discussion |
| 3 hours | 1400/1700 Discussions re various jobs with Jason et al |
| | |
| | **Sunday December 5th** |
| 3 hours | 1000/1300 Reviewing list from John Norman and working up extra tasks |
| 2 hours | 1400/1600 Working on mooring drawing with Barclay |
| | |
| | **Monday December 6th** |
| 4 hours | 0800/1200 working on task list for upcoming meeting, working on mooring diagram with Barclay, instructing same on winch seats |
| 5 hours | 1300/1800 various tasks, working on teams meeting with Jason and John |
| | |
| | **Tuesday December 7th.** |
| 3 hours | 1000/1300 working on alternate mooring diagram, chasing Jewellery |
| 2 hours | 1400/1600 Designing anchor spread |
| 2 hours | 1730/1930 Working on anchor spread |
| | |
| | **Wednesday December 8th.** |
| 3 hours | 1300/1600 Working on jewellery with Extreme East Rigging |
| | |
| | **Thursday December 9th.** |
| 4 hours | 1230/ 1630 Reviewing Jewellery quotes from Extreme East Rigging and instructing Barclay on Winch seat bid package preparation |

| | |
|---|---|
| | **Friday December 10th** |
| 4 hours | 1100/1500 Organizing nest weeks trip for barge and compiling anchor design |
| | |
| | **Monday December 13th.** |
| 2 hours | 0900/1100 Compiling anchor spread design |
| 4 hours | 1200/1600 Anchor system design meeting with C. Gaetz |
| | |
| | **Tuesday December 14th.** |
| 3 hours | O900/1200 various items regarding tomorrows trip |
| 6 hours | 1400/2000 Anchor spread design |
| | |
| | **Wednesday December 15th.** |
| 13 Hours | 0600/1900 Drive to Marystown monitor ongoing procedures at Marbase |
| | |
| | **Thursday December 16th.** |
| 12 hours | 0700/1900 Monitor ongoing ballast transfer operation at barge and return to St Johns |
| | |
| | **Friday December 17th.** |
| 2 hours | 0800/1000 Prepare and meet with John Norman |
| 4 hours | 1000/1400 Finalise anchoring plan and prepare for distribution to all hands, monitor ongoing ballast operations |
| | |
| | **Monday December 20th** |
| 2 hours | 0800/1000 Ballast water control |
| 4 hours | 1300/1700 Ballast water control and repair preparations |
| | |
| | **Tuesday December 21st** |
| 4 hours | 0800/1200 Ballast water control operations |
| 3 hours | 1400/1700 Ballast control and repair options |
| | |
| | **Wednesday December 22nd.** |
| 3 hours | 099/1200 Reviewing repair options with Butler and Barclay |
| | |
| | **Thursday December 23rd.** |
| 5 hours | 1200/1700 Reviewing repair options and final report with Butler et al |
| | |
| | **Friday December 24th.** |
| 2 hours | 0900/1100 Preparing final repair options updating Jason |
| | |
| | **Monday December 27th** |
| 2 hours | 1000/1200 Working with Barclay, Butler et al on final repair options. |
| 2 hours | 1400/1600 Obtaining quotes from Delmar on anchor handling jewellery |
| | |
| | |

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|---|---|
| | **Tuesday December 28th** |
| 2 hours | 1100 /1300 Chasing up repair estimates |
| | |
| | **Thursday December 30th** |
| 2 hours | 0900/1100 Chasing down alternate marine solutions |
| 7 hours | 1300/2000 Compiling repair option report |
| | |
| | |
| | **Total Hours for December 140** |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 5** **CFI St. Lawrence Barge Moorings**

**Anthony Barclay December Time Sheet**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Wednesday December 13th.** |
| 8 hours | 0800/1600 Finalising design of winch seats and obtaining pricing for same |
| | |
| | **Monday December 20th** |
| 8 hours | 0800/1700 Reviewing damage survey reports and preparing specification for remedial options |
| | |
| | **Wednesday December 22nd** |
| 4 hours | 0900/1300 Continue reviewing damage survey reports and preparing specification for remedial options |
| | |
| | **Thursday December 30th** |
| 10 Hours | 0800/1900 Cost estimation work for repairs |
| | |
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| | **Total for December, 30 Hours** |
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# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 6** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy January Time Sheet**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Monday January 3rd** |
| 2 hours | 1300/1500 Working on repair estimates. |
| | |
| | **Tuesday January 4th** |
| 4 hours | 0800/1200 Working on repair estimates with Messrs Barclay, Pitt and Jason |
| 5 hours | 1300/1800 Working on repair estimates with Messrs Barclay and Pitt |
| | |
| | **Wednesday January 5th** |
| 2 hours | 1000/1200 Finalising repair quotes with Barclay and Pitt |
| 2 hours | 1600/1800 e and resubmitting repair work |
| | |
| | **Thursday January 6th** |
| 4 hours | 0900/1300 Continue working on Repair options and prepare for upcoming teams meeting meting |
| 4 hours | 1400/1900 Teams meeting with Jason, John and Pat et al on repair options |
| | |
| | **Friday January 7th** |
| 2 hours | 1000/1200 Working on mooring options. |
| 3 hours | 1400/1700 Working on mooring drawing with Barclay as well as repair costs |
| | |
| | **Sunday January 9th** |
| 2 hours | 1000/1200 Working on task list for upcoming meetings, |
| 5 hours | 1800/2300 working on mooring plan as well as way forward |
| | |
| | **Monday January 10th.** |
| 3 hours | 1000/1300 working on alternate mooring diagram, chasing Jewellery |
| 2 hours | 1400/1600 Designing anchor spread |
| 2 hours | 1730/1930 Working on anchor spread and finalizing so-ordinates |
| | |
| | **Tuesday January 11th.** |
| 3 hours | 0800/1200 Working on moorings, preparing for afternoon meeting |
| 3 hours | 1300/1600 Visit Pennecon site and inspect anchors and chains with Master of Arctic, deliver mooring plan for his critique |

| | |
|---|---|
| | **Tuesday January11th (Cont.)** |
| 3 hours | 1600/1900 Teams meeting on moorings and final costs |
| | |
| | **Wednesday January 12th** |
| 1 hour | 1000/1400 Working with Global Maritime on new procedures proposal, sourcing data for same |
| 4 hours | 1200/1600 Working on mooring spread and value of chain on offer |
| | |
| | **Thursday January 14th.** |
| 2 hours | 0900/1100 Compiling anchor spread design |
| 4 hours | 1200/1400 Anchor system design |
| 1 hour | 1500/1600 Meeting with John Norman |
| 2 hours | 1600/1800 Finalizing anchor spread costs |
| | |
| | Total 65 hours |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 6** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy January Time Sheet 15/31st**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Saturday January 15th** |
| 2 hours | 1500/1700 Phone calls to Texas, trying to locate jewellery at appropriate prices |
| | |
| | **Monday January 17th** |
| 3 hours | 0900/1200 Working on anchor plans pair o-ordinating mooring procedures with Global Maritime |
| 3 hours | 1300/1600 Working on mooring plan |
| | |
| | **Tuesday January 18th** |
| 4 hours | 0800/1200 Chasing down alternative anchor and chain proposals from Europe |
| 3 hours | 1300/1600 Chasing down alternative anchor suppliers locally, liaising with Damen shipyards regarding utility vessels. |
| | |
| | **Wednesday January 19th** |
| 4 hours | 1000/1200 and 1399/1500 Continue working on alternative anchor supply options, clarify ballast control options with Horizon |
| | |
| | **Thursday January 20th** |
| 5 hours | 0800/1300 Working on mooring options. Teams meeting with Global Maritime UK, review Multi-Cat Oderin in harbour |
| 3 hours | 1400/1700 sourcing alternative anchoring operations |
| | |
| | **Friday January 21st** |
| 5 hours | 0900/1200 and 1400/1600 Reviewing Intermoor proposal, reviewing ballast proposals redoing mooring spread and sending to all concerned |
| | |
| | **Monday January 24th.** |
| 3 hours | 0900/1200 Reviewing mooring plans |
| 3 hours | 1300/1600 Meet with Horizon, redoing anchor spread |
| 2 hours | 1730/1930 Working on anchor spread and finalizing co-ordinates sending new drawings to all concerned |
| | |
| | **Tuesday January 25th** |
| 2 hours | 0900/1100 Working on moorings and ballast control issues |

| | |
|---|---|
| | |
| | **Wednesday January 26th** |
| 1 hour | 1000/1100 reviewing various items on mooring spread |
| 2 hours | 1400/1600 Working on mooring spread and value of chain on offer |
| | |
| | **Thursday January 27th.** |
| 4 hours | 1200/1500 Travel to Bay Bulls and review available jewellery |
| 3 hours | 1500/1800 Reviewing costs with Pennecon |
| | |
| | **Friday January 28th** |
| 3 hours | 0900/1200 Reviewing Ballast plan comments and rental prices from Pennecon |
| | |
| | **Saturday January 29th** |
| 1 hour | Reviewing Loading costs from Pennecon |
| | |
| | **Sunday January 30th** |
| 8 hours | 1000/1200 and 1300/1900 Finalising and sending budget |
| | |
| | Monday January 31st |
| 2 hours | 0900/1000 and 1700/1800 Budget and project discussions with Jason Flood |
| | |
| | **Total of 66 hours** |
| | |
| | |
| | |
| | |
| | |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 5** **CFI St. Lawrence Barge Moorings**

**Anthony Barclay December Time Sheet**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Wednesday December 13th.** |
| 8 hours | 0800/1600 Finalising design of winch seats and obtaining pricing for same |
| | |
| | **Monday December 20th** |
| 8 hours | 0800/1700 Reviewing damage survey reports and preparing specification for remedial options |
| | |
| | **Wednesday December 22nd** |
| 4 hours | 0900/1300 Continue reviewing damage survey reports and preparing specification for remedial options |
| | |
| | **Thursday December 30th** |
| 10 Hours | 0800/1900 Cost estimation work for repairs |
| | |
| | |
| | **Total for December, 30 Hours** |
| | |
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# EXPENSE REPORT

Sheet No. 1

| | | | | | |
|---|---|---|---|---|---|
| Location | Newfoundland | Rig | Barge | Name | Richard Spellacy |
| Job Category | consultant | Client | CFI | W/Order# | RQN0012966 |
| Start Date(s): | Oct 12,20 At | | Hrs. | Job Description | Barge Moorings |
| Completion Date(s): | 21 08 202 At | | Hrs. | Total Days Attended | 29 |

| Item No. | Date | Description | Foreign Cash | Co. Credit Card $ | Cash $ | Exchange Rate (If Appl.) | Total Can$ $ |
|---|---|---|---|---|---|---|---|
| 1 | 10-29-21 | St. Lawrence /return 700K at $0.60/K | | | | | 420.00 |
| 2 | 11-12-21 | St. Lawrence /return 700K at $0.60/K | | | | | 420.00 |
| 3 | 11-05-21 | Bay Bulls /return 90K@$0.60/K | | | | | 54.00 |
| 4 | | | | | | | |
| 5 | | | | | | | |
| 6 | | | | | | | |
| 8 | | | | | | | |
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| 23 | | | | | | | |
| 24 | | | | | | | |
| 25 | | | | | | | |
| | | | 0.00 | 0.00 | 0.00 | | |
| | | **C/FWD Totals** | | | | | 894.00 |

| | |
|---|---|
| Less: Billed to Company | |
| Amount Due Employee | 894.00 |

ERROR

Signed _____ Date 06-07-15 Authorize _____

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 6** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy January Time Sheet**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Monday January 3rd** |
| 2 hours | 1300/1500 Working on repair estimates. |
| | |
| | **Tuesday January 4th** |
| 4 hours | 0800/1200 Working on repair estimates with Messrs Barclay, Pitt and Jason |
| 5 hours | 1300/1800 Working on repair estimates with Messrs Barclay and Pitt |
| | |
| | **Wednesday January 5th** |
| 2 hours | 1000/1200 Finalising repair quotes with Barclay and Pitt |
| 2 hours | 1600/1800 e and resubmitting repair work |
| | |
| | **Thursday January 6th** |
| 4 hours | 0900/1300 Continue working on Repair options and prepare for upcoming teams meeting meting |
| 4 hours | 1400/1900 Teams meeting with Jason, John and Pat et al on repair options |
| | |
| | **Friday January 7th** |
| 2 hours | 1000/1200 Working on mooring options. |
| 3 hours | 1400/1700 Working on mooring drawing with Barclay as well as repair costs |
| | |
| | **Sunday January 9th** |
| 2 hours | 1000/1200 Working on task list for upcoming meetings, |
| 5 hours | 1800/2300 working on mooring plan as well as way forward |
| | |
| | **Monday January 10th.** |
| 3 hours | 1000/1300 working on alternate mooring diagram, chasing Jewellery |
| 2 hours | 1400/1600 Designing anchor spread |
| 2 hours | 1730/1930 Working on anchor spread and finalizing so-ordinates |
| | |
| | **Tuesday January 11th.** |
| 3 hours | 0800/1200 Working on moorings, preparing for afternoon meeting |
| 3 hours | 1300/1600 Visit Pennecon site and inspect anchors and chains with Master of Arctic, deliver mooring plan for his critique |

| | |
|---|---|
| | **Tuesday January11th (Cont.)** |
| 3 hours | 1600/1900 Teams meeting on moorings and final costs |
| | |
| | **Wednesday January 12th** |
| 1 hour | 1000/1400 Working with Global Maritime on new procedures proposal, sourcing data for same |
| 4 hours | 1200/1600 Working on mooring spread and value of chain on offer |
| | |
| | **Thursday January 14th.** |
| 2 hours | 0900/1100 Compiling anchor spread design |
| 4 hours | 1200/1400 Anchor system design |
| 1 hour | 1500/1600 Meeting with John Norman |
| 2 hours | 1600/1800 Finalizing anchor spread costs |
| | |
| | Total 65 hours |

# INAMINKA MARINE
# Operational Log of Events

**Installation/Vessel:** **Page 6** **CFI St. Lawrence Barge Moorings**

**Richard Spellacy January Time Sheet 15/31st**

| Time & Date | Description of Event |
|---|---|
| | |
| | **Saturday January 15th** |
| 2 hours | 1500/1700 Phone calls to Texas, trying to locate jewellery at appropriate prices |
| | |
| | **Monday January 17th** |
| 3 hours | 0900/1200 Working on anchor plans pair o-ordinating mooring procedures with Global Maritime |
| 3 hours | 1300/1600 Working on mooring plan |
| | |
| | **Tuesday January 18th** |
| 4 hours | 0800/1200 Chasing down alternative anchor and chain proposals from Europe |
| 3 hours | 1300/1600 Chasing down alternative anchor suppliers locally, liaising with Damen shipyards regarding utility vessels. |
| | |
| | **Wednesday January 19th** |
| 4 hours | 1000/1200 and 1399/1500 Continue working on alternative anchor supply options, clarify ballast control options with Horizon |
| | |
| | **Thursday January 20th** |
| 5 hours | 0800/1300 Working on mooring options. Teams meeting with Global Maritime UK, review Multi-Cat Oderin in harbour |
| 3 hours | 1400/1700 sourcing alternative anchoring operations |
| | |
| | **Friday January 21st** |
| 5 hours | 0900/1200 and 1400/1600 Reviewing Intermoor proposal, reviewing ballast proposals redoing mooring spread and sending to all concerned |
| | |
| | **Monday January 24th.** |
| 3 hours | 0900/1200 Reviewing mooring plans |
| 3 hours | 1300/1600 Meet with Horizon, redoing anchor spread |
| 2 hours | 1730/1930 Working on anchor spread and finalizing co-ordinates sending new drawings to all concerned |
| | |
| | **Tuesday January 25th** |
| 2 hours | 0900/1100 Working on moorings and ballast control issues |

| | |
|---|---|
| | |
| | **Wednesday January 26th** |
| 1 hour | 1000/1100 reviewing various items on mooring spread |
| 2 hours | 1400/1600 Working on mooring spread and value of chain on offer |
| | |
| | **Thursday January 27th.** |
| 4 hours | 1200/1500 Travel to Bay Bulls and review available jewellery |
| 3 hours | 1500/1800 Reviewing costs with Pennecon |
| | |
| | **Friday January 28th** |
| 3 hours | 0900/1200 Reviewing Ballast plan comments and rental prices from Pennecon |
| | |
| | **Saturday January 29th** |
| 1 hour | Reviewing Loading costs from Pennecon |
| | |
| | **Sunday January 30th** |
| 8 hours | 1000/1200 and 1300/1900 Finalising and sending budget |
| | |
| | Monday January 31st |
| 2 hours | 0900/1000 and 1700/1800 Budget and project discussions with Jason Flood |
| | |
| | **Total of 66 hours** |
| | |
| | |
| | |
| | |
| | |

# Operational Log of Events

**Page 1 CFI St. Lawrence Barge Moorings**

**Richard Spellacy February legal Time Sheet Feb/Sept**

| Time & Date | Description of Event |
|---|---|
| | |
| | **February 1st** |
| 8 hours | Jason Flood x 2 , Ron Milmine & Toby Butler, |
| | |
| | **February 2nd** |
| 8 hours | Tomas Serafinavicius, Leo Power, Chris Gonsoulin & Anthony Barclay |
| | |
| | **February 3rd** |
| 10 hours | Paul Antle x 2, Stephen Penny x 2 Eric Machum |
| | |
| | **February 4th** |
| 8 hours | Paul Antle x 3, Eric Machum |
| | |
| | **February 6th** |
| 4 hours | Paul Antle, Cliff Gaetz |
| | |
| | **February 8th** |
| 2 hours | Stephen Penny |
| | |
| | **February 9th** |
| 4 hours | Seamus Ryder x 2 |
| | |
| | **February 11th** |
| 6 hours | Paul Antle x 2, Stephen Penny |
| | |
| | **February 13th,** |
| 4 hours | Stephen Penny, Patrick Gannon |
| | |
| | **February 14th.** |
| 6 hours | Deborah Hutchings x 3 |
| | |
| | **February 15th** |
| 12 hours | Deborah Hutchings x 3, John Norman, Accounts Payable, Toby Butler |
| | |
| | **February 16th** |
| 6 hours | Deborah Hutchings x 3 |

| | |
|---|---|
| | |
| | **February 17th** |
| 6 hours | Deborah Hutchings x 3 |
| | |
| | **February 18th** |
| 14 hours | Deborah Hutchings x 7 |
| | |
| | **February 23rd** |
| 8 hours | Deborah Hutchings x 3, Patrick Gannon x 1 |
| | |
| | **February 28** |
| 2 hours | Deborah Hutchings x 1 |
| | |
| | **Total for February, 108 hours** |
| | |
| | |
| | **Hours for March** |
| | **March 10** |
| 2 hours | Deborah Hutchings |
| | |
| | **March 12** |
| 4 hours | Patrick Gannon, Deborah hutchings |
| | |
| | **March 13** |
| 2 hours | Deborah Hutchings |
| | |
| | **March 25** |
| 2 hours | Deborah Hutchings |
| | |
| | **March 30** |
| 2 hours | Patrick Gannon |
| | |
| | **Total for March 12 hours** |
| | |
| | |
| | **Hours for April** |
| | |
| | **April 1** |
| 2 hours | Paul Antle |
| | |
| | **April 03** |
| 2 hours | Patrick Gannon |
| | |
| | **April 8th** |
| 4 hours | Phil Clark x 2 |

| | |
|---|---|
| | |
| | **April 11** |
| 14 hours | Phil Clark x 2 Deborah Hutchings x 2, John Norman x 3 |
| | |
| | **April 13** |
| 2 hours | Deborah Hutchings |
| | |
| | **April 22** |
| 4 hours | Deborah Hutchings, Paul Antle |
| | |
| | **April 23** |
| 2 hours | Paul Antle |
| | |
| | **April 25** |
| 4 hours | Deborah Hutchings, Paul Antle |
| | |
| | **April 29** |
| 2 hours | Deborah Hutchings |
| | |
| | **Total Hours for April 36** |
| | |
| | |
| | **Hours for May** |
| | |
| | **May 12** |
| 2 hours | Phil Clarke |
| | |
| | **Total Hours for May 2** |
| | |
| | |
| | **Hours for June** |
| | **June 05** |
| 2 hours | **Sean Leet** |
| | |
| | **June 07** |
| 6 hours | Phil Clarke x 3 |
| | |
| | **June 08** |
| 4 hours | Phil Clarke, Cliff Gaetz |
| | |
| | |
| | **Total Hours for June 12** |
| | |
| | **Hours for July** |
| | **July 11** |

| | |
|---|---|
| 4 hours | Phil Clarke x 2 |
| | |
| | **July 13** |
| 4 hours | Deborah Hutchings x 2 |
| | |
| | **July 14** |
| 2 hours | Phil Clarke |
| | |
| | **July 19** |
| 4 hours | Deborah Hutchings x 2 |
| | |
| | **July 20** |
| 2 hours | Deborah Hutchings |
| | |
| | **July 29** |
| 2 hours | Deborah Hutchings |
| | |
| | **Total Hours for July 18** |
| | |
| | **Hours for August** |
| | **August 02** |
| 4 hours | Deborah Hutchings x 2 |
| | |
| | **August 03** |
| 2 hours | Deborah Hutchings |
| | |
| | **August 04** |
| 2 hours | Deborah Hutchings |
| | |
| | **August 05** |
| 4 hours | Deborah Hutchings x 2 |
| | |
| | **August 08** |
| 2 hours | Deborah Hutchings, |
| | |
| | **August 10** |
| 2 hours | Toby Butler |
| | |
| | **August 11** |
| 4 hours | Toby Butler, Deborah Hutchings |
| | |
| | **August 18** |
| 6 hours | Deborah Hutchings x 3 |
| ` | **August 19** |
| 2 hours | Tony Barclay |

| | |
|---|---|
| | |
| | **August 22** |
| 2 hours | Deborah Hutchings |
| | |
| | **August 25** |
| 4 hours | Deborah Hutchings x 2 |
| | |
| | **August 26** |
| 4 hours | Deborah Hutchings x 2 |
| | |
| | **August 30** |
| 10 hours | Deborah Hutchings x 5 |
| | |
| | **August 31** |
| 8 hours | Deborah Hutchings x 4 |
| | |
| | **Total hours for August 56** |
| | |
| | **September 01** |
| 4 hours | Deborah Hutchings x 2 |
| | |
| | **September 02** |
| 6 hours | Deborah Hutchings x 3 |
| | |
| | **September 08** |
| 14 hours | Deborah Hutchings x 2 Self x 5 |
| | |
| | **September 13** |
| 14 hours | Deborah Hutchings x 4 Self x 3 |
| | |
| | **September 15** |
| 2 hours | Deborah Hutchings x 1 |
| | |
| | **September 16** |
| 6 hours | Deborah Hutchings x 3 |
| | |
| | **September 22** |
| 2 hours | Deborah Hutchings |
| | |
| | **September 25** |
| 6 hours | Deborah Hutchings x 3 |
| | |
| | **September 26** |
| 6 hours | **Attendance in court** |
| | |

| | |
|---|---|
| | **Total for September 60 hours** |
| | |
| | **Total hours on court filing February through August 304** |
| | **@$220/hour = $66,880.00** |

## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Wednesday, March 8, 2023 11:32 AM
**To:** Deborah Hutchings
**Subject:** FW: St. Lawrence moorings Barge 21

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** Thursday, July 14, 2022 4:49 PM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** RE: St. Lawrence moorings

Dick:

Thanks very much for the intelligence. We will pass along.

Cheers,

**Phil Clarke | Partner**
Grant Thornton LLP
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
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**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Friday, July 8, 2022 11:03 AM
**To:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** RE: St. Lawrence moorings

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*****NEW*** DO NOT ENTER YOUR GT PASSWORD ON ANY EXTERNAL EMAIL REQUEST**

Hi Phil

As per my previous advice, my recommendation for a permanent port for any of the new buyers would involve the use of the barge as proposed followed up by the use of a self elevating platform such as we use in the offshore industry and I have included a ling to the vessel owned by NPCC out of Abu Dhabi. The convenience of such a vessel is that when a ship is expected, it can be lowered into the water for the loading and raised out of the weather again after loading is complete. This will allow the barge to remain clear of the weather and there is a good chance that a long term rental arrangement can be struck with a company such as NPCC for an existing hull or even a purpose built hull, lowering the capital necessary for such an item of infrastructure. A commercial arrangement such as this will greatly reduce the initial capital outlay and greatly enhance the flexibility of the port arrangements, Units such as the SEP 250, details of which are attached have been in use in the oilfields since the 1950's and I would be pleased to assist any prospective purchaser to explore this option

Regards

Dick

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** June 8, 2022 12:46 PM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Cc:** BarclayAnthony0 <barclayanthony0@gmail.com>; sean.leet@horizonmaritime.com; Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** RE: St. Lawrence moorings

Dick:

Absolutely. We will make sure this information is available to Phase 2 bidders.

Cheers!

**Phil Clarke | Partner**
Grant Thornton LLP
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**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Wednesday, June 8, 2022 9:30 AM
**To:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Cc:** BarclayAnthony0 <barclayanthony0@gmail.com>; sean.leet@horizonmaritime.com; Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** RE: St. Lawrence moorings

CAUTION: EXTERNAL EMAIL. DO NOT CLICK ON LINKS OR OPEN ATTACHMENTS YOU DO NOT TRUST
***NEW*** DO NOT ENTER YOUR GT PASSWORD ON ANY EXTERNAL EMAIL REQUEST

Hi Phil
Thankyou for this. I realise that you don't have the funds for this type of activity but I have heard that some of the potential buyers of the mine have an interest in this proposal and all of them are going to have to get their product out to market somehow. In the last few months we have picked up a great deal of knowledge regarding the export of this material and we can provide any or all of these groups with a sensible means of egress so I as hoping to get this information and the capabilities of our group out to the interested parties. We can provide a safe and sensible means of export at a number of cost and capability levels so anything you can do to pass this on would be appreciated

Thanks

Dick

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** June 7, 2022 12:56 PM
**To:** Dick Spellacy <richardspellacy@hotmail.com>; Patrick Gannon <pgannon@canadafluorspar.com>
**Cc:** sean.leet@horizonmaritime.com; Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** RE: St. Lawrence moorings

Dick:

Thanks for this information. The CFI insolvency proceedings do not have funding in place to complete this work. We have made application to extend the dates of the sales process so that binding offers are due July 22 and a goal of Sept 2 for a closing date for a transaction.

We can pass this information on to the successful bidder and let them make the decision to take this forward, or not.

Cheers,

**Phil Clarke | Partner**
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**E** Phil.Clarke@ca.gt.com | **W** http://www.grantthornton.ca/

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**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Sunday, June 5, 2022 6:20 PM
**To:** Patrick Gannon <pgannon@canadafluorspar.com>; Clarke, Phil <Phil.Clarke@ca.gt.com>

**Cc:** sean.leet@horizonmaritime.com; Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** St. Lawrence moorings

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***NEW*** DO NOT ENTER YOUR GT PASSWORD ON ANY EXTERNAL EMAIL REQUEST

Hi Pat

As per our conversation, after discussions with the owners and management of Horizon Maritime, they are willing to offer to supply and emplace the moorings in St. Lawrence as originally proposed in my proposal at the end of January with the exception being that there will be no barge as there is no real certainty as to the status of the barge owned by CFI. However, the moorings will be sized as originally conceived and emplaced so that they accommodate either that vessel or another one similarly sized. Horizon will be responsible for supplying all the moorings as originally conceived and will leave the barge end of the chain secured to a pick up line which in turn will be attached to a pick up buoy in the case of the seaward anchors and lead back to the dock in the case of the shore fast anchors.

As I explained to you over the phone, the price for this class of vessel in the North Sea has skyrocketed with rates in excess of 100,000 pounds per day being discussed as we speak which may help to explain the price differential since this issue was last discussed. The vessel is committed to the first week in August when it has another job with a flexible time scale but this job can be slotted in between the two or even at the end. This offer is on the table for discussion until the end of June but if there is no contact or interest by anybody at that point, the owners reserve the right to withdraw the offer.

To supply and install all the moorings as originally proposed, C$2,100,000.00 (Two million, One hundred thousand Canadian dollars)

Best regards

Dick

---

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## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Wednesday, March 8, 2023 11:31 AM
**To:** Deborah Hutchings
**Subject:** FW: St. Lawrence moorings Barge 19

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** Monday, July 11, 2022 2:30 PM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>; BarclayAnthony0 <barclayanthony0@gmail.com>
**Subject:** RE: St. Lawrence moorings

Thanks Dick I thought I read that somewhere but didn't bring it up as you know more about the history than I. Cheers!

**Phil Clarke | Partner**
Grant Thornton LLP
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
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**E** Phil.Clarke@ca.gt.com | **W** http://www.grantthornton.ca/

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**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Friday, July 8, 2022 11:06 AM
**To:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>; BarclayAnthony0 <barclayanthony0@gmail.com>
**Subject:** RE: St. Lawrence moorings

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Phil

Regarding my recent email, we did do the math on adapting the existing narge but it does not have the requisite internal stiffeners to allow elevation out of the water.

Regards

Dick

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** June 8, 2022 12:46 PM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Cc:** BarclayAnthony0 <barclayanthony0@gmail.com>; sean.leet@horizonmaritime.com; Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** RE: St. Lawrence moorings

Dick:

Absolutely. We will make sure this information is available to Phase 2 bidders.

Cheers!

**Phil Clarke | Partner**
Grant Thornton LLP
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
**T** +1 902 420 7191 | **F** +1 902 420 1068 | **C** +1 902 293 9119

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**From:** Dick Spellacy <richardspellacy@hotmail.com>
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**Subject:** RE: St. Lawrence moorings

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Hi Phil
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Thanks

Dick

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** June 7, 2022 12:56 PM
**To:** Dick Spellacy <richardspellacy@hotmail.com>; Patrick Gannon <pgannon@canadafluorspar.com>
**Cc:** sean.leet@horizonmaritime.com; Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** RE: St. Lawrence moorings

Dick:

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We can pass this information on to the successful bidder and let them make the decision to take this forward, or not.

Cheers,

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**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Sunday, June 5, 2022 6:20 PM
**To:** Patrick Gannon <pgannon@canadafluorspar.com>; Clarke, Phil <Phil.Clarke@ca.gt.com>
**Cc:** sean.leet@horizonmaritime.com; Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** St. Lawrence moorings

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Hi Pat

As per our conversation, after discussions with the owners and management of Horizon Maritime, they are willing to offer to supply and emplace the moorings in St. Lawrence as originally proposed in my proposal at the end of January with the exception being that there will be no barge as there is no real certainty as to the status of the barge owned by

CFI. However, the moorings will be sized as originally conceived and emplaced so that they accommodate either that vessel or another one similarly sized. Horizon will be responsible for supplying all the moorings as originally conceived and will leave the barge end of the chain secured to a pick up line which in turn will be attached to a pick up buoy in the case of the seaward anchors and lead back to the dock in the case of the shore fast anchors.

As I explained to you over the phone, the price for this class of vessel in the North Sea has skyrocketed with rates in excess of 100,000 pounds per day being discussed as we speak which may help to explain the price differential since this issue was last discussed. The vessel is committed to the first week in August when it has another job with a flexible time scale but this job can be slotted in between the two or even at the end. This offer is on the table for discussion until the end of June but if there is no contact or interest by anybody at that point, the owners reserve the right to withdraw the offer.

To supply and install all the moorings as originally proposed, C$2,100,000.00 (Two million, One hundred thousand Canadian dollars)

Best regards

Dick

---

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## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Wednesday, March 8, 2023 11:30 AM
**To:** Deborah Hutchings
**Subject:** FW: St. Lawrence moorings Barge 18

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** Monday, July 11, 2022 2:03 PM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Cc:** Deborah LJ. Hutchings <dhutchings@bensonbuffett.com>
**Subject:** RE: St. Lawrence moorings

Dick:

Thanks for the note. I would appreciate if you could provide me with contact information for those involved. I can reach out to gather information.

Further to the RJG application – we have put them on notice of you claim and the Federal Court matter. We shall make sure you legal counsel is served on any proceeding once the court sets down dates on the RJG application. For further information you legal counsel can contact Darren O'Keefe who is handling this matter for CFI.

Cheers,

**Phil Clarke | Partner**
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**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Friday, July 8, 2022 11:36 AM
**To:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Cc:** Deborah LJ. Hutchings <dhutchings@bensonbuffett.com>
**Subject:** RE: St. Lawrence moorings

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Hi Again Phil

Regarding our conversation about the barge, you should be advised that when she arrived here Giovanini and company were contracted to take the barge out to sea and do a ballast water transfer as per international regulations but I have been informed by the people involved that even though they were paid a substantial figure for this service, it was in fact not performed and has left the owners of the barge with a charge from transport Canada to do this procedure. If this matter is of interest to you, I will put you in direct touch with the parties who handled the job.

Cheers

Dick

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** June 8, 2022 12:46 PM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Cc:** BarclayAnthony0 <barclayanthony0@gmail.com>; sean.leet@horizonmaritime.com; Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** RE: St. Lawrence moorings

Dick:

Absolutely. We will make sure this information is available to Phase 2 bidders.

Cheers!

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**Subject:** RE: St. Lawrence moorings

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Hi Phil
Thankyou for this. I realise that you don't have the funds for this type of activity but I have heard that some of the potential buyers of the mine have an interest in this proposal and all of them are going to have to get their product out to market somehow. In the last few months we have picked up a great deal of knowledge regarding the export of this material and we can provide any or all of these groups with a sensible means of egress so I as hoping to get this information and the capabilities of our group out to the interested parties. We can provide a safe and sensible means of export at a number of cost and capability levels so anything you can do to pass this on would be appreciated

Thanks

Dick

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** June 7, 2022 12:56 PM
**To:** Dick Spellacy <richardspellacy@hotmail.com>; Patrick Gannon <pgannon@canadafluorspar.com>
**Cc:** sean.leet@horizonmaritime.com; Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** RE: St. Lawrence moorings

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**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Sunday, June 5, 2022 6:20 PM

**To:** Patrick Gannon <pgannon@canadafluorspar.com>; Clarke, Phil <Phil.Clarke@ca.gt.com>
**Cc:** sean.leet@horizonmaritime.com; Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** St. Lawrence moorings

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Hi Pat

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As I explained to you over the phone, the price for this class of vessel in the North Sea has skyrocketed with rates in excess of 100,000 pounds per day being discussed as we speak which may help to explain the price differential since this issue was last discussed. The vessel is committed to the first week in August when it has another job with a flexible time scale but this job can be slotted in between the two or even at the end. This offer is on the table for discussion until the end of June but if there is no contact or interest by anybody at that point, the owners reserve the right to withdraw the offer.

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Best regards

Dick

---

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## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Wednesday, March 8, 2023 11:29 AM
**To:** Deborah Hutchings
**Subject:** FW: St. Lawrence moorings Barge 17

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** Wednesday, June 8, 2022 12:46 PM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Cc:** BarclayAnthony0 <barclayanthony0@gmail.com>; sean.leet@horizonmaritime.com; Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** RE: St. Lawrence moorings

Dick:

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Cheers!

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**Cc:** BarclayAnthony0 <barclayanthony0@gmail.com>; sean.leet@horizonmaritime.com; Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** RE: St. Lawrence moorings

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**Sent:** June 7, 2022 12:56 PM
**To:** Dick Spellacy <richardspellacy@hotmail.com>; Patrick Gannon <pgannon@canadafluorspar.com>
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**Subject:** RE: St. Lawrence moorings

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**Cc:** sean.leet@horizonmaritime.com; Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** St. Lawrence moorings

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Best regards

Dick

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## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Wednesday, March 8, 2023 11:29 AM
**To:** Deborah Hutchings
**Subject:** FW: proposal Barge 16

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** Tuesday, June 7, 2022 1:22 PM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Subject:** RE: proposal

Dick:

I am meeting with our new lawyer on this matter this week to discuss. Optimistically looking to have a position next week. I am in court Friday afternoon on another CFI matter.

Will Cahill at Cox & Palmer is taking over the legal proceedings related to the barge. The previously assigned lawyer left the firm. Ms. Hutchings has been advised. They are getting themselves up to speed prior to our meeting later this week.

Cheers,

**Phil Clarke | Partner**
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**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Thursday, June 2, 2022 11:10 AM
**To:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Subject:** RE: proposal

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Hi Phil, is the barge sale going ahead?

Regards

Dick

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** May 12, 2022 10:12 AM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** RE: proposal

Dick:

Thanks for the note. I got your voice message and will reach out between meetings today.

Cheers,

**Phil Clarke | Partner**
Grant Thornton LLP
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
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**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Wednesday, May 11, 2022 7:24 PM
**To:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** RE: proposal

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Hi Phil

Having two people named Pat in the conversation so I Have clarified this a bit with the addition of the surname in red

Dick

**From:** Dick Spellacy
**Sent:** May 11, 2022 3:05 PM
**To:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** RE: proposal

Hi Phil

I have been talking to Pat Gannon and he has told me about the desire of one or more of the potential purchasers desire to be able to use the barge and the mooring set up that I had presented and of course selling the barge to Pat Miller in that case may present a problem that is a bit knotty but not insoluble. The proposal that I have in mind and will put to Pat Miller is one that will permit the sale of the barge but allow CFI to retain control of the barge at least until after any sale of the mine has been completed. Please give me a call and I will spell out the details

Regards

Dick

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** April 11, 2022 10:19 AM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Cc:** pat@millershipping.com
**Subject:** RE: proposal

Thanks Dick. Pat – my contact information is below. Cheers!

**Phil Clarke, KStJ, CPA, CA, CIRP, LIT | Partner**
Grant Thornton LLP
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
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**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Monday, April 11, 2022 8:54 AM
**To:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Cc:** pat@millershipping.com
**Subject:** RE: proposal

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OK Will do. His name is Pat Miller and he is the owner of Miller Shipping and is copied on this mail, his direct number is 709 690 4575

Cheers

Dick

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** April 11, 2022 9:14 AM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Subject:** RE: proposal

Mr. Spellacy:

Thanks for the information. We will explore all options. If you could have the interested party contact me about purchasing the barge that would be appreciated.

Cheers,

**Phil Clarke, KStJ, CPA, CA, CIRP, LIT | Partner**
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**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Sunday, April 10, 2022 9:19 PM
**To:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Subject:** RE: proposal

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Good Morning Phil

I don't wish to drown you with information but I have attached the profile of the Horizon Arctic which is the vessel THAT Horizon would use to do the relocation of the barge if that is the way you decide you want to go. This vessel will be demobilising equipment in Argentia this coming Friday and has a short window before proceeding to Bay Bulls for her next job and the day rate for this vessel is in the high $60K so when you add the fuel in you will see where the charges are coming from. I have put this to you again as time is very much of the essence here and although the berth is empty

we don't have the agreement of the Argentia Harbour master to berth the barge there yet and that is a prerequisite to any action.

If however, you decide to sell the barge instead, I have to inform you that I was contacted over the weekend by a local ship owner who knows the barge, its' history and all the drawbacks including the retained ballast water situation and any offer that he makes will be at the lower end of the spetrum but does have an interest in purchasing the barge, please advise which direction you want to go and I will try and facilitate the way forward

Regards

Dick

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** April 8, 2022 1:05 PM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Cc:** Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** RE: proposal

Dick:

Received with thanks.

Cheers,

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Grant Thornton LLP
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
**T** +1 902 420 7191 | **F** +1 902 420 1068 | Cell +1 902 293 9119
**E** Phil.Clarke@ca.gt.com | **W** http://www.grantthornton.ca/

Grant Thornton LLP is proud to be recognized as one of Canada's best workplaces for our fourteenth consecutive year!

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Friday, April 8, 2022 12:14 PM
**To:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Cc:** Cliff Gaetz <cliff.gaetz@horizonmaritime.com>
**Subject:** RE: proposal

**CAUTION: EXTERNAL EMAIL. DO NOT CLICK ON LINKS OR OPEN ATTACHMENTS YOU DO NOT TRUST**
*****NEW*** DO NOT ENTER YOUR GT PASSWORD ON ANY EXTERNAL EMAIL REQUEST**

Hi Phil,
Will do, in the meantime, I had meetings with Horizon Offshore this morning. This company that has previously successfully moved the barge from St. Lawrence to Marystown in September of last year and as luck would have it, the

same vessel, the Horizon Arctic is coming available in Argentia in a few days time and can move the barge back to a berth in Argentia. The berth is condemned for any wok but the barge can at least tie up there. The total distance of the mobilisation of the vessel and completed tow of the barge is approximately 220 nautical miles and the whole evolution will take around 1.5 vessel days to complete. The principal cost in the whole evolution will be fuel and the vessel will probably consume around 30 Cu.m of fuel and marine diesel is currently running at around C$2300 per Cu.m at this time. Given the vessel time and the necessary people available at each end I would suspect that the total cost would be somewhere in the region of $150,000 but in this respect I would be more comfortable if you were to deal directly with the principals of Horizon and for the sake of clarity I have copied the operations director of Horizon, Cliff Gaetz on this mail. If you are able to reach agreement on this issue with Cliff then we will need to contact the Harbour Master at Argentia to secure the berth.

Just so that there is no misunderstanding on this, there will be cheaper solutions around but this is a big barge and it has got out of control previously with a smaller tug and collided with the St. Lawrence town wharf and at this time of year, weather can very definitely be an issue and I am comfortable that this vessel can indeed move the barge safely, it is in the area so there is no untoward mobilisation fee and will do the job

Kind Regards

Dick

**From:** Clarke, Phil <Phil.Clarke@ca.gt.com>
**Sent:** April 8, 2022 11:01 AM
**To:** richardspellacy@hotmail.com
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** FW: proposal

Dick:

This email was forwarded to me. If you could correspond with me directly on the barge matter in the future that would be appreciated. We are evaluating the situation with regards to the barge and will circle back once we determine our path forward.

Cheers,

**Phil Clarke, KStJ, CPA, CA, CIRP, LIT | Partner**
Grant Thornton LLP
Nova Centre, North Tower | Suite 1000 - 1675 Grafton Street | Halifax | NS | B3J 0E9
**T** +1 902 420 7191 | **F** +1 902 420 1068 | Cell +1 902 293 9119
**E** Phil.Clarke@ca.gt.com | **W** http://www.grantthornton.ca/

GrantThornton

Best Workplaces Great Place To Work. CANADA 2021

Grant Thornton LLP is proud to be recognized as one of Canada's best workplaces for our fourteenth consecutive year!

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** April 7, 2022 9:57 PM
**To:** CanadaFluorspar <canadafluorspar@ca.gt.com>
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** FW: proposal

You don't often get email from richardspellacy@hotmail.com. Learn why this is important

**CAUTION: EXTERNAL EMAIL. DO NOT CLICK ON LINKS OR OPEN ATTACHMENTS YOU DO NOT TRUST**
*****NEW*** DO NOT ENTER YOUR GT PASSWORD ON ANY EXTERNAL EMAIL REQUEST**

Mr. Clarke
I know that you are up to you armpits trying to put together a proposal to sell the mine so I really don't want to bother you too much but I have had a good look at the mine and its prospects for the future and have few suggestions to make. No matter who buys the mine, it can only be operated profitably if the mine operator has a means of successfully exporting the product to the end user and that means a marine terminal of some description. After our conversation the other day, I did some digging and calling around and have come up with a possible solution and a way of moving forward.

1. As far as I can ascertain from our conversation, you do not expect this possible sale prospect to be resolved until July.
2. At the moment, export can continue via the Peter Kiewit facility but that will add as a minimum between $30 and $35 per ton to the freight cost and will stop if Kiewit's manage to secure any of the Bay du Nord work and I suspect that they will.
3. The barge that is owned by the mine and is currently lying alongside at the Marbase facility in Marystown under arrest by my Company, Inaminka Marine is currently safely berthed but Marbase have already advised me that they will require the barge to move by the end of the month and will be in touch with you shortly on that. This means that you will have to locate and stem a safe berth and secure tugs to move the barge and ensure that adequate insurance is in place.
4. Since our conversation I have asked around and can stem almost all of the facilities necessary to construct a temporary marine terminal as well as an acceptable solution going forward and this provision set down with costs and availability can only help your cause as you progress with the potential sale of the facility.
5. In a nutshell, in the near future, you will have to get my permission to move the barge which will not be unreasonably withheld so long as you have a safe berth, means of towing with a reputable towing company and acceptable marine insurance. I am going to suggest to you, that if my accounts are resolved, I can assist you with the first task of moving the barge as part of the process, you will of course have to pay for the tugs, new berth and insurance and I can revive as much of the plan that I have already constructed as possible and have it ready for mid-August installation which is the latest that I can hold the boat for and then you will have an acceptable export solution and I can assist with a permanent solution for the new owner

Kind Regards

Captain Richard Spellacy
President – Inaminka Marine Sevices Ltd.

---

Disclaimer: This email is intended solely for the person or entity to which it is addressed and may contain confidential and/or privileged information. Any review, dissemination, copying, printing or other use of this email by persons or entities other than the addressee is prohibited. If you have received this email in error, please contact the sender immediately and delete the material from any computer.

## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** August 31, 2022 5:24 PM
**To:** Deborah Hutchings
**Subject:** FW: Invoice
**Attachments:** Inaminka2021089 CFIdocbrokerage.doc; Expences CFI.xlsx; CFI timesheet P1.docx

Fyi 2

This is Exhibit B referred to in the Affidavit of Richard A. Spellacy Sworn or affirmed before me this 2nd day of September, 2022.

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Friday, November 26, 2021 9:56 AM
**To:** Ron Milmine <rmilmine@canadafluorspar.com>
**Subject:** RE: Invoice

Ron

As discussed and from today, I will bill at an hourly rate of $225.00

Cheers

Dick

**From:** Ron Milmine <rmilmine@canadafluorspar.com>
**Sent:** November 26, 2021 9:13 AM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Subject:** FW: Invoice

Hi Dick: When u get some time please call me so we can go over your invoices that you submitted

1-709-873-3331 ext 133

**Ron Milmine**
Procurement/Warehouse Supervisor
Canada Fluorspar Inc.
P.O. Box 337, St. Lawrence, NL, A0E 2V0
Tel: 709-873-3331 Cell 709-277-6805 Fax: 709-873-3335 www.canadafluorspar.ca

**From:** Jason Flood <jflood@canadafluorspar.com>
**Sent:** November-23-21 8:59 AM
**To:** Ron Milmine <rmilmine@canadafluorspar.com>; Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** FW: Invoice

Please review the time sheet attachment and advise if you agree with the work performed by Dick? Specifically the work performed in early Oct as I did not get involved until later in Oct or early Nov.

Best Regards,

Jason Flood

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** November 20, 2021 4:13 PM
**To:** Jason Flood <jflood@canadafluorspar.com>
**Cc:** Leo Power <leo.power.nl@gmail.com>; Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** Invoice

Jason

Please find attached the invoice for services to date, I had a hard time trying to pin down the actual times for everything so I just gave a general description as this is the only job that I have been working on since mid-October except the few days I took out last week and that is reflected in the time sheet

Cheers

Dick

## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** August 31, 2022 5:25 PM
**To:** Deborah Hutchings
**Subject:** FW: Tugboat

Fyi4

---

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Friday, October 15, 2021 12:15 PM
**To:** Ron Milmine <rmilmine@canadafluorspar.com>
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** RE: Tugboat

Ron

Just for your own information going forward, one of the main problems of small tugs and big barges is the propensity of the barge to overrun the tug in any kind of weather and there has been a number of cases in North America of late with the last one being in BC about two years ago in calm water where the barge overran the tug killing two of the tug's crew.

Cheers

Dick

---

**From:** Ron Milmine <rmilmine@canadafluorspar.com>
**Sent:** October 15, 2021 8:04 AM
**To:** RICHARDSPELLACY@HOTMAIL.COM
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** FW: Tugboat

Hi Richard: It was a pleasure to meet with you last week to learn more about tugboat availability.
Can you read below and let me know if you feel this tugboat
CRT EXPRESS is capable of safely towing our barge.

Regards
Ron
**Ron Milmine**
Procurement/Warehouse Supervisor
Canada Fluorspar Inc.
P.O. Box 337, St. Lawrence, NL, A0E 2V0
Tel: 709-873-3331 Cell 709-277-6805 Fax: 709-873-3335 www.canadafluorspar.ca

---

**From:** Ron Milmine <rmilmine@canadafluorspar.com>
**Sent:** October-15-21 7:43 AM
**To:** Ron Milmine <rmilmine@canadafluorspar.com>
**Subject:** Fwd: Tugboat

Sent from my iPhone

Begin forwarded message:

**From:** Greg Pittman <gpittman@canadafluorspar.com>
**Date:** October 14, 2021 at 5:36:46 PM NDT
**To:** Ron Milmine <rmilmine@canadafluorspar.com>
**Subject: RE: Tugboat**

Ron:
Name: CRT Express
Crewing and contract agency: Canship
Length: 29.8 m
Gross Tonnage: 239
Deadweight: 50 t
Bollard Pull; 32 t

Cheers
Greg

-----Original Message-----
From: Ron Milmine <rmilmine@canadafluorspar.com>
Sent: October 14, 2021 5:33 PM
To: Greg Pittman <gpittman@canadafluorspar.com>
Subject: Tugboat

Can u provide details on the tug
Name
Size specs etc

Sent from my iPhone

## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** August 31, 2022 5:23 PM
**To:** Deborah Hutchings
**Subject:** FW: PO 21012 RQN12966 INAMINKA $90,000.00

Debbie I am just sending you the initial email contacts with CFI from October of last year and you can see that it is all related to the safe operation of the barge

-----Original Message-----
From: Dick Spellacy <richardspellacy@hotmail.com>
Sent: Tuesday, December 14, 2021 8:34 AM
To: Ron Milmine <rmilmine@canadafluorspar.com>
Cc: Jason Flood <jflood@canadafluorspar.com>
Subject: RE: PO 21012 RQN12966 INAMINKA $90,000.00

Hi Ron well received with thanks

Dick

-----Original Message-----
From: Ron Milmine <rmilmine@canadafluorspar.com>
Sent: December 14, 2021 8:26 AM
To: Dick Spellacy <richardspellacy@hotmail.com>
Cc: Andrea Lockyer <anlockyer@canadafluorspar.com>; Jason Flood <jflood@canadafluorspar.com>; Lucy Kelly <lkelly@canadafluorspar.com>; Paula Marie Slaney <pslaney@canadafluorspar.com>
Subject: PO 21012 RQN12966 INAMINKA $90,000.00

-----Original Message-----
From: Purchasing Workflow <noreply@canadafluorspar.com>
Sent: December 14, 2021 8:14 AM
To: Purchasing <purchasing@canadafluorspar.com>
Subject: Purchase Order

Dear Vendor;

The attached file lists the items that we wish to purchase from your company. PO Number 21012: RQN0012966 in the amount of $90,000.00 .

All packing slips must contain PO number and any back-order quantities to be stated on packing slip.

For Collect shipments, please email purchasing@canadafluorspar.com the following when ready for pick up:

Please acknowledge receipt of this Purchase Oorder

Warehouse receiving Hours are from:
8:30am - 2:30pm Monday to Friday

All packing slips should indicate CFI part numbers.

Pick up location
Contact person
Hours of operation
Number of cartons/skids
DIM
Weight

Invoice to: Canada Fluorspar (NL) Inc., P. O. Box 337 St. Lawrence, NL A0E 2V0 Please ensure that the CFI (NL) PO # and your Company HST# are printed on the invoice.
Forward invoice to A/P email address: ap@canadafluorspar.com

If you have any questions regarding this purchase order, please contact a member of our Purchasing Group at 709-873-3331 Select # 2.

Regards,
Purchasing Group
Canada Fluorspar (NL) Inc.
P. O. Box 337
St. Lawrence, NL
A0E 2V0

Canada Fluorspar (NL) Inc.

# Purchase Requisition

| Date | Page |
|---|---|
| 2021-11-05 | 1 |
| Purchase Requisition Number RQN0012966 | |

| Reference | Description | Required Date | | Requested By |
|---|---|---|---|---|
| Blue Beach | Review BB barge mooring away f | | CAP2021-001 | Serena Hickey |

| Ship To | Bill To | Ship Via | FOB Point |
|---|---|---|---|
| | | | |

| Item | Description | Vendor | Expected Arrival | GL Account | Quantity | UOM | Unit Cost | Extended Cost |
|---|---|---|---|---|---|---|---|---|
| CAPDC | Review BB barge mooring away from cribs | | | 18343-505-033 | 60.00 | EA | 1,500.00 CAD | 90,000.00 |

Comment:
Vendor Richard Spellacy

Total Cost: 90,000.00

Approver Name: Approver Position / Title:

# Purchase Order

| Date | Page |
|---|---|
| Dec 14, 2021 | 1 |
| Purchase Order Number | |
| PO00021012 | |

Canada Fluorspar (NL) Inc.
P.O. Box 337
St. Lawrence, NL A0E 2V0

01/19/2022
7:27:52AM

REQUISITION # **RQN0012966**

**Vendor Address:**

Inaminka Marine Services Ltd.
Suite 202
130 Lemarchant Rd
St. John's, NL A1C 2H2
Canada

| Reference | Contact | Vendor Number | PO Date | Terms | Ship Via | Expected Arrival |
|---|---|---|---|---|---|---|
| Blue Beach | | INAMAR | Dec 14, 2021 | NET60 | | |

| Qty. Ordered | Vendor Item Number | Description | CFI Item Number | Unit Cost | UOM | Extended Price |
|---|---|---|---|---|---|---|
| 0.0000 | CAPDC | Review BB barge mooring away from cribs $220.00 PER HOUR<br>**Instructions:** Requisitioner: SHICKEY RQN0012966 | CAPDC | 1.000000 | EA | 0.00 |
| 0.0000 | CAPDC | MILELAGE .60 PER KM<br>**Instructions:** Requisitioner: SHICKEY RQN0012966 | CAPDC | 1.000000 | MT | 0.00 |
| 50,000.0000 | RQN13616 | Review BB Barge Mooring Away from Crib (220.00 per hr) | CAPDC | 1.000000 | EA | 50,000.00 |
| 3,000.0000 | CAPDC | MILELAGE | CAPDC | 1.000000 | EA | 3,000.00 |

**Comments:**
Richard Spellacy to SUBMIT DAILY RECORD OF WORK DONE WITH INVOICE

**Tax Summary:**
HSTGST 7,950.00

| | |
|---|---|
| **Less:** included tax | **0.00** |
| **Subtotal** | **53,000.00** |
| **Total tax** | **7,950.00** |
| **Total purchase order** | **60,950.00** |

CFI
CANADA FLUORSPAR INC.

# Purchase Order

| Date | Page |
|---|---|
| Dec 14, 2021 | 1 |

Purchase Order Number
PO00021012

12/14/2021
8:14:19AM

REQUISITION # RQN0012966

**Vendor Address:**

Inaminka Marine Services Ltd.
Suite 202
130 Lemarchant Rd
St. John's, NL A1C 2H2
Canada

Contact : Richard Spellacy
Phone: 7096851725
Email: richardspellacy@hotmail.com

**Ship To/Billing address**

**Canada Fluorspar (NL) Inc**
**141 Director Drive**
**P.O. Box 337**
**St. Lawrence, NL**
**A0E 2V0**
**Phone: (709) 873-3331**
**Fax: (709) 873-3335**

| Reference | Contact | Vendor Number | PO Date | Terms | Ship Via | Expected Arrival |
|---|---|---|---|---|---|---|
| Blue Beach | | INAMAR | 12/14/2021 | NET60 | | |

| Vendor Item Number | Description | CFI Item Number | Qty. Ordered | Expected Arrival | Unit Cost | UOM | Extended Price |
|---|---|---|---|---|---|---|---|
| GL ACCT: | Review BB barge mooring away from cribs $220.00 PER HOUR 18343-505-033 | CAPDC | 87,000.00 | | 1.000000 | EA | 87,000.00 |
| GL ACCT: | MILELAGE .60 PER KM 18343-505-033 | CAPDC | 3,000.00 | | 1.000000 | MT | 3,000.00 |

**Comments:**
Richard Spellacy to SUBMIT DAILY RECORD OF WORK DONE WITH INVOICE

**Tax Summary:**
HSTGST 13,500.00

| | |
|---|---|
| Subtotal | 90,000.00 |
| Total tax | 13,500.00 |
| Total purchase order | 103,500.00 |

| Approver Name: | Approver Position / Title: |
|---|---|
| Bill Dobbs | |
| Jason Flood | |
| Patrick Gannon | |
| Ron Milmine | |
| Serena Hickey | |
| Terry Fleming | |

INAMINKA MARINE LTD.
130 LeMarchant Road, Suite #301
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email;dspellacy@nf.aibn.com
HST#88690 8235 RT0001

November 30th 2021

**Canada Fluorspar (NL) Inc.**
**PO Box 337**
**St. Lawrence, NL**
**A0E2V0**

RQN #N0012966
Inaminka 20209

Attention: Jason Flood

Re Consulting on loading Barge

| | |
|---|---|
| 27.5 days @ C$1,500.00 per day | $41,250.00 |
| HST @15% | $6,187.50 |
| Expences as attached | $894.00 |
| **Total** | **$48,331.50** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

INAMINKA MARINE LTD.
130 LeMarchant Road, Suite #301
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

December 12th 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 20210

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 64.5 hours @$220.00/hour | $14,190.00 |
| A. Barclay 24 hours @$200.00/hour | $4,800.00 |
| HST @15% | $2,848.50 |
| Expences as attached | $539.17 |
| **Total** | **$22,377.67** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

December 31st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202111

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 140.0 hours @$220.00/hour | $30,800.00 |
| A. Barclay 30 hours @$200.00/hour | $6,000.00 |
| HST @15% | $5,520.00 |
| Expences as attached | $606.85 |
| **Total** | **$42,926.85** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

January 15th. 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202201

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 65.0 hours @$220.00/hour | $14,300.00 |
| HST @15% | $2,145.00 |
| **Total** | **$16,445.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

**INAMINKA MARINE LTD.**
130 LeMarchant Road, Suite #202
St. Johns, Newfoundland, A1C 2H2
(709) 739-4714
Fax: (709) 739-0317
email:dspellacy@nf.aibn.com
HST#88690 8235 RT0001

February 1st 2021

Canada Fluorspar (NL) Inc.
PO Box 337
St. Lawrence, NL
A0E2V0
Re P/O #O00021012
RQ#0012966

Inaminka 202202

Attention: Jason Flood/Ron Milmine

Re Consulting on loading Barge

| | |
|---|---|
| R. Spellacy 66.0 hours @$220.00/hour | $14,520.00 |
| Expences as attached | $91.00 |
| HST @15% | $2,178.00 |
| **Total** | **$16,789.00** |

Please deposit directly to the account of Inaminka Marine at;
Canadian Imperial Bank of Commerce
Atlantic Place
St. Johns

| | |
|---|---|
| A/C # | 00063-010-4811410 |
| IBAN # | //CC001000063 |
| BIC/SWIFT | CIBCCATT |

Kind regards

R. A. Spellacy

# Barclay Associates Ltd.

20 Carrick Drive

St. John's, NL, A1A 4A8

Telephone: (709) 722-7821

Cell: (709) 730-8897

Email: barclayanthony0@gmail.com


To whom it may concern:

Mr. A. Barclay, president of the captioned company, was engaged to carry out certain technical services in support of Inaminka's work on the 61M deck barge moored at the Marystown shipyard facility. Mr. Barclay is professional engineer, registered in the province of Newfoundland and Labrador, as well as a chartered engineer and naval architect, registered with the Royal Institute of Naval Architects in the UK.

The scope of work undertaken by Mr. Barclay included –

Pre-inspection meetings

Inspection of vessel in Marystown

Review of surveyor's damage report

Analysis of longitudinal and transverse strength.

Design of proposed winch seats.

Cost estimate for repair options

This work was carried out under the direction of Mr. Richard Spellacy, president of Inaminka Marine Services Inc.

Signed: A. Barclay, P. Eng.

A Barclay

Barclay Associates Ltd.

## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** August 31, 2022 5:24 PM
**To:** Deborah Hutchings
**Subject:** FW: Invoice
**Attachments:** Inaminka2021089 CFIdocbrokerage.doc; Expences CFI.xlsx; CFI timesheet P1.docx

Fyi 2

This is Exhibit B referred to in the Affidavit of Richard A. Spellacy Sworn or affirmed before me this 2nd day of September, 2022.

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Friday, November 26, 2021 9:56 AM
**To:** Ron Milmine <rmilmine@canadafluorspar.com>
**Subject:** RE: Invoice

Ron

As discussed and from today, I will bill at an hourly rate of $225.00

Cheers

Dick

**From:** Ron Milmine <rmilmine@canadafluorspar.com>
**Sent:** November 26, 2021 9:13 AM
**To:** Dick Spellacy <richardspellacy@hotmail.com>
**Subject:** FW: Invoice

Hi Dick: When u get some time please call me so we can go over your invoices that you submitted

1-709-873-3331 ext 133

**Ron Milmine**
Procurement/Warehouse Supervisor
Canada Fluorspar Inc.
P.O. Box 337, St. Lawrence, NL, A0E 2V0
Tel: 709-873-3331 Cell 709-277-6805 Fax: 709-873-3335 www.canadafluorspar.ca

**From:** Jason Flood <jflood@canadafluorspar.com>
**Sent:** November-23-21 8:59 AM
**To:** Ron Milmine <rmilmine@canadafluorspar.com>; Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** FW: Invoice

Please review the time sheet attachment and advise if you agree with the work performed by Dick? Specifically the work performed in early Oct as I did not get involved until later in Oct or early Nov.

Best Regards,

Jason Flood

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** November 20, 2021 4:13 PM
**To:** Jason Flood <jflood@canadafluorspar.com>
**Cc:** Leo Power <leo.power.nl@gmail.com>; Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** Invoice

Jason

Please find attached the invoice for services to date, I had a hard time trying to pin down the actual times for everything so I just gave a general description as this is the only job that I have been working on since mid-October except the few days I took out last week and that is reflected in the time sheet

Cheers

Dick

## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** August 31, 2022 5:25 PM
**To:** Deborah Hutchings
**Subject:** FW: Tugboat

Fyi4

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**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** Friday, October 15, 2021 12:15 PM
**To:** Ron Milmine <rmilmine@canadafluorspar.com>
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** RE: Tugboat

Ron

Just for your own information going forward, one of the main problems of small tugs and big barges is the propensity of the barge to overrun the tug in any kind of weather and there has been a number of cases in North America of late with the last one being in BC about two years ago in calm water where the barge overran the tug killing two of the tug's crew.

Cheers

Dick

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**From:** Ron Milmine <rmilmine@canadafluorspar.com>
**Sent:** October 15, 2021 8:04 AM
**To:** RICHARDSPELLACY@HOTMAIL.COM
**Cc:** Patrick Gannon <pgannon@canadafluorspar.com>
**Subject:** FW: Tugboat

Hi Richard: It was a pleasure to meet with you last week to learn more about tugboat availability.
Can you read below and let me know if you feel this tugboat
CRT EXPRESS is capable of safely towing our barge.

Regards
Ron
**Ron Milmine**
Procurement/Warehouse Supervisor
Canada Fluorspar Inc.
P.O. Box 337, St. Lawrence, NL, A0E 2V0
Tel: 709-873-3331 Cell 709-277-6805 Fax: 709-873-3335 www.canadafluorspar.ca

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**From:** Ron Milmine <rmilmine@canadafluorspar.com>
**Sent:** October-15-21 7:43 AM
**To:** Ron Milmine <rmilmine@canadafluorspar.com>
**Subject:** Fwd: Tugboat

Sent from my iPhone

Begin forwarded message:

**From:** Greg Pittman <gpittman@canadafluorspar.com>
**Date:** October 14, 2021 at 5:36:46 PM NDT
**To:** Ron Milmine <rmilmine@canadafluorspar.com>
**Subject: RE: Tugboat**

Ron:
Name: CRT Express
Crewing and contract agency: Canship
Length: 29.8 m
Gross Tonnage: 239
Deadweight: 50 t
Bollard Pull; 32 t

Cheers
Greg

-----Original Message-----
From: Ron Milmine <rmilmine@canadafluorspar.com>
Sent: October 14, 2021 5:33 PM
To: Greg Pittman <gpittman@canadafluorspar.com>
Subject: Tugboat

Can u provide details on the tug
Name
Size specs etc

Sent from my iPhone

## Deborah Hutchings

**From:** Dick Spellacy <richardspellacy@hotmail.com>
**Sent:** August 31, 2022 5:23 PM
**To:** Deborah Hutchings
**Subject:** FW: PO 21012 RQN12966 INAMINKA $90,000.00

Debbie I am just sending you the initial email contacts with CFI from October of last year and you can see that it is all related to the safe operation of the barge

-----Original Message-----
From: Dick Spellacy <richardspellacy@hotmail.com>
Sent: Tuesday, December 14, 2021 8:34 AM
To: Ron Milmine <rmilmine@canadafluorspar.com>
Cc: Jason Flood <jflood@canadafluorspar.com>
Subject: RE: PO 21012 RQN12966 INAMINKA $90,000.00

Hi Ron well received with thanks

Dick

-----Original Message-----
From: Ron Milmine <rmilmine@canadafluorspar.com>
Sent: December 14, 2021 8:26 AM
To: Dick Spellacy <richardspellacy@hotmail.com>
Cc: Andrea Lockyer <anlockyer@canadafluorspar.com>; Jason Flood <jflood@canadafluorspar.com>; Lucy Kelly <lkelly@canadafluorspar.com>; Paula Marie Slaney <pslaney@canadafluorspar.com>
Subject: PO 21012 RQN12966 INAMINKA $90,000.00

-----Original Message-----
From: Purchasing Workflow <noreply@canadafluorspar.com>
Sent: December 14, 2021 8:14 AM
To: Purchasing <purchasing@canadafluorspar.com>
Subject: Purchase Order

Dear Vendor;

The attached file lists the items that we wish to purchase from your company. PO Number 21012: RQN0012966 in the amount of $90,000.00 .

All packing slips must contain PO number and any back-order quantities to be stated on packing slip.

For Collect shipments, please email purchasing@canadafluorspar.com the following when ready for pick up:

Please acknowledge receipt of this Purchase Oorder

Warehouse receiving Hours are from:
8:30am - 2:30pm Monday to Friday

All packing slips should indicate CFI part numbers.

Pick up location
Contact person
Hours of operation
Number of cartons/skids
DIM
Weight

Invoice to: Canada Fluorspar (NL) Inc., P. O. Box 337 St. Lawrence, NL A0E 2V0 Please ensure that the CFI (NL) PO # and your Company HST# are printed on the invoice.
Forward invoice to A/P email address: ap@canadafluorspar.com

If you have any questions regarding this purchase order, please contact a member of our Purchasing Group at 709-873-3331 Select # 2.

Regards,
Purchasing Group
Canada Fluorspar (NL) Inc.
P. O. Box 337
St. Lawrence, NL
A0E 2V0

**Maritime jurisdiction**

**(2)** Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:

**(a)** any claim with respect to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein;

**(b)** any question arising between co-owners of a ship with respect to possession, employment or earnings of a ship;

**(c)** any claim in respect of a mortgage or hypothecation of, or charge on, a ship or any part interest therein or any charge in the nature of bottomry or respondentia for which a ship or part interest therein or cargo was made security;

**(d)** any claim for damage or for loss of life or personal injury caused by a ship either in collision or otherwise;

**(e)** any claim for damage sustained by, or for loss of, a ship including, without restricting the generality of the foregoing, damage to or loss of the cargo or equipment of, or any property in or on or being loaded on or off, a ship;

**(f)** any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;

**(g)** any claim for loss of life or personal injury occurring in connection with the operation of a ship including, without restricting the generality of the foregoing, any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of the ship are responsible, being an act, neglect or default in the management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;

**(h)** any claim for loss of or damage to goods carried in or on a ship including, without restricting the generality of the foregoing, loss of or damage to passengers' baggage or personal effects;

**(i)** any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;

**(j)** any claim for salvage including, without restricting the generality of the foregoing, claims for salvage of life, cargo, equipment or other property of, from or by an aircraft to the same extent and in the same manner as if the aircraft were a ship;

**(k)** any claim for towage in respect of a ship or of an aircraft while the aircraft is water-borne;

**(l)** any claim for pilotage in respect of a ship or of an aircraft while the aircraft is water-borne;

**(m)** any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;

**(n)** any claim arising out of a contract relating to the construction, repair or equipping of a ship;

**(o)** any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his or her employment;

**(p)** any claim by a master, charterer or agent of a ship or shipowner in respect of disbursements, or by a shipper in respect of advances, made on account of a ship;

**(q)** any claim in respect of general average contribution;

**(r)** any claim arising out of or in connection with a contract of marine insurance; and

**(s)** any claim for dock charges, harbour dues or canal tolls including, without restricting the generality of the foregoing, charges for the use of facilities supplied in connection therewith.

T-194-97
2003 FC 873

**Canadian Imperial Bank of Commerce** (*Plaintiff*)

*v.*

**The Owners and all other Interested Parties in the Ships *Le Chene No. 1*, *L'Orme No. 1*, *Le Saule No. 1* and the *W. M. Vacy Ash*** (*Defendants*)

*INDEXED AS: CANADIAN IMPERIAL BANK OF COMMERCE v. LE CHÊNE NO. 1 (THE) (F.C.)*

Federal Court, Snider J.—Toronto, June 2; Ottawa, July 14, 2003.

*Maritime Law — Liens and Mortgages — Employee claiming unpaid wages for service on defendant ships — Amounts allegedly secured by maritime lien against proceeds of sale of ships — Could not claim annual bonuses but entitled to damages for wrongful dismissal — Scope of admiralty jurisdiction — Evolution of interpretation of "wages" — Maritime lien arising in respect of damages for wrongful dismissal — Key factor in determining whether maritime lien arises service to ship — Link between service, defendant ships established — Lien attached to ship employee would have been working on, but for wrongful dismissal — Damages for wrongful dismissal to be paid out to employee in priority to claim of CIBC.*

This was a motion to set aside a decision of Prothonotary Lafrenière with respect to bonus payments and a maritime lien claimed by the applicant, Donald MacKenzie. The latter is a chief engineer who served for many years on ships owned and operated by Socanav Inc., a large tanker company in Montréal. He began his employment with Socanav on July 1, 1985. Of the 12 years that passed from that date, the applicant spent eight years as a member of the crew of the defendant ships. At the time of his dismissal, he was serving on the ship *Le Chêne No. 1*. Due to its financial difficulties, Socanav entered into a short-term agreement with a numbered company to operate the defendant ships and to pay all costs relating to their maintenance. The agreement expired in early January 1997 and the applicant's employment was terminated shortly thereafter. Within a few weeks, the Quebec Superior Court in Bankruptcy declared Socanav bankrupt, retroactively to the date of filing

T-194-97
2003 CF 873

**Banque Canadienne Impériale de Commerce** (*demanderesse*)

*c.*

**Les propriétaires et toutes les autres parties ayant un intérêt dans les navires *Le Chêne N° 1*, *L'Orme N° 1*, *Le Saule N° 1* et le *W. M. Vacy Ash*** (*défendeurs*)

*RÉPERTORIÉ: BANQUE CANADIENNE IMPÉRIALE DE COMMERCE c. LE CHÊNE N° 1 (LE) (C.F.)*

Cour fédérale, juge Snider—Toronto, 2 juin; Ottawa, 14 juillet 2003.

*Droit maritime — Privilèges et hypothèques — Un employé réclamait des salaires impayés pour ses services sur les navires défendeurs — Ces montants seraient garantis par un privilège maritime grevant le produit de la vente des navires — Il ne pouvait pas réclamer un montant représentant les primes annuelles mais il avait droit à une indemnité pour licenciement abusif — Portée de la compétence en droit maritime — Évolution de l'interprétation du mot «salaire» — Un privilège maritime se rattache à une indemnité pour licenciement abusif — Le facteur clé de la question de savoir si un privilège maritime existe réside dans le service effectué sur le navire — Un lien a été établi entre le service et les navires défendeurs — Le privilège se rattache au navire sur lequel l'employé aurait travaillé s'il n'y avait pas eu licenciement abusif — L'indemnité pour licenciement abusif devra être versée à l'employé en priorité par rapport à la réclamation de la CIBC.*

Il s'agissait d'une requête visant à faire infirmer la décision du protonotaire portant sur le paiement de primes et sur un privilège maritime revendiqués par le requérant Donald MacKenzie. Celui-ci est un mécanicien en chef qui a travaillé pendant de nombreuses années sur des navires possédés et exploités par Socanav Inc., grande société commerciale de Montréal qui exploite des pétroliers. Il a commencé à travailler pour Socanav le 1er juillet 1985. Sur les 12 années écoulées depuis ce jour, le requérant a été membre d'équipage des navires défendeurs pendant huit ans. Au moment de son licenciement, il travaillait sur le navire *Le Chêne n° 1*. Étant donné que Socanav avait des difficultés financières, elle a conclu une entente à court terme avec une société à numéros pour l'exploitation des navires défendeurs et le paiement de tous les coûts liés à leur entretien. Cette entente a expiré au début de janvier 1997, et l'emploi du requérant a pris fin peu

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of its notice of intention to make a proposal to creditors (September 20, 1996). Following the sale of the defendant ships, the proceeds, in the amount of $2,700,000 were paid into Court pending satisfaction of third party claims. The applicant claimed unpaid wages for his service which, according to him, are secured by a maritime lien against the proceeds of sale of the defendant ships. His claim competed with that of the plaintiff in the main action, the Canadian Imperial Bank of Commerce (CIBC), who claimed priority based on its mortgages on the defendant ships. The Prothonotary found that the applicant was not entitled to annual bonuses, that he could claim damages for wrongful dismissal and that the amounts claimed did not give rise to a maritime lien.

*Held*, the motion should be allowed with respect to the maritime lien for the applicant's claim to damages.

The decision of a prothonotary is to be accorded significant deference. Unless it was based upon a wrong principle or a misapprehension of the facts, the decision of Prothonotary Lafrenière in respect of the applicant's entitlement to bonus payments should not be disturbed. However, the issues related to damages for wrongful dismissal and maritime lien, relying for a large part on the correct interpretation of applicable law, should be reviewed *de novo*. As to the Prothonotary's conclusion on the issue of annual bonuses, the applicant was unable to identify any specific error, other than referring to the same evidence considered by the Prothonotary. Therefore, such decision should not be disturbed. Likewise, the Prothonotary was right in concluding that the applicant was entitled to damages for wrongful dismissal since his employment relationship was terminated as a result of the act of the employer, without cause and without notice.

The question of whether the amounts claimed give rise to a maritime lien should be considered in the context of the Admiralty jurisdiction. The scope of Admiralty jurisdiction in respect of the rights of seamen evolved to include such amounts to ensure the fairest treatment possible for those persons who work on board ships. Historically, only wages directly earned on board the ship in question were protected. However, the interpretation of "wages" broadened to meet the changing nature of employment generally and seamen's rights in particular. Thus, the concept of "wages" includes damages for wrongful dismissal, where such damages would arise on the facts. Canadian law appears to have accepted that a maritime

de temps après. Quelques semaines plus tard, la Cour supérieure du Québec, siégeant en matière de faillite, a prononcé la faillite de Socanav, rétroactivement à la date de production de son avis d'intention de présenter une proposition aux créanciers (le 20 septembre 1996). Le produit de la vente des navires défendeurs, soit 2,7 millions de dollars, a été versé à la Cour, en attente du règlement des réclamations des tiers. Le demandeur a réclamé des salaires impayés pour ses services et, selon lui, ces montants sont garantis par un privilège maritime grevant le produit de la vente des navires défendeurs. Sa réclamation était en concurrence avec celle de la demanderesse dans l'action principale, la Banque Canadienne Impériale de Commerce (CIBC) qui prétendait avoir priorité vu ses hypothèques grevant les navires défendeurs. Le protonotaire a décidé que le requérant n'avait pas droit à des primes annuelles, qu'il avait droit à une indemnité pour licenciement abusif et que les montants réclamés ne donnaient pas droit à un privilège maritime.

*Jugement*: la requête est accueillie quant au privilège maritime revendiqué par le requérant pour la réclamation d'une indemnité.

Il y a lieu de faire preuve d'une grande retenue à l'égard de la décision d'un protonotaire. Sauf si elle s'appuyait sur un principe erroné ou sur une mauvaise compréhension des faits, la décision du protonotaire Lafrenière relativement au droit du requérant au paiement des primes ne devrait pas être modifiée. Cependant, les questions liées à l'indemnité pour licenciement abusif et au privilège maritime, s'appuyant en grande partie sur une interprétation correcte du droit applicable, devraient être examinées de nouveau. Quant à la conclusion du protonotaire sur la question des primes annuelles, le requérant n'a pu déterminer d'erreur précise et n'a fait que mentionner la même preuve que le protonotaire avait examinée. En conséquence, il convient de ne pas infirmer cette conclusion. De même, le protonotaire a conclu à bon droit que le requérant avait droit à une indemnité pour licenciement abusif, étant donné que la relation d'emploi a été terminée du fait de l'employeur, que le licenciement n'était pas motivé et a été fait sans préavis.

La question de savoir si les montants réclamés donnaient droit à un privilège maritime doit être examinée dans le contexte de la compétence en droit maritime. La portée de la compétence en droit maritime relative aux droits des marins s'est élargie dans le but d'assurer le traitement le plus équitable possible des personnes qui travaillent à bord des navires. Dans le passé, seuls les salaires directement gagnés sur les navires en question étaient protégés. Cependant, l'interprétation du mot «salaire» s'est élargie afin de s'adapter à la nature changeante de l'emploi en général et des droits des marins en particulier. Ainsi, le concept de «salaire» comporte une indemnité pour licenciement abusif dans la mesure où cette indemnité découle

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lien arises in respect of damages for wrongful dismissal. When read with subsections 22(1), 43(2) and 43(3) of the *Federal Courts Act*, paragraph 22(2)(*o*) of said Act gives rise to a statutory lien for "any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his or her employment". Damages for wrongful dismissal would generally be included as "other remuneration or benefits". A maritime lien can arise out of a claim for damages for wrongful dismissal because those damages are part of wages earned on board a vessel. The key factor in determining whether a maritime lien arises is the service to the ship. The lien is not dependent on who hired the seaman and arises independently of the contract. If in the relevant period the claimant was rendering a service to the ship as a member of the crew, he is entitled to a maritime lien in respect of his wages in respect of that period assessed in accordance with his contract. The right to a maritime lien is not contingent on the nature of the seaman's contractual arrangements. The applicant's service was referable to one or more of the defendant ships as a member of the crew. The applicant was retained to render service as a crew member on Socanav's ships and, at the time of his dismissal, he was a member of the crew of one of the defendant ships. These facts established a link between the service of the applicant and the defendant ships. The applicant was entitled to a reasonable notice period when he was dismissed. A maritime lien arose whether the applicant actually worked during the notice period or whether he was given salary in lieu of that notice upon dismissal. In general, the lien would attach to the ship that the applicant would have been working on, but for the wrongful dismissal. In this case, that would be *Le Chêne No. 1* and the lien should attach to that particular vessel. As to the quantum of the damages, the parties have agreed that, should a claim for wrongful dismissal arise on the facts, eight months' wages in lieu of notice would be appropriate. This amount should be paid out to the applicant in priority to the claim of CIBC.

des faits. Le droit canadien semble avoir accepté qu'un privilège maritime se rattache à une indemnité pour licenciement abusif. Lorsqu'il est lu en corrélation avec les paragraphes 22(1), 43(2) et 43(3) de la *Loi sur les Cours fédérales*, l'alinéa 22(2)*o*) de cette Loi donne naissance à un privilège d'origine législative pour «une demande formulée par un capitaine, un officier ou un autre membre de l'équipage d'un navire relativement au salaire, à l'argent, aux biens ou à toute autre forme de rémunération ou de prestations découlant de son engagement». Les indemnités pour licenciement abusif seraient généralement incluses à titre d'«autre forme de rémunération ou de prestations». Un privilège maritime peut trouver sa source dans une réclamation d'indemnité pour licenciement abusif puisque ces indemnités font partie du salaire gagné à bord d'un navire. Le facteur clé de la question de savoir si un privilège maritime existe réside dans le service effectué sur le navire. Le privilège ne dépend pas de la personne qui a embauché le marin et trouve sa source indépendamment du contrat. Si, durant la période pertinente, le réclamant offrait ses services sur le navire à titre de membre d'équipage, il a le droit de voir un privilège maritime grever son salaire en ce qui concerne la période examinée, conformément à son contrat. Le droit à un privilège maritime ne dépend pas de la nature des arrangements contractuels du marin. Le service du requérant se rapportait à un ou plusieurs des navires défendeurs à titre de membre d'équipage. On a retenu ses services pour travailler à titre de membre d'équipage sur l'un des navires de Socanav et, au moment de son licenciement, il était membre d'équipage de l'un des navires défendeurs. Ces faits établissent un lien entre les services du requérant et les navires défendeurs. Le requérant avait droit à une période d'avis raisonnable lorsqu'il a été licencié. Un privilège maritime existait, peu importe s'il avait réellement travaillé pendant la période d'avis ou s'il avait reçu un salaire à titre d'avis au moment du licenciement. En général, le privilège maritime gréve le navire sur lequel le requérant aurait travaillé s'il n'y avait pas eu licenciement abusif. En l'espèce, il s'agit du navire *Le Chêne n° 1*. Pour ce qui est du montant de l'indemnité, les parties se sont entendues pour dire que, si le bien-fondé d'une réclamation pour licenciement abusif était reconnu selon les faits, un salaire de huit mois à titre d'avis serait approprié. Ce montant devrait être versé au requérant en priorité par rapport à la réclamation de la CIBC.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

*Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (as am. by S.C. 1992, c. 27, s. 2).

*Federal Courts Act*, R.S.C., 1985, c. F-7 (as am. by S.C. 2002, c. 8, s. 14), ss. 22(1) (as am. *idem*, s. 31), (2)(*o*) (as am. *idem*), 43(2) (as am. *idem*, s. 40), (3) (as am. *idem*).

LOIS ET RÈGLEMENTS

*Loi sur les Cours fédérales*, L.R.C. (1985), ch. F-7 (mod. par L.C. 2002, ch. 8, art. 14), art. 22(1) (mod., *idem*, art. 31), (2)*o*), 43(2) (mod., *idem*, art. 40), (3) (mod., *idem*).

*Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3 (mod. par L.C. 1992, ch. 27, art. 2).

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CASES JUDICIALLY CONSIDERED

APPLIED:

*Halcyon Skies, The*, [1976] 1 Lloyd's Rep. 461 (Q.B.D.); *Llido v. Lowell Thomas Explorer (The)*, [1980] 1 F.C. 339 (T.D.); *Ever Success, The*, [1999] 1 Lloyd's Rep. 824 (Q.B.).

DISTINGUISHED:

*Tacoma City, The*, [1991] 1 Lloyd's Rep. 330 (C.A.).

REFERRED TO:

*Demetries Karamanlis v. Norsland (The)*, [1971] F.C. 487 (T.D.); *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425; [1993] 1 C.T.C. 186; (1993), 93 DTC 5080; 149 N.R. 273 (C.A.); *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)* (2000), 16 C.B.R. (4th) 188 (F.C.T.D.).

AUTHORS CITED

Tetley, William. *Maritime Liens and Claims*, 2nd ed. Montréal: International Shipping Publications, 1998.

MOTION to set aside a decision of the Prothonotary ((2003), 41 C.B.R. (4th) 13; 229 F.T.R. 181) finding that the applicant could not claim annual bonuses, that he was entitled to damages for wrongful dismissal and that the amounts claimed did not give rise to a maritime lien. Motion allowed with respect to the maritime lien for the applicant's claim for damages.

APPEARANCES:

*Edouard Baudry* for plaintiff.
*Garri Benjamin Hendell* for defendants.

SOLICITORS OF RECORD:

*Lavery, de Billy*, Montréal, for plaintiff.
*Borden Ladner Gervais LLP*, Toronto, for defendants.

*The following are the reasons for order and order rendered in English by*

[1] SNIDER J.: Chief Engineer Donald MacKenzie served for many years on ships owned and operated by

JURISPRUDENCE

DÉCISIONS APPLIQUÉES:

*Halcyon Skies, The*, [1976] 1 Lloyd's Rep. 461 (Q.B.D.); *Llido c. Lowell Thomas Explorer (Le)*, [1980] 1 C.F. 339 (1re inst.); *Ever Success, The*, [1999] 1 Lloyd's Rep. 824 (Q.B.).

DISTINCTION FAITE D'AVEC:

*Tacoma City, The*, [1991] 1 Lloyd's Rep. 330 (C.A.).

DÉCISIONS CITÉES:

*Demetries Karamanlis c. Norsland (Le)*, [1971] C.F. 487 (1re inst.); *Canada c. Aqua-Gem Investments Ltd.*, [1993] 2 C.F. 425; [1993] 1 C.T.C. 186; (1993), 93 DTC 5080; 149 N.R. 273 (C.A.); *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndic)* (2000), 16 C.B.R. (4th) 188 (C.F. 1re inst.).

DOCTRINE

Tetley, William. *Maritime Liens and Claims*, 2nd ed. Montréal: International Shipping Publications, 1998.

REQUÊTE visant à faire infirmer la décision du protonotaire ((2003), 41 C.B.R. (4th) 13; 229 F.T.R. 181) portant que le requérant n'avait pas droit à des primes annuelles, qu'il avait droit à une indemnité pour licenciement abusif et que les montants réclamés ne donnaient pas droit à un privilège maritime. La requête est accueillie quant au privilège maritime revendiqué par le requérant pour la réclamation d'une indemnité.

ONT COMPARU:

*Edouard Baudry* pour la demanderesse.
*Garri Benjamin Hendell* pour les défendeurs.

AVOCATS INSCRITS AU DOSSIER:

*Lavery, de Billy*, Montréal, pour la demanderesse.
*Borden Ladner Gervais s.r.l.*, Toronto, pour les défendeurs.

*Ce qui suit est la version française des motifs de l'ordonnance et ordonnance rendus par*

[1] LE JUGE SNIDER: Le mécanicien en chef Donald MacKenzie a travaillé pendant de nombreuses années sur

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Socanav Inc. (Socanav). He claims that he is entitled to unpaid wages for his service and, further, that such amounts are secured by a maritime lien against the proceeds of sale of *Le Chêne No. 1*, *L'Orme No. 1* and *Le Saule No. 1* (the defendant ships). Mr. MacKenzie's claim competes with that of the plaintiff, the Canadian Imperial Bank of Commerce (CIBC) who claims priority based on its mortgages on the defendant ships.

[2] At the time the motion was originally brought before Prothonotary Lafrenière by Mr. MacKenzie, the amount in dispute was $73,286.84, less employment benefits he received, plus interest and costs. That amount consists of two types of payments: an amount for unpaid bonuses and eight months of wages as damages for wrongful dismissal. Prothonotary Lafrenière's decision, dated March 10, 2003 and reported as *Canadian Imperial Bank of Commerce v. Le Chêne No. 1 (The)*, (2003), 41 C.B.R. (4th) 13 (F.C.T.D.), can be summarized as follows:

1. The claim by Mr. MacKenzie to $12,500 in bonuses was not supported by the evidence and was disallowed.

2. Mr. MacKenzie's claim to damages arising from the failure of his employer to provide adequate notice of termination was allowed.

3. Mr. MacKenzie was not entitled to a maritime lien in respect of his claim to damages for wrongful dismissal.

[3] MacKenzie, in this motion, asks this Court to reverse the decision with respect to the conclusions of Prothonotary on the bonus payments and the maritime lien.

[4] CIBC did not dispute that Mr. MacKenzie is entitled to vacation pay of $9,878.40 and to reimbursement of personal expenses totalling $320. Further, it agrees that these amounts are secured by maritime liens and take priority over its mortgages. Second, based on the decision of Pratte J. (as he then

des navires possédés et exploités par Socanav Inc. (Socanav). Il soutient qu'il a le droit de recevoir des salaires impayés pour ses services et qu'en outre, ces montants sont garantis par un privilège maritime grevant le produit de la vente des navires *Le Chêne n° 1*, *L'Orme n° 1* et *Le Saule n° 1* (les navires défendeurs). La réclamation de M. MacKenzie est en concurrence avec celle de la demanderesse, la Banque Canadienne Impériale de Commerce (la CIBC) qui prétend avoir priorité vu ses hypothèques grevant les navires défendeurs.

[2] Au moment où la requête a été déposée devant le protonotaire Lafrenière par M. MacKenzie, le montant en litige s'élevait à 73 286,84 $, moins les avantages reçus au titre de l'emploi, plus les intérêts et les dépens. Le montant consiste en deux types de paiements: une somme pour primes impayées et huit mois de salaires à titre d'indemnité pour licenciement abusif. La décision du protonotaire Lafrenière, en date du 10 mars 2003 et publiée sous le nom *Banque canadienne impériale de commerce c. Le Chêne n° 1 (Le)* (2003), 41 C.B.R. (4th) 13 (C.F. 1re inst), peut être résumée de la façon suivante:

1. La réclamation de 12 500 $ de M. MacKenzie en primes n'était pas appuyée par la preuve et a été rejetée.

2. La réclamation de M. MacKenzie pour obtenir une indemnité en raison du fait que l'employeur ne lui a pas donné un avis adéquat de cessation d'emploi a été accueillie.

3. M. MacKenzie n'avait pas droit à un privilège maritime en ce qui concerne sa réclamation pour obtenir une indemnité pour licenciement abusif.

[3] M. MacKenzie, dans le cadre de sa requête, demande à cette Cour d'infirmer la décision pour ce qui est des conclusions du protonotaire portant sur le paiement de la prime et le privilège maritime.

[4] La banque CIBC n'a pas contesté le fait que M. MacKenzie a droit au paiement de vacances pour la somme de 9 878,40 $, ainsi qu'au remboursement de dépenses personnelles pour la somme de 320 $. De plus, elle admet que ces sommes sont garanties par des privilèges maritimes et ont donc préséance sur ses

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was) in *Demetries Karamanlis v. Norsland (The)*, [1971] F.C. 487 (T.D.), CIBC acknowledges that this Court has jurisdiction to award damages for wrongful dismissal. It concedes as well, for the purpose of this motion, that a reasonable notice period would have been eight months. CIBC disagrees, however, that Mr. MacKenzie was wrongfully dismissed, or that he is entitled to recover annual bonuses. Moreover, CIBC maintains that even if the claims are established to be valid, they are not secured by a maritime lien, and consequently, do not rank ahead of CIBC's security.

hypothèques. Deuxièmement, la banque CIBC admet, au vu de la décision du juge Pratte (siégeant alors à la Section de première instance) dans *Demetries Karamanlis c. Norsland (Le)*, [1971] C.F. 487 (1^re inst.), que cette Cour est compétente pour accorder une indemnité pour licenciement abusif. Elle admet aussi, aux fins de la présente requête, qu'en l'instance, huit mois était une période raisonnable pour l'avis de licenciement. Toutefois, la banque CIBC conteste le fait que M. MacKenzie aurait fait l'objet d'un licenciement abusif, ou qu'il aurait droit à des primes annuelles. Elle soutient de plus, que même si les réclamations étaient valables, elles n'ont pas droit à la protection d'un privilège maritime et, par conséquent, elles n'ont pas préséance sur les garanties détenues par la banque CIBC.

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Issues

[5] The issues before Prothonotary Lafrenière and before me are:

1. Is Mr. MacKenzie entitled to unpaid bonuses on the basis of an implied term of his employment by Socanav?

2. Given that Socanav was declared bankrupt, is Mr. MacKenzie entitled to damages for wrongful dismissal as a result of his eight years of service on the defendant ships?

3. If Mr. MacKenzie is entitled to either or both of the foregoing, do these amounts give rise to a maritime lien when his employment contract employed him to serve "on one of Société Sofati/Socanav ships" rather than on a specifically named ship?

Questions en litige

[5] Les questions en litige dont le protonotaire Lafrenière et moi-même étions saisis sont les suivantes:

1. M. MacKenzie a-t-il droit à des primes impayées au motif qu'il s'agit d'une condition implicite de son emploi auprès de Socanav?

2. Étant donné que Socanav a déclaré faillite, M. MacKenzie a-t-il droit à une indemnité pour licenciement abusif en conséquence de ses huit années de service sur les navires défendeurs?

3. Si M. MacKenzie a droit à l'un ou l'autre de ces montants ou aux deux, ceux-ci donnent-ils droit à un privilège maritime alors que son contrat d'emploi prévoyait qu'il travaillerait «sur l'un des navires de Sofati/Socanav» plutôt que sur un navire précis?

Background

[6] The defendant ships were owned by Socanav, a large tanker company in Montréal. Mr. MacKenzie began his employment with Socanav on July 1, 1985. The one-page letter agreement, dated June 4, 1985 between Société Sofati/Socanav and Mr. MacKenzie stated that "as of July 1, 1985 we hereby offer you a position as Chief Engineer on one of Société Sofati/Socanav's ships." This contract also set out Mr. MacKenzie's daily wages (payable 365 days per year),

Contexte

[6] Les navires défendeurs étaient la propriété de Socanav, une grande société commerciale de Montréal qui exploite des pétroliers. M. MacKenzie a commencé à travailler pour Socanav le 1^er juillet 1985. La lettre d'entente d'une page, en date du 4 juin 1985, signée par la Société Sofati/Socanav et M. MacKenzie, précisait que [TRADUCTION] «nous vous offrons par la présente, à compter du 1^er juillet 1985, un poste de mécanicien en chef sur l'un des navires de la Société Sofati/Socanav».

his work rotation and his fringe benefits. Of the 12 years that passed from July 1, 1985, Mr. MacKenzie spent 2894 days or eight years as a member of the crew of *Le Chêne No. 1*, *L'Orme No. 1* and *Le Saule No. 1*. At the time he was dismissed, he was serving on the ship *Le Chêne No. 1*.

Ce contrat prévoyait également le salaire quotidien de M. MacKenzie (payable 365 jours par année), son quart de travail et ses avantages sociaux. Sur les 12 années écoulées depuis le 1er juillet 1985, M. MacKenzie a été membre d'équipage des navires *Le Chêne n° 1*, *L'Orme n° 1* et *Le Saule n° 1* pendant 2 894 jours ou huit ans. Au moment de son licenciement, il travaillait sur le navire *Le Chêne n° 1*.

[7] On September 20, 1996, Socanav filed a notice of intention to make a proposal to creditors pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 [as am. by S.C. 1992, c. 27, s. 2]. The Quebec Superior Court in Bankruptcy (the Bankruptcy Court) granted Socanav's petition to appoint an interim receiver, with the power to sell certain of its assets and to complete the sale to another company. The sale fell through, however, after one of Socanav's other vessels was seized by unpaid suppliers at a port in France on October 21, 1996.

[7] Le 20 septembre 1996, Socanav a produit un avis d'intention de présenter une proposition aux créanciers en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3 [mod. par L.C. 1992, ch. 27, art. 2]. La Cour supérieure du Québec, siégeant en matière de faillite (le tribunal des faillites), a accueilli la demande de Socanav visant à nommer un séquestre intérimaire, ayant compétence pour vendre certains actifs et réaliser la vente à une autre société commerciale. Cette vente a toutefois échoué après qu'un des navires de Socanav eut été saisi par des fournisseurs impayés dans un port de France, le 21 octobre 1996.

[8] Due to its continued financial difficulties, Socanav entered into a short-term agreement with a numbered company on November 21, 1996 to operate the defendant ships and to pay all costs relating to their maintenance. The agreement expired in early January 1997 and Mr. MacKenzie's employment was terminated shortly thereafter. Within a few weeks, the Bankruptcy Court declared Socanav bankrupt, retroactively to the date of filing of its notice.

[8] Étant donné que Socanav avait toujours des difficultés financières, elle a conclu une entente à court terme avec une société à numéros le 21 novembre 1996. Cette entente portait sur l'exploitation des navires défendeurs et prévoyait le paiement de tous les coûts liés à leur entretien. Elle a expiré au début de janvier 1997, et l'emploi de M. MacKenzie a pris fin peu de temps après. Quelques semaines plus tard, le tribunal des faillites a prononcé la faillite de Socanav, rétroactivement à la production de son avis.

[9] The defendant ships, *Le Chêne No. 1*, *L'Orme No. 1* and *Le Saule No. 1*, were arrested by their mortgagee, CIBC, and ordered to be sold by this Court on March 10, 1997. On April 7, 1997, following the sale of the vessels, the proceeds, in the amount of $2,700,000 were paid into Court pending satisfaction or disposition of third party claims. All of the claims by other third parties have since been resolved, and a number of payments have been made. Mr. MacKenzie is the sole remaining claimant against the balance of the funds standing to the credit of this action in the amount of $120,000, plus accrued interest. The monies have been held back from CIBC pending a determination of the quantum of Mr. MacKenzie's claim and its priority in relation to that of

[9] Les navires défendeurs, *Le Chêne n° 1*, *L'Orme n° 1* et *Le Saule n° 1* ont été saisis par leur créancière hypothécaire, la banque CIBC, et ils ont fait l'objet d'une ordonnance de vente de cette Cour le 10 mars 1997. Le 7 avril 1997, le proudit de la vente des navires, au montant de 2,7 millions de dollars, a été versé à la Cour, en attente du règlement des réclamations des tiers. Toutes les réclamations des tiers, sont maintenant réglées et plusieurs versements ont été faits. M. MacKenzie est le seul réclamant qui vise le solde des fonds en cette affaire, qui est de 120 000 $ plus les intérêts accumulés. Ces montants n'ont pas été versés à la banque CIBC, en attente de la détermination du montant de la réclamation de M. MacKenzie, ainsi que de son ordre de préséance

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CIBC. In light of the substantial shortfall in the Socanav liquidation, it is critical to Mr. MacKenzie that his claim be protected by a maritime wages lien.

Analysis

[10] For the reasons that follow, I am of the view that the analysis and conclusions of Prothonotary Lafrenière were correct with respect to Mr. MacKenzie's entitlement to bonus payments and damages for failure to give notice of termination. However, I conclude that Mr. MacKenzie is entitled to a maritime lien for his claim to damages.

What is the appropriate standard of review?

[11] CIBC submits that since the Prothonotary's rulings dealt with issues of law, those ruling are to be reviewed *de novo* by this Court. Mr. MacKenzie does not expressly disagree, although he argues that the Prothonotary's decision with respect to the bonus payments was based on a misapprehension of the facts.

[12] The decision of a prothonotary of this Court is to be accorded significant deference. The conclusion of Prothonotary Lafrenière in respect of Mr. MacKenzie's entitlement to bonus payments was reached on the basis of the evidence before him. Unless it was based upon a wrong principle or upon a misapprehension of the facts, his decision should not be disturbed (*Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.)). However, the issues related to damages for wrongful dismissal and maritime lien, relying for a large part on the correct interpretation of applicable law, should be reviewed *de novo*.

Is Mr. MacKenzie entitled to annual bonuses?

[13] According to the affidavit evidence of Mr. MacKenzie, bonuses of up to $5,000 were paid annually to employees from 1986 to 1991. Mr. MacKenzie therefore claims $12,500, representing the average annual bonuses that he claims should have been paid to

par rapport à la banque CIBC. Au vu du solde négatif important à la suite de la liquidation de Socanav, il est essentiel pour M. MacKenzie que sa réclamation soit protégée par un privilège maritime.

Analyse

[10] Pour les raisons qui suivent, je suis d'avis que l'analyse et les conclusions du protonotaire Lafrenière étaient justes en ce qui concerne le droit de M. MacKenzie au paiement des primes et l'indemnité pour défaut d'un avis de cessation d'emploi adéquat. Cependant, je conclus que M. MacKenzie a droit à un privilège maritime pour protéger sa réclamation en indemnité.

Quelle est la norme de contrôle appropriée?

[11] La CIBC soutient que, comme les décisions du protonotaire portaient sur des questions de droit, elles doivent être examinées de nouveau par cette Cour. M. MacKenzie n'était pas en total désaccord, même s'il soutient que la décision du protonotaire relative au paiement des primes s'appuyait sur une mauvaise compréhension des faits.

[12] Il faut faire preuve d'une grande retenue à l'égard de la décision d'un protonotaire de cette cour. La conclusion du protonotaire Lafrenière relative au droit de M. MacKenzie au paiement des primes était fondée sur la preuve déposée devant lui. Sauf si elle s'appuyait sur un principe erroné ou sur une mauvaise compréhension des faits, sa décision ne devrait pas être modifiée (*Canada c. Aqua-Gem Investments Ltd.*, [1993] 2 C.F. 425 (C.A.)). Cependant, les questions liées à l'indemnité pour licenciement abusif et au privilège maritime, s'appuyant en grande partie sur une interprétation correcte du droit applicable, devraient être examinées de nouveau.

M. MacKenzie a-t-il droit à des primes annuelles?

[13] Selon le témoignage par affidavit de M. MacKenzie, des primes annuelles pouvant atteindre 5 000 $ ont été payées aux employés entre 1986 et 1991. M. MacKenzie réclame donc un montant de 12 500 $ représentant les primes annuelles moyennes qui, selon

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him over the last five years of the company's operations. The Prothonotary concluded, at paragraph 9, that this claim was not supported by the evidence as follows:

> . . . the evidence falls short of establishing a firm commitment on the part of the employer to reinstate annual bonuses. The fact that the employees did not grieve the employer's failure to pay bonuses over the years suggests that they recognized that such payments were entirely discretionary. Since it has not been established that MacKenzie was entitled to bonuses under his contract of employment, or otherwise, (see *Llido v. The "Lowell Thomas Explorer"*, [1980] 1 F.C. 339), I conclude that this portion of his claim should not be allowed.

[14] Before me, Mr. MacKenzie argues that this decision was based on a misapprehension of the facts. However, other than referring to the same evidence clearly considered by the Prothonotary, he was unable to identify any specific error. Rather, Mr. MacKenzie would have me weigh the evidence differently. I decline to do so. Accordingly, I am not prepared to overturn Prothonotary Lafrenière's conclusion on this issue.

Is Mr. MacKenzie entitled to damages for wrongful dismissal?

[15] Having considered the submissions of parties, I am persuaded that Mr. MacKenzie is entitled to damages for wrongful dismissal. Having heard the submissions of parties, I find that I concur with and adopt the following reasoning and conclusion of Prothonotary Lafrenière, at paragraphs 10 and 11:

> MacKenzie claims that it was an implied term of his employment that reasonable notice or pay in lieu would be given in the event of dismissal. There is no dispute that Socanav's assignment in bankruptcy resulted in the termination of MacKenzie's employment. MacKenzie's claim for damages arises from the failure by his employer to provide adequate notice of termination. CIBC contends that Socanav cannot be faulted for failing to give notice of termination to its employees, since public disclosure of its financial difficulties would only have precipitated its demise. It submits that Socanav acted reasonably in its attempts to stave off bankruptcy and to continue its business, and that MacKenzie was therefore not dismissed voluntarily, but rather, that his employment was terminated by operation of law. I disagree.

lui, auraient dû lui être payées au cours des cinq dernières années d'exploitation de la société. Le protonotaire a conclu, au paragraphe 9, que cette réclamation n'était pas appuyée par la preuve:

> [. . .] la preuve ne suffit pas à démontrer l'existence d'un engagement ferme de la part de l'employeur de verser à nouveau des bonis annuels. Le fait que les employés n'ont pas logé de griefs suite au défaut de leur employeur de leur verser les bonis au fil des ans indique qu'ils reconnaissaient que ces versements étaient totalement discrétionnaires. Étant donné qu'on n'a pas démontré que MacKenzie avait droit aux bonis en vertu de son contrat d'emploi, ou de toute autre considération (voir *Llido c. Le «Lowell Thomas Explorer»*, [1980] 1 C.F. 339), je conclus que cette partie de sa réclamation doit être rejetée.

[14] M. MacKenzie soutient que la décision du protonotaire s'appuyait sur une mauvaise compréhension des faits. Cependant, il n'a pu déterminer d'erreur précise et n'a fait que mentionner la même preuve que le protonotaire avait clairement examinée. M. MacKenzie aurait plutôt voulu m'amener à évaluer la preuve différemment. Je refuse de le faire. En conséquence, je ne suis pas disposée à infirmer la conclusion du protonotaire Lafrenière sur cette question.

M. MacKenzie a-t-il droit à une indemnité pour licenciement abusif?

[15] Ayant examiné les observations des parties, je suis convaincue que M. MacKenzie a droit à une indemnité pour licenciement abusif. Après avoir entendu les observations des parties, je souscris au raisonnement suivant du protonotaire Lafrenière aux paragraphes 10 et 11:

> MacKenzie soutient que parmi les conditions implicites de son emploi il y en a une qui prévoit un avis raisonnable, ou un versement de substitution, en cas de licenciement. Il n'y a pas de litige quant au fait que la déclaration de faillite de Socanav est venue mettre fin à l'emploi de MacKenzie. La réclamation de MacKenzie pour obtenir une indemnité à ce titre trouve sa source dans le fait que l'employeur ne lui a pas donné un avis adéquat de cessation d'emploi. La banque CIBC soutient qu'on ne peut reprocher à Socanav de n'avoir pas donné un tel avis à ses employés, étant donné que le fait de rendre ses difficultés financières publiques aurait eu pour conséquence d'accélérer sa chute. Elle soutient que Socanav a agi de façon raisonnable dans une tentative d'éviter la faillite et de continuer ses opérations et, par conséquent, que MacKenzie n'a pas été

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At common law, the ability of a terminated employee to seek damages for wrongful dismissal from a bankrupt employer is directly related to the manner in which the employer was assigned in bankruptcy. If the assignment occurred on the petition of a creditor, the employee's right to damages may not exist. However, where the assignment is made voluntarily, in the sense that it was the employer's choice to trigger the bankruptcy, the employer effectively terminates the employment: *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Re Penningtons' Stores Ltd.* (1996), 21 C.C.E.L. (2d) 318; and *In Re Bryant, Isard and Co.* (1922), 3 C.B.R. 352. Based on the evidence before me, I conclude that MacKenzie's employment relationship was terminated as a result of the act of the employer. Since termination was without cause and without notice, MacKenzie is entitled to damages for wrongful dismissal.

Do the amounts claimed give rise to a maritime lien?

[16] As noted earlier, Prothonotary Lafrenière concluded at paragraph 18 that:

. . . although MacKenzie worked 8 out his 12 years with Socanav crewing on the Defendant ships, I am unable to conclude that his claim for severance pay or damages [is] referable to the services he provided on the Defendant ships. . . . I conclude that the claimed wages in lieu of notice or damages for wrongful dismissal give no lien upon the Defendant ships, save and except for the vacation pay and personal expenses that were conceded by CIBC.

[17] With respect, I am unable to agree with this conclusion. As this is an issue to be reviewed *de novo*, there is no need to examine his analysis for specific errors. Rather, I have approached this analysis afresh and reached a different conclusion.

(i) Scope of Admiralty jurisdiction

[18] Since the 1880s, claims for damages for wrongful dismissal have been recognized as claims over which Admiralty courts have had jurisdiction because they were seen as part of "wages". The scope of Admiralty jurisdiction in respect of the rights of seamen evolved to

licencié volontairement mais bien plutôt en vertu de la législation. Je ne suis pas de cet avis.

En common law, la possibilité pour un employé d'obtenir une indemnité pour licenciement abusif d'un employeur en faillite est directement liée à la procédure utilisée pour la mise en faillite. Si la mise en faillite est le fait d'un créancier, le droit de l'employé à une indemnité peut être inexistant. Toutefois, lorsque la mise en faillite est volontaire, au sens où c'est l'employeur qui a décidé de déclarer faillite, ce dernier met effectivement fin à l'emploi: *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Re Penningtons' Stores Ltd.* (1996), 21 C.C.E.L. (2d) 318; et *In Re Bryant, Isard and Co.* (1922), 3 C.B.R. 352. Au vu de la preuve qui m'est présentée, je conclus que la relation d'emploi entre la société et MacKenzie a été terminée du fait de l'employeur. Étant donné que le licenciement n'était pas motivé et qu'il a été fait sans préavis, MacKenzie a droit à une indemnité pour licenciement abusif.

Les montants réclamés donnent-ils droit à un privilège maritime?

[16] Comme il est indiqué ci-dessus, le protonotaire Lafrenière a conclu ce qui suit au paragraphe 18:

[. . .] même si MacKenzie a travaillé huit de ses 12 années de service avec Socanav au sein des équipages des navires défendeurs, je ne peux arriver à la conclusion que sa réclamation d'indemnité de départ ou d'indemnité de licenciement est liée aux services qu'il fournissait sur les navires défendeurs. Pour ces motifs, je conclus que le salaire réclamé à titre d'avis d'indemnité de licenciement abusif ne donne naissance à aucun privilège portant sur les navires défendeurs, sauf pour le salaire de vacances et les dépenses personnelles acceptées par la banque CIBC.

[17] En toute déférence, je ne peux souscrire à cette conclusion. Comme il s'agit d'une question devant être examinée de nouveau, il n'est pas nécessaire d'en faire l'analyse pour trouver des erreurs. J'ai plutôt procédé à une nouvelle analyse et je suis parvenue à une conclusion différente.

(i) Portée de la compétence en droit maritime

[18] Depuis les années 1880, les réclamations d'indemnité pour licenciement abusif ont été reconnues comme des réclamations relevant de la compétence des cours d'amirauté parce qu'elles étaient considérées comme faisant partie d'un «salaire». La portée de la

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include such amounts to ensure the fairest treatment possible for those persons who work on board ships. Historically, only wages directly earned on board the ship in question were protected. However, the interpretation of "wages" broadened to meet the changing nature of employment generally and seamen's rights in particular. This process was described by Brandon J. in *Halcyon Skies, The*, [1976] 1 Lloyd's Rep. 461 (Q.B.D.), at page 464 where he stated:

Although . . . the Admiralty jurisdiction over claims for wages was limited to wages earned on board the ship, this concept was very broadly interpreted. In particular, the jurisdiction was regularly exercised, both before and after 1861, not only in respect of claims in debt for unpaid wages in the strict sense, but also in respect of claims in damages for wrongful dismissal, including claims for wages lost and for the cost of repatriation (viaticum). [Emphasis added.]

[19] Thus, the concept of "wages" includes damages for wrongful dismissal, where such damages would arise on the facts.

(ii) Maritime lien

[20] In *The Halcyon Skies*, Brandon J. also considered the extent of maritime liens as related to wages and, in particular, the types of payments to crew members that would give rise to such a lien. Although the issue before the Court in *The Halcyon Skies*, *supra*, was whether a maritime lien attached to pension contributions owed by the ship's owners, the following reasoning of Brandon J. at page 470, is equally applicable to damages for wrongful dismissal.

As I said earlier, the requirement that wages, in order to be recoverable in Admiralty, should have been earned on board the ship existed, in theory at least, under the law as administered by the High Court of Admiralty before 1861. In practice, however, such limitation was never interpreted strictly and did not prevent that Court, as was recognized in *The British Trade* at pp. 108 to 110, from exercising jurisdiction, under the head of wages, over claims for wrongful dismissal arising out of ordinary mariner's contracts, or from

compétence en droit maritime relative aux droits des marins s'est élargie dans le but d'assurer le traitement le plus équitable possible des personnes qui travaillent à bord des navires. Dans le passé, seuls les salaires directement gagnés sur les navires en question étaient protégés. Cependant, l'interprétation du mot «salaire» s'est élargie afin de s'adapter à la nature changeante de l'emploi en général et des droits des marins en particulier. Ce processus a été décrit par M. le juge Brandon dans l'affaire *Halcyon Skies, The*, [1976] 1 Lloyd's Rep. 461 (Q.B.D.), à la page 464 où il a déclaré ce qui suit:

[TRADUCTION] Même si la compétence en droit maritime sur les réclamations de salaire était limitée aux salaires gagnés à bord du navire, ce concept a été interprété de façon très générale. En particulier, la compétence a été régulièrement exercée, avant et après 1861, non seulement à l'égard des demandes pour salaire impayé au sens strict, mais également à l'égard des réclamations pour obtenir une indemnité pour licenciement abusif, y compris les réclamations pour salaire perdu et pour le coût de rapatriement (viatique). [Non souligné dans l'original.]

[19] Ainsi, le concept de «salaire» comporte une indemnité pour licenciement abusif dans la mesure où cette indemnité découle des faits.

(ii) Privilège maritime

[20] Dans l'affaire *The Halcyon Skies*, le juge Brandon a également examiné l'étendue des privilèges maritimes liés aux salaires et, en particulier, les types de paiements versés aux membres d'équipage qui donneraient lieu à ce type de privilège. Même si la Cour dans l'affaire *The Halcyon Skies*, précitée, se demandait si un privilège maritime grevait les cotisations de retraite dues par les propriétaires du navire, le raisonnement suivant du juge Brandon à la page 470 s'applique autant à une indemnité pour licenciement abusif.

[TRADUCTION] Comme je l'ai dit plus tôt, l'exigence selon laquelle les salaires, pour être récupérables devant le tribunal d'amirauté, devaient avoir été gagnés à bord des navires existait, en théorie du moins, en vertu du droit administré par la Haute Cour d'amirauté avant 1861. En pratique, cependant, une telle limitation n'a jamais été interprétée strictement et n'a pas empêché cette Cour, comme on l'a reconnu dans *The British Trade* aux pages 108 à 110, d'exercer sa compétence sur les réclamations pour obtenir une indemnité pour

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according to seamen the same maritime lien in respect of such claims as they had in respect of claims for wages in the strict sense. In these circumstances it seems to me reasonable to infer that when the legislature, by s. 10 of the 1861 Act, enlarged the existing jurisdiction over claims for wages due under ordinary mariners' contracts so as to cover similar claims due under special contracts, it intended, despite the use of the hallowed phrase "earned . . . . on board the ship" that the enlarged jurisdiction should, so far as concerns the kinds of claims covered, be co-extensive with the existing jurisdiction.

[21] Canadian law also appears to have accepted that a lien arises in respect of damages for wrongful dismissal. In *Llido v. Lowell Thomas Explorer (The)*, [1980] 1 F.C. 339 (T.D.), Marceau J. dealt with a marine engineer's claim for a month's salary allegedly promised near the end of his employment. In deciding that this particular amount was not secured by a maritime lien, Marceau J. stated at pages 352-353:

> A maritime lien attaches to a vessel for salaries or wages *earned on board* [underlining in original] by the master and the crew member. If the additional pay that is the subject matter of the claim here had been a condition of employment of Captain Holland, I think it would have been part of his wages earned on board. If it had been compensation for wrongful dismissal, a case could have been made to have it included in the wages earned on board. [Emphasis added.]

[22] This analysis is consistent with the *Federal Courts Act*, R.S.C., 1985, c. F-7 [as am. by S.C. 2002, c. 8, s. 14]. When read with subsections 22(1) [as am. *idem*, s. 31], 43(2) [as am. *idem*, s. 40] and 43(3) [as am. *idem*], paragraph 22(2)(*o*) [as am. *idem*, s. 31] gives rise to a statutory lien for "any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his or her employment". In my view, damages for wrongful dismissal would generally be included as "other remuneration or benefits".

[23] As a result, I am satisfied that a maritime lien can arise out of a claim for damages for wrongful dismissal

licenciement abusif, au titre de salaire, découlant des contrats des marins ordinaires ni d'accorder aux marins le même privilège maritime à l'égard des réclamations qu'ils avaient à l'égard des réclamations pour salaire au sens strict. Dans ces circonstances, il me semble raisonnable d'inférer que lorsque l'assemblée législative, en vertu de l'article 10 de la Loi de 1861, a étendu la compétence actuelle sur les réclamations pour salaire dû en vertu des contrats des marins ordinaires, de façon à couvrir les réclamations semblables dues en vertu de contrats spéciaux, elle souhaitait, malgré l'utilisation de l'expression consacrée «gagné à bord du navire», que la compétence étendue ait la même portée que la compétence actuelle, en ce qui concerne le type de réclamations couvertes.

[21] Le droit canadien semble avoir accepté qu'un privilège se rattache à une indemnité pour licenciement abusif. Dans l'affaire *Llido c. Lowell Thomas Explorer (Le)*, [1980] 1 C.F. 339 (C.F. 1re inst.), M. le juge Marceau a examiné la réclamation d'un ingénieur maritime pour un mois de salaire qui lui aurait été promis vers la fin de son emploi. En décidant que ce montant n'était pas garanti par un privilège maritime, le juge Marceau a déclaré ce qui suit aux pages 352 et 353:

> Un privilège maritime affecte un navire à raison des salaires ou gages gagnés à bord [souligné dans l'original] par le commandant et les membres de l'équipage. Si le supplément de traitement qui fait l'objet de la demande avait été une condition de l'emploi du capitaine Holland, je pense qu'il aurait fait partie de ses gages gagnés à bord. S'il s'agissait d'une compensation pour licenciement abusif, on pourrait trouver un motif de l'inclure dans les gages gagnés à bord. [Non souligné dans l'original.]

[22] Cette analyse est compatible avec la *Loi sur les Cours fédérales*, L.R.C. (1985), ch. F-7 [mod. par L.C. 2002, ch. 8, art. 14]. Lorsqu'il est lu en corrélation avec les paragraphes 22(1) [mod. *idem*, art. 31], 43(2) [mod., *idem*, art. 40] et 43(3) [mod., *idem*], l'alinéa 22(2)*o*) donne naissance à un privilège d'origine législative pour «une demande formulée par un capitaine, un officier ou un autre membre de l'équipage d'un navire relativement au salaire, à l'argent, aux biens ou à toute autre forme de rémunération ou de prestations découlant de son engagement». À mon avis, les indemnités pour licenciement abusif seraient généralement incluses à titre d'«autre forme de rémunération ou de prestations».

[23] En conséquence, je suis convaincue qu'un privilège maritime peut trouver sa source dans une

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because those damages are part of wages earned on board a vessel. The question then becomes whether a maritime lien arises on the facts of this case.

(iii) Application to Mr. MacKenzie

[24] Mr. MacKenzie was employed as a Chief Engineer on one of Société Sofati/Soconav's ships. CIBC submits that the fact that his contract did not assign him to any particular ship is the determinative factor. Had Mr. MacKenzie served on one ship only, CIBC agrees that he would have been entitled to a maritime lien for his damages. However, under his contract, Mr. MacKenzie served on a number of vessels. His record of sea service shows significant movement among several ships. Thus, CIBC argues that there "is no link between any particular defendant vessel and any entitlement that Donald [MacKenzie] might have under the Company Service Agreement that could support a maritime lien."

[25] The respondent relies on *Tacoma City, The*, [1991] 1 Lloyd's Rep. 330 (C.A.) as authority for its position that the claim for wrongful dismissal, in this case, does not give rise to a maritime lien. In *The Tacoma City*, *supra*, the England and Wales Court of Appeal (Civil Division) addressed whether a lien attached to severance payments, as opposed to damages for wrongful dismissal, that arose out of a complex contractual arrangement between a company and affected seamen. As on the facts of this case, there was no particular vessel identified in the contract. In analyzing the nature of the severance payments owed to the seamen, all three judges took great pains to carefully analyze the nature of the severance payments under the contractual arrangements and to distinguish such payments from "wages". Illustrative of the reasoning of the Court are the comments of Lord Justice Dillon who described the severance payments at pages 347 and 348 as follows:

> The severance pay is payable when the seaman becomes surplus to the requirements of the shipping company or group, . . . . the severance pay is to be calculated by reference to the whole of his service with the company or group in question

réclamation d'indemnité pour licenciement abusif puisque ces indemnités font partie du salaire gagné à bord d'un navire. Cela revient donc à se demander si un privilège maritime trouve sa source dans les faits de la présente affaire.

(iii) Application au cas de M. MacKenzie

[24] M. MacKenzie était employé comme mécanicien en chef sur l'un des navires de la Société Sofati/Soconav. La CIBC soutient que le fait que son contrat ne l'a pas affecté à un navire en particulier constitue un facteur déterminant. Si M. MacKenzie n'avait travaillé que sur un navire, la CIBC aurait été d'accord pour dire que son indemnité aurait été garantie par un privilège maritime. Cependant, selon son contrat, M. MacKenzie a travaillé sur un certain nombre de navires. Son dossier de service en mer indique un déplacement important entre plusieurs navires. Ainsi, la CIBC fait valoir qu'il «n'existe pas de lien entre un navire défendeur précis et un droit que Donald [MacKenzie] pourrait avoir en vertu d'un contrat de service qui pourrait appuyer un privilège maritime».

[25] L'intimée se fonde sur l'affaire *Tacoma City, The*, [1991] 1 Lloyd's Rep. 330 (C.A.) pour faire valoir que la réclamation pour licenciement abusif, en l'espèce, ne donne pas naissance à un privilège maritime. Dans l'affaire *The Tacoma City*, précitée, la England and Wales Court of Appeal (Civil Division) a abordé la question de savoir si un privilège était rattaché à des indemnités de départ, par opposition à des indemnités pour licenciement abusif, qui découlaient d'un arrangement contractuel complexe conclu entre une société et les marins touchés. Comme pour les faits de l'espèce, il n'y avait pas de navire précisément nommé dans le contrat. En analysant la nature des indemnités de départ dues aux marins, les trois juges se sont donné beaucoup de mal pour analyser la nature des indemnités de départ selon les arrangements contractuels et pour distinguer ces indemnités du «salaire». Les commentaires du lord juge Dillon, qui a décrit les indemnités de départ de la façon suivante aux pages 347 et 348, illustrent le raisonnement de la Cour:

> [TRADUCTION] L'indemnité de départ est payable lorsque le marin devenait en trop selon les exigences de la société ou du groupe d'expédition [. . .] l'indemnité de départ doit être calculée d'après l'ensemble du service du marin auprès de la

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. . . . Indeed it is not paid as remuneration for his services at all; it is paid as compensation for the loss of the expectation he would otherwise have had that because of his long service he would have been offered further employment by the company or group after the end of what was in the event his final voyage in his last ship for the company or group.

Such a payment is therefore not, in my judgment, "wages" even in the extended sense in which that word is used in the context of a maritime lien.

[26] The fundamental finding of the Court in *The Tacoma City*, *supra*, was, in my belief, not that argued before me by CIBC; rather, the Court dealt with the nature of a contractual entitlement to severance payments and concluded that such payments were not, on those facts, "wages". The case should not, in my view, be extended to a conclusion that wages earned under an umbrella contract cannot enjoy the benefit of a maritime lien. The conclusions in *The Tacoma City*, *supra*, should be limited to its unusual facts.

[27] However, an interesting secondary aspect of *The Tacoma City*, *supra*, was a claim by three of the seamen for wages in lieu of notice. The Court was not required to address whether a maritime lien attached to this claim since, on the facts, there was no entitlement to damages for wrongful dismissal. It is significant that the bank mortgagee did not dispute that a maritime lien could attach to damages for wrongful dismissal in this case provided the facts supported the claims to wages in lieu of notice.

[28] In the case before me, in contrast to that before the Court in *The Tacoma City*, *supra*, I am dealing, not with severance pay, but with a claim for an amount that would represent the wages that Mr. MacKenzie would have earned for his service as a member of the crew had his employment continued. This is directly assessed and quantified as wages referable to the ship on which he served and, as such, is the very type of payment for which a maritime lien should arise to protect Mr. MacKenzie and other seamen in his position.

société ou du groupe en question [. . .] En effet, elle n'est pas du tout versée à titre de rémunération pour les services de ce dernier. Elle est versée à titre de compensation pour la perte de l'espérance qu'il aurait eu par ailleurs parce que, en raison de son long service, il aurait obtenu un nouvel emploi auprès de la société ou du groupe après la fin de ce qui était en l'occurrence son dernier voyage sur le navire de la société ou du groupe.

Un tel paiement n'est donc pas, selon moi, un «salaire» même au sens large dans lequel ce mot est utilisé dans le contexte du privilège maritime.

[26] La conclusion fondamentale de la Cour dans l'affaire *The Tacoma City*, précitée, n'était pas, à mon avis, celle qui a été débattue devant moi par la CIBC. La Cour a plutôt traité de la nature d'un droit contractuel à des indemnités de départ et a conclu que ces paiements n'étaient pas, en réalité, des «salaires». On ne devrait pas en conclure, à mon avis, que le salaire gagné en vertu d'un contrat d'application générale ne peut bénéficier d'un privilège maritime. Les conclusions de l'affaire *The Tacoma City*, précitée, ne devraient s'appliquer qu'à ses faits inhabituels.

[27] Cependant, un aspect secondaire intéressant de l'affaire *The Tacoma City*, précitée, consistait en une réclamation présentée par trois des marins pour obtenir un salaire à titre d'avis. La Cour n'était pas tenue de se demander si un privilège maritime était rattaché à cette réclamation puisqu'il n'y avait pas de droit à une indemnité pour licenciement abusif. Il importe de noter que la banque créancière n'a pas contesté la possibilité qu'un privilège maritime grève la réclamation pour licenciement abusif en l'espèce dans la mesure où les faits appuyaient les réclamations de salaire à titre d'avis.

[28] Dans le cas dont je suis saisie, contrairement à celui qui était devant la Cour dans l'affaire *The Tacoma City*, précitée, je dois me prononcer, non pas sur une indemnité de départ, mais bien sur une réclamation en vue d'obtenir un montant qui représenterait le salaire que M. MacKenzie aurait gagné pour ses services en tant que membre d'équipage si son emploi s'était poursuivi. Cela est directement évalué et quantifié en tant que salaire relativement au navire sur lequel il a travaillé et, à ce titre, il s'agit du type même de paiement donnant naissance à un privilège maritime en vue de la protection de M. MacKenzie et d'autres marins dans sa position.

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[29] The key factor in determining whether a maritime lien arises is the service to the ship (W. Tetley, *Maritime Liens and Claims*, 2nd ed. (Montréal: International shipping Publications, 1998); The *Tacoma City*, *supra*). The lien is not dependent on who hired the seaman (*Maritime Liens and Claims*, *supra*) and arises independently of the contract (*The Tacoma City*, *supra*; *Ever Success The*, [1999] 1 Lloyd's Rep. 824 (Q.B.). The proper approach is to ask "whether in the relevant period the claimant was rendering a service to the ship as a member of the crew. If he was, he is entitled to a maritime lien in respect of his wages in respect of that period assessed in accordance with his contract" (*The Ever Success*, *supra*, at page 824).

. . . whether in the relevant period the claimant was rendering a service to the ship as a member of the crew: if he was, he was entitled to a maritime lien in respect of his wages in respect of that period assessed in accordance with his contract. . . .

[30] Was Mr. MacKenzie's service referable to one or more of the defendant ships as a member of the crew? In my view, it was. Contrary to the submissions of CIBC, the right to a maritime lien is not contingent on the nature of the seaman's contractual arrangements. The fact that the specific ships were not named in the contract is not, in my view, sufficient to deprive Mr. MacKenzie of the protection of a maritime lien in respect of amounts owed to him. Under the simple and clear terms of the letter agreement, Mr. MacKenzie was hired by Socanav to work as a Chief Engineer on one of Socanav's ships. In other words, he was retained to render service as a crew member on Socanav's ships. At the time of his dismissal, he was a member of the crew of one of the defendant ships, *Le Chêne No. 1*. In my view, these facts establish a link between the service of Mr. MacKenzie and the defendant ships. Mr. MacKenzie was entitled to a reasonable notice period when he was dismissed. If he had received this notice, he would have worked an additional period of time and earned wages for his work. A maritime lien arises whether Mr. MacKenzie actually worked during the notice period or whether he was given salary in lieu of that notice upon dismissal.

[29] Le facteur clé de la question de savoir si un privilège maritime existe réside dans le service effectué sur le navire (W. Tetley, *Maritime Liens and Claims*, 2e éd. (Montréal: International Shipping Publications, 1998; l'affaire *The Tacoma City*, précitée). Le privilège ne dépend pas de la personne qui a embauché le marin (*Maritime Liens and Claims*, précité) et trouve sa source indépendamment du contrat (l'affaire *The Tacoma City*, précitée; *Ever Success, The*, [1999] 1 Lloyd's Rep. 824 (Q.B.)). L'approche appropriée consiste à se demander «si, durant la période pertinente, le réclamant offrait ses services sur le navire à titre de membre d'équipage. Si c'était le cas, il a le droit de voir un privilège maritime grever son salaire en ce qui concerne la période examinée, conformément à son contrat» (l'affaire *The Ever Success*, précitée, à la page 824).

[TRADUCTION] [. . .] si, durant la période pertinente, le réclamant offrait ses services sur le navire à titre de membre d'équipage. Si c'était le cas, il a le droit de voir un privilège grever son salaire en ce qui concerne la période examinée, conformément à son contrat.

[30] Le service de M. MacKenzie se rapportait-il à un ou plusieurs des navires défendeurs à titre de membre d'équipage? À mon avis, c'était le cas. Contrairement aux observations de la CIBC, le droit à un privilège maritime ne dépend pas de la nature des arrangements contractuels du marin. Le fait qu'un navire n'a pas été précisément nommé dans ce contrat ne suffit pas selon moi à priver M. MacKenzie de la protection d'un privilège maritime en ce qui concerne les montants qui lui sont dus. En vertu des conditions simples et claires de la lettre d'entente, M. MacKenzie a été embauché par Socanav afin de travailler à titre de mécanicien en chef sur l'un de ses navires de Socanav. En d'autres termes, on a retenu ses services pour travailler à titre de membre d'équipage sur l'un de ses navires. Au moment de son licenciement, il était membre d'équipage de l'un des navires défendeurs, *Le Chêne nº 1*. À mon avis, ces faits établissent un lien entre les services de M. MacKenzie et les navires défendeurs. M. MacKenzie avait droit à une période d'avis raisonnable lorsqu'il a été licencié. S'il avait reçu cet avis, il aurait travaillé pendant encore une certaine période et il aurait gagné un salaire pour son travail. Un privilège maritime existe, peu importe si M. MacKenzie a réellement travaillé pendant la période

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(iv) Attachment and Quantum

[31] In general, the maritime lien would attach to the ship that received the benefit upon which the claim is based (*Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)* (2001), 16 C.B.R. (4th) 188 (F.C.T.D.)). Accordingly, the lien would attach to the ship that Mr. MacKenzie would have been working on, but for the wrongful dismissal. In this case, that would be *Le Chêne No.1*, the ship on which he was serving at the time of his dismissal. Although under his contract, he could have been reassigned to other ships, there was no evidence before me that he would not have continued as Chief Engineer aboard *Le Chêne No. 1*. Accordingly, I would attach the lien to that particular vessel.

[32] The quantum of the damages for wrongful dismissal would be calculated with reference to the contract between Mr. MacKenzie and Socanav. In this case, the parties have agreed that, should a claim for wrongful dismissal arise on the facts, eight months' wages in lieu of notice would be appropriate. I conclude that this amount should be paid out to Mr. MacKenzie in priority to the claim of CIBC.

ORDER

This court orders that:

1. The amount of $50,588 representing eight months' pay in lieu of notice for his dismissal, plus accrued interest, together with vacation pay of $9,878.40 and personal expenses of $320, plus accrued interest, shall be paid out to Donald MacKenzie in priority to the claim of CIBC.

2. Parties shall have 15 days from the date of this order to serve and file written submissions with respect to the costs of this motion and the motion below and 5 days thereafter to serve and file written submissions in reply.

d'avis ou s'il a reçu un salaire à titre d'avis au moment du licenciement.

(iv) Saisie et montant

[31] En général, le privilège maritime grève le navire qui a reçu le bénéfice sur lequel s'appuie la réclamation (*Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndic)*, (2000), 16 C.B.R. (4th) 188 (C.F. 1^re inst.)). En conséquence, le privilège se rattache au navire sur lequel M. MacKenzie aurait travaillé s'il n'y avait pas eu licenciement abusif. En l'espèce, il s'agit du navire *Le Chêne n^o 1* sur lequel il travaillait au moment de son licenciement. Malgré le fait qu'en vertu de son contrat il aurait pu être affecté sur d'autres navires, rien dans la preuve déposée devant moi n'indique qu'il n'aurait pas continué à travailler comme mécanicien en chef à bord du navire *Le Chêne n^o 1*. En conséquence, j'attache le privilège à ce navire.

[32] Le montant de l'indemnité pour licenciement abusif sera calculé en fonction du contrat conclu entre M. MacKenzie et Socanav. En l'espèce, les parties se sont entendues pour dire que, si le bien-fondé d'une réclamation pour licenciement abusif était reconnu selon les faits, un salaire de huit mois à titre d'avis serait approprié. Je conclus que ce montant devrait être versé à M. MacKenzie en priorité par rapport à la réclamation de la CIBC.

ORDONNANCE

La Cour ordonne que:

1. Le montant de 50 588 $, représentant une paie de huit mois à titre d'avis de licenciement, plus les intérêts accumulés, ainsi qu'une paie de vacances de 9 878,40 $ et des dépenses personnelles de 320 $, plus les intérêts accumulés, soient versés à Donald MacKenzie en priorité par rapport à la réclamation de la CIBC.

2. Les parties disposent de 15 jours, à compter de la date de la présente ordonnance, pour signifier et produire des observations écrites quant aux dépens de la présente requête et de la précédente, et de cinq jours par la suite pour signifier et produire des observations écrites en guise de réponse.

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### Short title

**1** This Act may be cited as the *Canada Shipping Act, 2001*.

# Interpretation

### Definitions

**2** The definitions in this section apply in this Act.

**vessel** means a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to method or lack of propulsion, and includes such a vessel that is under construction. It does not include a floating object of a prescribed class. (*bâtiment*)

### Liens

**86 (1)** The master, and each crew member, of a Canadian vessel has a maritime lien against the vessel for claims that arise in respect of their employment on the vessel, including in respect of wages and costs of repatriation that are payable to the master or crew member under any law or custom.

**Foreign liens**

**(2)** The master and each crew member of a vessel on whom a maritime lien against the vessel is conferred by a jurisdiction other than Canada in respect of employment on the vessel has a maritime lien against the vessel.

**Liens for necessaries**

**(2.1)** The master of a Canadian vessel has a maritime lien against the vessel for claims that arise in respect of disbursements made or liabilities incurred by the master for necessaries on account of the vessel.

**Claims**

**(3)** The master, and each crew member, of a vessel may maintain an action against the vessel in the Federal Court, or any court of competent jurisdiction whose rules provide for *in rem* procedure in respect of vessels, for claims in respect of which a lien is conferred by subsection (1), (2) or (2.1).

**Priority**

**(4)** Liens conferred by subsection (1) or (2) rank in priority to all other claims, secured or unsecured, against the vessel, other than

**(a)** claims for costs relating to the arrest and the judicial sale of the vessel; or

**(b)** any lien arising from a claim for salvage in respect of the vessel.

**Priority — liens for necessaries**

**(5)** Liens conferred by subsection (2.1) rank in priority to all other claims, secured or unsecured, against the vessel, other than

**(a)** liens conferred by subsection (1) or (2);

**(b)** claims for costs relating to the arrest and the judicial sale of the vessel; or

**(c)** any lien arising from a claim for salvage in respect of the vessel.

**Carrier's lien**

**248 (1)** A carrier has, on goods carried under a contract of carriage, a lien for any amount that is due to the carrier under the contract for freight or costs of storing, disposing of or preserving the goods.

**Notice of lien to owner of goods**

**(2)** Before exercising a lien, a carrier must give notice of it to the owner of the goods, specifying the amount claimed and the particulars of the claim.

**Notice of lien to third parties**

**(3)** If the carrier places the goods in the custody of a third party and gives the third party notice of the lien and the third party does not retain them until notified by the carrier that the lien is discharged or does not return them to the carrier, the third party is liable to the carrier. The third party may charge the carrier for storing the goods or for any reasonable action taken to preserve them or to protect property or human life from damage they may cause.

**Third party's protection**

**(4)** A third party who retains goods until notified by the carrier that the lien is discharged or who returns them to the carrier is not liable to the owner of the goods, regardless of whether the lien claimed by the carrier is valid.

**Sale or other disposition of goods**

**249 (1)** If an owner of goods does not take delivery of the goods after notice of delivery has been given or fails to discharge a lien after it is exercised, the carrier may

**(a)** sell them by public auction at any time that is 90 days after the notice of delivery is given and 10 days after giving notice of the time and place of the auction in a newspaper that is circulated in the vicinity of the auction; or

**(b)** if the goods are perishable or pose a threat to public health or safety, sell or otherwise dispose of them in the manner and for the

price that is reasonable in the circumstances after giving notice of the sale or other disposition to the owner of the goods.

**Application of proceeds of disposition**

**(2)** The proceeds of the disposition must be credited toward payment of the amounts due or payable under the contract of carriage or any other amounts reasonably incurred for storing, disposing of or preserving the goods. Any surplus must be paid to the owner of the goods.

# Maritime Lien

**Definition of *foreign vessel***

**139 (1)** In this section, ***foreign vessel*** has the same meaning as in section 2 of the *Canada Shipping Act, 2001*.

**Maritime lien**

**(2)** A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise

**(a)** in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or

**(b)** out of a contract relating to the repair or equipping of the foreign vessel.

**Services requested by owner**

**(2.1)** Subject to section 251 of the *Canada Shipping Act, 2001*, for the purposes of paragraph (2)(a), with respect to stevedoring or lighterage, the services must have been provided at the request of the owner of the foreign vessel or a person acting on the owner's behalf.

**Exception**

**(3)** A maritime lien against a foreign vessel may be enforced by an action *in rem* against a foreign vessel unless

**(a)** the vessel is a warship, coast guard ship or police vessel; or

**(b)** at the time the claim arises or the action is commenced, the vessel is being used exclusively for non-commercial governmental purposes.

***Federal Courts Act***

**(4)** Subsection 43(3) of the *Federal Courts Act* does not apply to a claim secured by a maritime lien under this section.

**Frans G. A. De Roy and Thierry Van Doosselaere, as Trustees in Bankruptcy of ABC Containerline N.V., the Owners, Charterers and all others interested in the Ship "Brussel", and the Ship "Brussel"** *Appellants*

*v.*

**Holt Cargo Systems Inc.** *Respondent*

**Indexed as: Holt Cargo Systems Inc. *v.* ABC Containerline N.V. (Trustees of)**

**Neutral citation: 2001 SCC 90.**

File No.: 27290.

2001: March 20; 2001: December 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Courts — Jurisdiction — Federal Court of Canada — Maritime law — Stay of proceedings — U.S. creditor bringing maritime law action against Belgian ship in Federal Court — Belgian shipowner subsequently adjudged bankrupt in Belgium — Quebec Superior Court making orders purporting to dispose of ship and proceeds of sale — Whether Federal Court erred in exercise of its discretion to deny trustees' application for stay of proceedings — Federal Court Act, R.S.C. 1985, c. F-7, s. 50.*

In late March 1996, a Belgian ship was arrested at Halifax in connection with an *in rem* action commenced by the respondent Holt, a U.S. company, in the Federal Court claiming a maritime lien for stevedoring services provided in the U.S. The ship's Belgian owner was subsequently adjudged bankrupt by the Belgian bankruptcy court and the appellants were appointed the trustees in bankruptcy. In May the appellant trustees obtained an order of the Quebec Superior Court, Civil Chamber that "recognized and declared executory in Quebec" the Belgian bankruptcy order. Their application to the Federal Court, Trial Division for an adjournment of the *in rem* proceedings against the ship was denied,

**Frans G. A. De Roy et Thierry Van Doosselaere, en qualité de syndics de faillite de ABC Containerline N.V., les propriétaires, affréteurs et toutes autres personnes ayant un droit sur le navire « Brussel », et le navire « Brussel »** *Appelants*

*c.*

**Holt Cargo Systems Inc.** *Intimée*

**Répertorié : Holt Cargo Systems Inc. *c.* ABC Containerline N.V. (Syndics de)**

**Référence neutre : 2001 CSC 90.**

N° du greffe : 27290.

2001 : 20 mars; 2001 : 20 décembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

*Tribunaux — Compétence — Cour fédérale du Canada — Droit maritime — Suspension des procédures — Créancier américain intentant en Cour fédérale une action fondée sur le droit maritime contre un navire belge — Faillite du propriétaire belge survenue par la suite en Belgique — Cour supérieure du Québec délivrant des ordonnances censées statuer sur le sort du navire et le produit de la vente — La Cour fédérale a-t-elle commis une erreur dans l'exercice de son pouvoir discrétionnaire de refuser la demande de suspension des procédures présentée par les syndics? — Loi sur la Cour fédérale, L.R.C. 1985, ch. F-7, art. 50.*

À la fin du mois de mars 1996, un navire belge a été saisi à Halifax à la suite d'une action *in rem* que l'intimée Holt, une compagnie américaine, avait intentée devant la Cour fédérale et dans laquelle elle invoquait un privilège maritime pour des services d'acconage fournis aux États-Unis. Le propriétaire belge du navire a, par la suite, été mis en faillite par le tribunal de faillite belge, et les appelants ont été désignés syndics de faillite. Au cours du mois de mai, les syndics appelants ont obtenu auprès de la Chambre civile de la Cour supérieure du Québec une ordonnance « reconn[aissant] et déclar[ant] exécutoir[e] au Québec » l'ordonnance de faillite délivrée en Belgique. Leur requête déposée devant la Section

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and in default of defence, judgment was awarded to Holt against the ship, with leave to the trustees to challenge the precise quantum of the judgment if done promptly. The Federal Court ordered the ship appraised and laid down the procedure for its sale. The trustees then requested a stay of proceedings from the Federal Court "pending final disposition of the matter by the Superior Court". They produced various orders from the Quebec Superior Court sitting in bankruptcy one of which purported to dispose of the ship and the proceeds of sale. The Federal Court, Trial Division declined to give effect to the orders of the Canadian bankruptcy court or to stay its own proceedings. The Federal Court of Appeal upheld that decision.

de première instance de la Cour fédérale en vue d'obtenir l'ajournement des procédures *in rem* contre le navire a été rejetée et, faute de défense, Holt a obtenu jugement contre le navire, les syndics étant autorisés à contester le montant accordé à la condition d'agir promptement. La Cour fédérale a ordonné l'évaluation du navire et établi la procédure à suivre pour le vendre. Les syndics ont alors demandé à la Cour fédérale de suspendre les procédures « en attendant le règlement définitif de l'affaire par la Cour supérieure ». Ils ont produit diverses ordonnances de la Cour supérieure du Québec siégeant en matière de faillite, dont l'une était censée statuer sur le sort du navire et le produit de la vente. La Section de première instance de la Cour fédérale a refusé de mettre à exécution les ordonnances du tribunal de faillite canadien et de suspendre ses propres procédures. La Cour d'appel fédérale a confirmé cette décision.

*Held*: The appeal should be dismissed.

A maritime lien validly created under foreign law will be recognized and given the same priority in Canada as would be given to a maritime lien created in Canada under Canadian maritime law unless opposed to some rule of domestic policy or procedure which prevents the recognition of the right. Holt was entitled to have its maritime lien recognized by the Federal Court in these proceedings.

The Federal Court did not lose jurisdiction to proceed as a result of the various orders of the Quebec Superior Court sitting in bankruptcy. The Federal Court trial judge was not exercising original, ancillary or auxiliary jurisdiction in bankruptcy, but was dealing with *in rem* claims against the ship. Having ruled that he would recognize Holt's security interest as a matter of maritime law, the trial judge rightly concluded that there was no jurisdictional barrier to the Federal Court continuing to adjudicate Holt's *in rem* action against the ship. Insofar as Holt's claim was integrally connected to maritime matters, it lay within the jurisdiction of the Federal Court and it was for that court to decide whether or not to defer to the Belgian bankruptcy court having due regard both to international comity and convenience and to the rights of its own citizens or other persons who are under the protection of our laws.

In addressing the issue of a stay, the trial judge acknowledged the importance of comity and international coordination in bankruptcy matters. Having done so, he went on to place primary emphasis on the fact he was dealing with an *in rem* action by secured creditors against a ship which at the time of the bankruptcy the Federal Court had already arrested and at the time of the

*Arrêt* : Le pourvoi est rejeté.

Un privilège maritime validement créé sous le régime d'une loi étrangère est reconnu et se voit accorder, au Canada, la même priorité qu'un privilège maritime créé au Canada sous le régime du droit maritime canadien, à moins qu'il n'aille à l'encontre d'une règle quelconque de politique ou de procédure intérieure qui en empêche la reconnaissance. Holt avait droit en l'espèce à la reconnaissance de son privilège maritime par la Cour fédérale.

La Cour fédérale n'a pas perdu compétence à la suite des diverses ordonnances délivrées par la Cour supérieure du Québec siégeant en matière de faillite. Le juge de la Section de première instance de la Cour fédérale n'exerçait pas une juridiction de première instance, auxiliaire ou subordonnée en matière de faillite, mais était plutôt saisi de réclamations *in rem* contre le navire. Après avoir décidé de reconnaître la garantie de Holt sur le plan du droit maritime, le juge de première instance a conclu à juste titre qu'aucune entrave juridictionnelle n'empêchait la Cour fédérale de continuer d'instruire l'action *in rem* de Holt contre le navire. Dans la mesure où la réclamation de Holt était entièrement liée aux affaires maritimes, elle relevait de la compétence de la Cour fédérale et il appartenait à cette cour de décider si elle devait s'en remettre au tribunal de faillite belge, compte tenu à la fois de la courtoisie et des convenances internationales et des droits de ses propres citoyens ou des autres personnes qui sont sous la protection de nos lois.

En examinant la question de la suspension, le juge de première instance a reconnu l'importance de la courtoisie et de la coordination internationale en matière de faillite. Il a ensuite insisté principalement sur le fait qu'il était saisi d'une action *in rem* intentée par des créanciers garantis contre un navire dont la Cour fédérale avait déjà ordonné la saisie au moment de la faillite, et dont il avait

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interventions of the Canadian bankruptcy court he had already ordered appraised and sold.

The appellants' strongest argument is that the parties and the subject matter of the dispute are but weakly connected to Canada. However, lack of substantive connection to any particular jurisdiction, including their home port, is a feature of ships engaged in international maritime commerce. The trial judge considered the relevant factors in reaching his conclusion that the Federal Court was the appropriate forum to resolve Holt's secured claim against the ship. He committed no error in principle and did not refuse to take into consideration any major element appropriate for the determination of the case. In the absence of such error, the exercise of his discretion should be affirmed.

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**Referred to:** *Antwerp Bulkcarriers, N.V. (Re)*, [2001] 3 S.C.R. 951, 2001 SCC 91; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *In re Treco*, 240 F.3d 148 (2001); *Laane and Baltser v. Estonian State Cargo & Passenger Steamship Line*, [1949] S.C.R. 530; *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683; *The Tolten*, [1946] P. 135; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165; *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17; *Roberts v. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218; *Re Walker* (1998), 5 C.B.R. (4th) 123; *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *The Strandhill v. Walter W. Hodder Co.*, [1926] S.C.R. 680; *Todd Shipyards Corp. v. Altema Compania Maritima S.A.*, [1974] S.C.R. 1248; *Marlex Petroleum Inc. v. Har Rai (The)*, [1987] 1 S.C.R. 57, aff'g [1984] 2 F.C. 345; *Riordon Co. v. Danforth Co.*, [1923] S.C.R. 319; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Galbraith v. Grimshaw*, [1910] A.C. 508; *Anantapadmanabhaswami v. Official Receiver of Secunderabad*, [1933] A.C. 394; *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752; *Zingre v. The Queen*, [1981] 2 S.C.R. 392; *Spencer v. The Queen*, [1985] 2 S.C.R. 278; *Hilton v. Guyot*, 159 U.S. 113 (1895); *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N PLC*, [1993] 4 S.C.R. 289; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527 (1883); *Allen v. Hanson* (1890), 18 S.C.R. 667; *Re Breakwater Co.* (1914), 33 O.L.R. 65; *Re E. H. Clarke & Co.*, [1923] 1 D.L.R. 716; *Re Stewart & Matthews,*

déjà ordonné l'évaluation et la vente au moment des interventions du tribunal de faillite canadien.

L'argument le plus solide des appelants veut que les parties et l'objet du litige ne soient que faiblement liés au Canada. Cependant, l'absence de lien important avec un ressort particulier, y compris leur port d'attache, est une caractéristique des navires qui servent au commerce maritime international. Le juge de première instance a tenu compte des facteurs pertinents pour conclure que la Cour fédérale était le tribunal compétent pour régler la réclamation garantie de Holt contre le navire. Il n'a commis aucune erreur de principe et n'a pas refusé de tenir compte d'un élément prépondérant en l'espèce. En l'absence d'une telle erreur, il y a lieu de confirmer la validité de l'exercice de son pouvoir discrétionnaire.

**Jurisprudence**

**Arrêts mentionnés :** *Antwerp Bulkcarriers, N.V. (Re)*, [2001] 3 R.C.S. 951, 2001 CSC 91; *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897; *In re Treco*, 240 F.3d 148 (2001); *Laane and Baltser c. Estonian State Cargo & Passenger Steamship Line*, [1949] R.C.S. 530; *Q.N.S. Paper Co. c. Chartwell Shipping Ltd.*, [1989] 2 R.C.S. 683; *The Tolten*, [1946] P. 135; *Olympia & York Developments Ltd. c. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165; *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17; *Roberts c. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218; *Re Walker* (1998), 5 C.B.R. (4th) 123; *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061; *The Strandhill c. Walter W. Hodder Co.*, [1926] R.C.S. 680; *Todd Shipyards Corp. c. Altema Compania Maritima S.A.*, [1974] R.C.S. 1248; *Marlex Petroleum Inc. c. Har Rai (Le)*, [1987] 1 R.C.S. 57, conf. [1984] 2 C.F. 345; *Riordon Co. c. Danforth Co.*, [1923] R.C.S. 319; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Galbraith c. Grimshaw*, [1910] A.C. 508; *Anantapadmanabhaswami c. Official Receiver of Secunderabad*, [1933] A.C. 394; *ITO—International Terminal Operators Ltd. c. Miida Electronics Inc.*, [1986] 1 R.C.S. 752; *Zingre c. La Reine*, [1981] 2 R.C.S. 392; *Spencer c. La Reine*, [1985] 2 R.C.S. 278; *Hilton c. Guyot*, 159 U.S. 113 (1895); *Succession Ordon c. Grail*, [1998] 3 R.C.S. 437; *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077; *Hunt c. T&N PLC*, [1993] 4 R.C.S. 289; *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022; *Canada Southern Railway Co. c. Gebhard*, 109 U.S. 527 (1883); *Allen c. Hanson* (1890), 18 R.C.S. 667; *Re Breakwater Co.* (1914), 33 O.L.R. 65; *Re E. H. Clarke & Co.*, [1923] 1 D.L.R. 716; *Re Stewart & Matthews, Ltd. and The Winding-Up Act* (1916),

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*Ltd. and The Winding-Up Act* (1916), 10 W.W.R. 154; *Antares Shipping Corp. v. The Ship "Capricorn"*, [1977] 2 S.C.R. 422; *The Atlantic Star*, [1973] 2 All E.R. 175; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

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*Commercial Instruments and Maritime Liens Act*, 46 U.S.C. § 31342.

*Federal Court Act*, R.S.C. 1985, c. F-7, ss. 3, 17(6) [rep. & sub. 1990, c. 8, s. 3], 22(1), 50(1).

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10 W.W.R. 154; *Antares Shipping Corp. c. Le navire « Capricorn »*, [1977] 2 R.C.S. 422; *The Atlantic Star*, [1973] 2 All E.R. 175; *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3.

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POURVOI contre un arrêt de la Cour d'appel fédérale (1999), 173 D.L.R. (4th) 493, 239 N.R. 114, [1999] A.C.F. n$^{o}$ 337 (QL), confirmant un jugement de la Section de première instance, [1997] 3 C.F. 187, 127 F.T.R. 244, 146 D.L.R. (4th) 736, 46 C.B.R. (3d) 169, [1997] A.C.F. n$^{o}$ 409 (QL). Pourvoi rejeté.

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*David G. Colford*, for the appellants.

*Thomas E. Hart* and *Jane O'Neill*, for the respondent.

The judgment of the Court was delivered by

BINNIE J. — The problems of international bankruptcies have excited much recent judicial and academic commentary. In this appeal, we are required to determine whether a maritime law proceeding by a U.S. creditor against a Belgian ship in a Canadian court ought to have been stayed in deference to a Belgian court dealing with the subsequent bankruptcy of its Belgian shipowner. Deference to the Belgian bankruptcy court, it is argued, was required by the principles of international comity. Despite the obvious benefits of international coordination of bankruptcies that spread their financial wreckage across multiple jurisdictions, the Federal Court of Canada declined to stay its proceedings under Canadian maritime law. The present appeal is from its decision. The companion case, *Antwerp Bulkcarriers, N.V. (Re)*, [2001] 3 S.C.R. 951, 2001 SCC 91, released at the same time, deals with the appeal from the Quebec Court of Appeal on the bankruptcy side of the concurrent and interconnected proceedings.

The history of this litigation, in brief summary, is as follows. On March 30, 1996, the M/V "Brussel" (the "Ship") was arrested in Canadian waters near the entrance to Halifax harbour by order of the Federal Court of Canada. A week later, its Belgian owner made an assignment in bankruptcy at Antwerp with debts vastly exceeding its assets. The U.S. creditor, Holt Cargo Systems Inc. ("Holt"), persisted with its *in rem* action. Four months later, after a storm of motions and applications in the Federal Court and the Superior Court of Quebec sitting in Bankruptcy, with periodic interventions by the Eleventh Chamber of the Commercial Court of the Judicial District of Antwerp (the "Belgian bankruptcy court") and a related order by a U.S. bankruptcy court, the Ship was sold over the objection of the trustees in bankruptcy. The Federal Court ruled

*David G. Colford*, pour les appelants.

*Thomas E. Hart* et *Jane O'Neill*, pour l'intimée.

Version française du jugement de la Cour rendu par

1 LE JUGE BINNIE — Les problèmes de faillites internationales ont récemment fait l'objet de nombreux commentaires jurisprudentiels et doctrinaux. Dans le présent pourvoi, nous devons décider si des procédures en droit maritime qu'une créancière américaine a engagées contre un navire belge devant un tribunal canadien auraient dû être suspendues par déférence pour le tribunal belge saisi de la faillite subséquente du propriétaire belge du navire. Cette déférence pour le tribunal de faillite belge découlait, soutient-on, des principes de courtoisie internationale. Malgré les avantages évidents qu'offre la coordination internationale des faillites ayant des répercussions financières dans plus d'un ressort, la Cour fédérale du Canada a refusé de suspendre ses procédures en droit maritime canadien. C'est cette décision qui fait l'objet du présent pourvoi. L'arrêt connexe, *Re Antwerp Bulkcarriers, N.V.*, [2001] 3 R.C.S. 951, 2001 CSC 91, rendu simultanément, fait suite à l'appel interjeté contre un arrêt de la Cour d'appel du Québec portant sur l'aspect « faillite » des procédures concomitantes et étroitement liées.

2 Voici un bref historique du présent litige. Le 30 mars 1996, le N/M « Brussel » ( le « navire ») a été saisi dans les eaux canadiennes, près de l'entrée du port de Halifax, conformément à une ordonnance de la Cour fédérale du Canada. Une semaine plus tard, le propriétaire du navire, dont le passif excédait largement l'actif, a fait cession de ses biens à Anvers, en Belgique. La créancière américaine, Holt Cargo Systems Inc. (« Holt »), a maintenu son action *in rem*. Quatre mois plus tard, après une pluie de requêtes et de demandes en Cour fédérale et en Cour supérieure du Québec siégeant en matière de faillite, ponctuée d'interventions de la part de la Onzième Chambre du Tribunal de commerce du district judiciaire d'Anvers (le « tribunal de faillite belge ») et d'une ordonnance connexe délivrée par un tribunal de faillite américain, le navire a été vendu malgré

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that the proceeds of the sale are eventually to be distributed to secured creditors, including the respondent, depending on the outcome of this appeal.

3 The Superior Court of Quebec sitting in Bankruptcy (the "Canadian bankruptcy court") played a potentially important role in responding to the request for assistance from the Belgian Commercial Court exercising Belgian bankruptcy jurisdiction. However, I believe the trustees asked for more assistance from the Canadian bankruptcy court than could lawfully be given, and that the Federal Court did not err in principle in refusing a stay of the maritime law proceedings.

4 I would therefore dismiss the appeal.

I. Facts

5 The Ship was arrested at Halifax under a warrant of arrest issued at the instance of Holt, a U.S. company incorporated under the laws of New Jersey. The warrant for arrest was issued in connection with an *in rem* action commenced by Holt the same day in the Federal Court of Canada against the "owners, charterers and all others interested in the ship", and the Ship itself. The M/V "Brussel" was owned by Antwerp Bulkcarriers N.V. which, with other interrelated companies, carried on the business of international carriage of goods by sea.

6 Holt's action was for unpaid fees and charges for stevedoring and other related services provided to the Ship at Gloucester City, New Jersey, in the United States between 1994 and 1996 inclusive. No part of the debt was incurred in Canada and neither the Ship nor its creditors were ordinarily resident here.

7 Following the arrest of the Ship, cargo and container owners, shippers, suppliers, insurers and others also filed claims in the Federal Court. In total, statements of claim were filed in 27 separate actions. Moreover, notices of claim were filed in

l'opposition des syndics de faillite. La Cour fédérale a décidé que le produit de la vente serait réparti ultérieurement entre les créanciers garantis, dont l'intimée, selon l'issue du présent pourvoi.

La Cour supérieure du Québec siégeant en matière de faillite ( le « tribunal de faillite canadien ») a joué un rôle potentiellement important en répondant à la demande de concours présentée par le Tribunal de commerce belge exerçant compétence en matière de faillite. Cependant, j'estime que les syndics ont demandé au tribunal de faillite canadien un concours plus important que ce qui pouvait être accordé légalement, et que la Cour fédérale n'a commis aucune erreur de principe en refusant la suspension des procédures en droit maritime.

En conséquence, je suis d'avis de rejeter le pourvoi.

I. Les faits

Le navire a été saisi à Halifax en vertu d'un mandat de saisie décerné à la demande de Holt, une compagnie américaine constituée en vertu des lois du New Jersey. Le mandat de saisie a été décerné dans le cadre d'une action *in rem* que Holt avait intentée le même jour devant la Cour fédérale du Canada contre les « propriétaires, affréteurs et toutes autres personnes ayant un droit sur le navire », et le navire lui-même. Le N/M « Brussel » appartenait à Antwerp Bulkcarriers, N.V. qui, conjointement avec d'autres compagnies étroitement liées, exploitait une entreprise de transport maritime international de marchandises.

L'action de Holt visait le paiement des services d'acconage et autres services connexes fournis au navire à Gloucester City (New Jersey), aux États-Unis, entre 1994 et 1996 inclusivement. Aucune partie de la dette n'a été contractée au Canada, et ni le navire ni ses créanciers n'avaient leur lieu de résidence habituelle au Canada.

À la suite de la saisie du navire, les propriétaires de la cargaison et des conteneurs, les expéditeurs, les fournisseurs, les assureurs et d'autres personnes ont également déposé des réclamations en Cour fédérale. En tout, des déclarations ont été déposées

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Holt's *in rem* action against the Ship by more than 20 claimants in response to the Federal Court's order, discussed below, that the Ship be appraised and sold.

dans le cadre de 27 actions distinctes. De plus, réagissant à l'ordonnance d'évaluation et de vente du navire délivrée par la Cour fédérale et analysée plus loin, plus de 20 réclamants ont déposé des avis de réclamation dans l'action *in rem* de Holt contre le navire.

8 On April 5, 1996, a week after the Ship's arrest, the shipowner was adjudged bankrupt by the Belgian bankruptcy court, which appointed the appellants, T. Van Doosselaere and F. De Roy, as trustees in bankruptcy (the "Trustees"). Under Belgian law, the Trustees were required to take possession of all assets of the bankrupt holding company and its bankrupt affiliated companies, wherever situated. The major assets of the group of bankrupt companies were six cargo vessels, and at the time of the bankruptcy order at least five of these were under arrest in ports in Israel, Singapore, New Zealand, the Bahamas and, as stated, Canada. Other assets owned or leased by the debtors, including unpaid freight and shipping containers, had also been arrested, detained or threatened with seizure at various locations throughout the world. The Trustees filed applications in jurisdictions where proceedings had been commenced against the debtors seeking the release of the bankrupts' assets from arrest, preventing further seizure and arrest of their assets, and directing the submission of all claims against them to the bankruptcy proceedings in Belgium.

Le 5 avril 1996, soit une semaine après la saisie du navire, le propriétaire du navire a été mis en faillite par le tribunal de faillite belge, qui a désigné les appelants T. Van Doosselaere et F. De Roy syndics de faillite (les « syndics »). Sous le régime du droit belge, les syndics étaient tenus de prendre possession de tous les éléments d'actif de la société de portefeuille faillie et de ses sociétés affiliées faillies, où qu'ils soient. Les principaux éléments d'actif du groupe de sociétés faillies étaient six cargos dont au moins cinq étaient saisis dans des ports d'Israël, de Singapour, de Nouvelle-Zélande, des Bahamas et, comme nous l'avons vu, du Canada, au moment de l'ordonnance de faillite. D'autres éléments d'actif appartenant aux débiteurs ou loués par eux, notamment du fret et des conteneurs d'expédition impayés, avaient également été saisis, retenus ou menacés de saisie à différents endroits dans le monde. Dans les ressorts où des procédures avaient été engagées contre les débiteurs, les syndics ont présenté des demandes visant à faire lever la saisie des éléments d'actif des faillies, à empêcher d'autres saisies de leurs éléments d'actifs et à obtenir que toutes les réclamations les visant soient présentées dans le cadre des procédures de faillite en Belgique.

9 Faced with these difficult circumstances, the appellant Trustees urged on the Federal Court on several occasions the need for international cooperation in the resolution of bankruptcies and insolvencies that cross national boundaries. The effect of these arguments was to advocate deference to the Belgian courts, being the courts of the bankrupts' domicile. Adherence to what is sometimes called the "Grab Rule", in which each national court takes charge of assets in its own jurisdiction for the benefit of creditors who win the race to its courthouse, was said to be destructive of international order and fairness. (As will be seen, there is much merit in these submissions.)

Aux prises avec cette situation difficile, les syndics appelants ont souligné, à maintes reprises, en Cour fédérale la nécessité de la coopération internationale pour régler les faillites et les insolvabilités qui débordent les frontières nationales. Ils prônaient ainsi la déférence pour les tribunaux belges, qui sont les tribunaux du domicile des faillies. Ils ont fait valoir que le respect de ce qu'on appelle parfois la [TRADUCTION] « règle de l'appropriation », suivant laquelle chaque tribunal national s'occupe des éléments d'actif situés dans son propre ressort au profit des créanciers qui obtiennent gain de cause devant lui, nuit à l'ordre et à l'équité internationales. (Comme nous le verrons, ces observations sont très justes.)

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10 The "universalist" position advocated by the appellant Trustees was put forward in a series of motions and applications before the courts of Quebec and the Federal Court of Canada. A detailed summary of the complicated procedural history of this dispute is set out in an Appendix to the judgment in the companion case, *Antwerp Bulkcarriers, N.V.*, *supra*. What follows is a summary of the motions and applications most relevant to this appeal:

May 3, 1996

The appellant Trustees appear before MacKay J. of the Federal Court, Trial Division, to support moving the Ship to a "safe berth" at Halifax and to "remain under arrest" at its new location "until further orders are given by this Court". Order granted. The Ship was moved and remained there until its sale closed on August 1, 1996.

May 9, 1996

The appellant Trustees move *ex parte* before the Quebec Superior Court, Civil Chamber (i.e., not specified to be sitting in bankruptcy) and obtain an order which "recognized and declared executory in Quebec" the Belgian bankruptcy order (emphasis added).

May 13, 1996

The appellant Trustees apply to the Federal Court to have the *in rem* proceedings against the Ship adjourned for four weeks to enable them to make further inquiries about the claims and assets of the bankrupt estate. They do not undertake to file a defence in the action, or indeed suggest that a valid defence exists. MacKay J. expresses concern that the Ship has been under arrest for six weeks and that dock charges and other expenses are mounting. He concludes that he is exercising a maritime law jurisdiction, not a bankruptcy jurisdiction. The adjournment is denied.

L'approche « universaliste » préconisée par les syndics appelants a été énoncée dans une série de requêtes et de demandes déposées devant les tribunaux du Québec et la Cour fédérale du Canada. On trouve un résumé détaillé de l'historique procédural complexe du présent litige à l'annexe de l'arrêt connexe *Antwerp Bulkcarriers, N.V.*, précité. Voici un résumé des requêtes et des demandes les plus pertinentes en l'espèce :

3 mai 1996

Les syndics appelants comparaissent devant le juge MacKay de la Section de première instance de la Cour fédérale pour appuyer le déplacement du navire vers un [TRADUCTION] « poste d'amarrage sûr » à Halifax et pour qu'il y « demeure sous saisie jusqu'à ce que notre cour en ordonne autrement ». L'ordonnance est accordée. Le navire est déplacé et reste au même endroit jusqu'à sa vente, le 1er août 1996.

9 mai 1996

Les syndics appelants déposent une requête *ex parte* devant la Cour supérieure du Québec, Chambre civile (c'est-à-dire non désignée comme siégeant en matière de faillite), et obtiennent une ordonnance qui [TRADUCTION] « reconn[aît] et déclar[e] exécutoir[e] au Québec » l'ordonnance de faillite délivrée en Belgique (je souligne).

13 mai 1996

Les syndics appelants demandent à la Cour fédérale d'ajourner les procédures *in rem* contre le navire pour une période de quatre semaines afin de leur permettre d'obtenir plus de renseignements sur les réclamations et l'actif de la faillie. Ils ne s'engagent pas à produire une défense à l'action et n'indiquent pas non plus qu'il existe un moyen de défense valide. Le juge MacKay s'inquiète du fait que le navire est saisi depuis six semaines et que les droits de bassin et autres dépenses s'accumulent. Il conclut qu'il exerce une compétence en droit maritime et non une compétence en matière de faillite. L'ajournement est refusé.

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May 14, 1996

In default of defence, judgment is awarded to Holt against the Ship for $572,128.06, with leave to the Trustees to challenge the precise quantum of the judgment if done promptly.

May 17, 1996

The Federal Court orders the Ship appraised and lays down the procedure for its sale. The Trustees appeal. They also seek review and reconsideration of the orders of appraisal and sale of the Ship.

June 14, 1996

The appellant Trustees request a stay of proceedings from the Federal Court "pending final disposition of the matter by the [Quebec] Superior Court". The Trustees produce an *ex parte* order dated June 11, 1996 obtained from the Quebec Superior Court sitting in Bankruptcy that purports to dispose of the Ship and the proceeds of sale. Despite the Trustees' participation in the Federal Court proceedings over the previous six weeks, no notice of the application in Montreal was given to the Federal Court litigants. It subsequently emerges that the Quebec judge hearing the *ex parte* application was not told that the Ship has been arrested and ordered sold by the Federal Court. The stay is denied for reasons eventually issued on April 9, 1997. In MacKay J.'s view, this is still a maritime law case.

July 9, 1996

The appellant Trustees return before the Federal Court seeking to have the proceeds paid to them if the sale goes ahead, as ordered, on July 12. They are now armed with a further order dated June 28, 1996 of the Quebec Superior Court sitting in Bankruptcy, in which Guthrie J. confirmed with variations the *ex parte* order of June 11, after notice to all interested parties and a full hearing on the merits. It is the June 28, 1996 order that is the centrepiece of

14 mai 1996

Faute de défense, un jugement ordonnant de verser à Holt la somme de 572 128,06 $ est rendu contre le navire, les syndics étant autorisés à contester le montant accordé à la condition d'agir promptement.

17 mai 1996

La Cour fédérale ordonne l'évaluation du navire et établit la procédure à suivre pour le vendre. Les syndics interjettent appel. Ils sollicitent également la révision et le réexamen des ordonnances d'évaluation et de vente du navire.

14 juin 1996

Les syndics appelants demandent à la Cour fédérale de suspendre les procédures [TRADUCTION] « en attendant le règlement définitif de l'affaire par la Cour supérieure du Québec ». Les syndics produisent une ordonnance ex parte datée du 11 juin 1996, qu'ils ont obtenue auprès de la Cour supérieure du Québec siégeant en matière de faillite et qui est censée statuer sur le sort du navire et le produit de la vente. Bien que les syndics aient participé aux procédures devant la Cour fédérale au cours des six semaines précédentes, aucun avis de la requête déposée à Montréal n'a été donné aux parties devant la Cour fédérale. Il en ressort donc que le juge du Québec qui a entendu la requête ex parte n'a pas été avisé que le navire avait été saisi et que la Cour fédérale en avait ordonné la vente. La suspension est refusée pour les motifs déposés ultérieurement le 9 avril 1997. De l'avis du juge MacKay, il s'agit toujours d'une affaire de droit maritime.

9 juillet 1996

Les syndics appelants s'adressent de nouveau à la Cour fédérale dans le but d'obtenir le produit de la vente si cette dernière a lieu le 12 juillet, tel qu'ordonné. Ils sont maintenant munis d'une autre ordonnance de la Cour supérieure du Québec siégeant en matière de faillite, qui est datée du 28 juin 1996 et dans laquelle le juge Guthrie, après avoir avisé toutes les parties intéressées et avoir tenu une audience complète sur le fond, confirme l'ordon-

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the appellants' argument. I therefore reproduce its relevant portions below:

. . . THE COURT:

. . .

RECOGNIZES the Trustees as trustees in the bankruptcy of Antwerp Bulkcarriers, N.V., with the duty and power to take possession of, realise upon and confirm the assets of the Bankrupt situated anywhere in Canada, subject however to the rights, if any, of any creditors with claims secured under the laws of Canada, as by law provided;

PERMITS the sale of the ship "Brussel" to take place in accordance with the judgment rendered by the Federal Court of Canada, Trial Division, on May 17, 1996 provided that such sale is completed and the purchase price paid in full by the close of business in Halifax, Canada on July 12, 1996;

ORDERS that, in the event that the said sale is completed as aforesaid, the net proceeds of such sale (after payment of all expenses of advertisement of the sale, appraisal fees, insurance and all other costs, disbursements, commissions and other expenses necessary for the sale) be paid promptly to the Trustees for distribution amongst the creditors of the Bankrupt in observance of all their rights and in conformity with Belgian law;

ORDERS that, in the event the said sale is not so completed, the ship "Brussel" be delivered into the possession of the Trustees so that they can proceed to the sale of the said ship, locally or in any other place they consider more appropriate, and to the distribution of the net proceeds amongst the creditors of the Bankrupt in observance of all their rights and in conformity with Belgian law;

REQUESTS the aid of the Supreme Court of Nova Scotia with jurisdiction in bankruptcy, insofar as such aid may be necessary under the laws of Nova Scotia to give effect to the present judgment;

ORDERS that the present judgment be served promptly on Chief Justice of the Supreme Court of Nova Scotia, on the Marshall of the Federal Court of Canada in Halifax, on the Sheriff of the Halifax Regional Municipality, and on all parties who have asserted a claim in Canada in respect of the ship "Brussel"; . . . [Emphasis added.]

nance ex parte du 11 juin, sous réserve de certaines modifications. C'est l'ordonnance du 28 juin 1996 qui est l'élément central de l'argumentation des appelants. J'en reproduis donc ci-après les parties pertinentes :

[TRADUCTION] . . . LA COUR :

. . .

RECONNAÎT les syndics en qualité de syndics de la faillite de Antwerp Bulkcarriers, N.V., ayant l'obligation et le pouvoir de prendre possession des éléments d'actif de la faillie où qu'ils soient au Canada, de les réaliser et de les confirmer, sous réserve toutefois des droits des créanciers dont les réclamations sont garanties sous le régime des lois du Canada, conformément à la loi;

PERMET que le navire « Brussel » soit vendu conformément au jugement rendu par la Section de première instance de la Cour fédérale du Canada, le 17 mai 1996, à la condition que cette vente soit conclue et que le prix d'achat soit intégralement versé à la fin de la journée ouvrable à Halifax, au Canada, le 12 juillet 1996;

ORDONNE que, si ladite vente est conclue comme susdit, le produit net de la vente (après paiement de toutes les dépenses d'annonce de la vente, d'évaluation, d'assurance et autres coûts, débours, commissions et autres dépenses nécessaires à la vente) soit versé sans délai aux syndics en vue de sa répartition entre les créanciers de la faillie dans le respect de tous leurs droits et en conformité avec le droit belge;

ORDONNE que, si ladite vente n'est pas ainsi conclue, le navire « Brussel » soit remis aux syndics pour qu'ils le vendent, sur place ou à tout autre endroit qu'ils estiment plus convenable, et en répartissent le produit net entre les créanciers de la faillie dans le respect de tous leurs droits et en conformité avec le droit belge;

SOLLICITE le concours de la Cour suprême de la Nouvelle-Écosse ayant compétence en matière de faillite, dans la mesure où ce concours pourra être nécessaire sous le régime des lois de la Nouvelle-Écosse pour exécuter le présent jugement;

ORDONNE que le présent jugement soit signifié sans délai au juge en chef de la Cour suprême de la Nouvelle-Écosse, au prévôt de la Cour fédérale du Canada à Halifax, au shérif de la municipalité régionale de Halifax, et à toutes les parties qui ont fait valoir une réclamation au Canada à l'égard du navire « Brussel »; . . . [Je souligne.]

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It is clear from the order of June 28, 1996 that the Canadian bankruptcy court is now asserting control over the Ship and the related proceedings. It "permits" the sale ordered by MacKay J. to proceed, but only if it is completed by July 12. The proceeds of sale are to go to the appellant Trustees, not to the secured claimants who are litigating in the Federal Court. If the sale is not completed by July 12, the Ship is to be turned over to the Trustees irrespective of the orders of the Federal Court. The Supreme Court of Nova Scotia is requested to "aid" in giving effect to these directions.

As of July 1996, it will be noted, default judgment had been signed in the *in rem* action, the Ship had been appraised, and bids were being invited from potential purchasers. MacKay J. eventually ruled that the Trustees could obtain the proceeds of sale only if they posted security to answer the claims of the secured creditors. This was never forthcoming. His reasons were compendiously explained in a subsequent judgment of April 9, 1997, as will now be described.

II. Judicial History

A. *Federal Court, Trial Division*, [1997] 3 F.C. 187

MacKay J. said he accepted the principle of comity of nations but pointed out that "the Court is urged to respect jurisdiction claimed by others and to forego considering claims to relief in proceedings long established in maritime law" (para. 45). The Trustees alleged that Holt was forum shopping, but MacKay J. said he was "not persuaded it did more than seek recovery of its claim against the vessel where the ship was located" (para. 46).

MacKay J. "found no persuasive grounds . . . [for the Court] to stay its own processes which were

11 Il ressort clairement de l'ordonnance du 28 juin 1996 que le tribunal de faillite canadien exerce maintenant un contrôle sur le navire et les procédures qui y sont liées. Il « permet » que la vente ordonnée par le juge MacKay ait lieu, mais seulement à la condition qu'elle soit conclue le 12 juillet au plus tard. Le produit de la vente doit être versé aux syndics appelants et non aux créanciers garantis ayant intenté une action en Cour fédérale. Si la vente n'est pas conclue le 12 juillet au plus tard, le navire doit être remis aux syndics indépendamment des ordonnances de la Cour fédérale. Le « concours » de la Cour suprême de la Nouvelle-Écosse est sollicité pour exécuter ces directives.

12 Dès juillet 1996, comme nous le verrons, un jugement par défaut avait été rendu dans l'action *in rem*, le navire avait été évalué et les acquéreurs potentiels étaient invités à présenter des soumissions. Le juge MacKay a, par la suite, décidé que les syndics ne pourraient toucher le produit de la vente que s'ils constituaient un cautionnement pour satisfaire aux réclamations des créanciers garantis. Cela ne s'est jamais concrétisé. Comme nous le verrons, ses motifs ont été exposés de manière concise dans un jugement subséquent rendu le 9 avril 1997.

II. Historique des procédures judiciaires

A. *Cour fédérale, Section de première instance*, [1997] 3 C.F. 187

13 Le juge MacKay a dit qu'il acceptait le principe de la courtoisie internationale, mais il a souligné que « la Cour est instamment priée de respecter la compétence invoquée par d'autres et d'abandonner l'examen des demandes de redressement dans des procédures longtemps établies en droit maritime » (par. 45). Les syndics ont fait valoir que Holt était à la recherche d'un tribunal favorable, mais le juge MacKay a répondu qu'il n'était « pas persuadé qu'elle a fait plus que chercher à recouvrer sa créance contre le navire là où il se trouvait » (par. 46).

14 Le juge MacKay n'était « pas convaincu [. . .] du bien-fondé [pour la cour] [. . .] de suspendre

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then underway, and to permit determination of the outcome to be effectively left to the bankruptcy proceedings of the Commercial Court at Antwerp, recognized by the Superior Court of Quebec" (para. 47). He was "not persuaded that matters before this Court were those of bankruptcy" nor had it been "suggested that any bankruptcy would be based in or administered by any court in Canada" (para. 47). "[T]he balance of convenience favoured denying the stay since the majority of claimants, in Canada and the United States, appeared to be based on the east coast of North America with relatively easy access to the Court's process in Canada" (para. 48). Accordingly, the stay was refused.

ses propres procédures qui avaient alors été mises en branle et de permettre que l'issue de l'affaire soit effectivement laissée aux procédures de faillite [du Tribunal de commerce] d'Anvers qui avaient été reconnues par la Cour supérieure du Québec » (par. 47). Il n'était « pas persuadé du fait que les affaires dont la présente Cour a été saisie relevaient de la faillite », ajoutant que « personne n'a dit que la faillite relèverait d'un tribunal canadien ou serait administrée par un tribunal au Canada » (par. 47). « [L]a prépondérance des inconvénients favorisait le refus de la suspension puisque la majorité des réclamants, au Canada et aux États-Unis, semblaient être établis sur la côte est de l'Amérique du Nord, d'où ils jouissaient d'un accès relativement facile à la Cour, au Canada » (par. 48). En conséquence, la suspension a été refusée.

15 The claim of the appellant Trustees to the proceeds of the sale of the Ship was based on their view that once the matter was before the bankruptcy court in Quebec, "it alone had jurisdiction over the assets of the bankrupt" (para. 72). MacKay J. disagreed. On the contrary, he ruled "the determinations of this Court in relation to the arrest of a ship, a judgment in default and the sale of the ship, or the determination of a claim by a secured creditor to the proceeds of the sale of the ship, [are not] proceedings in bankruptcy" (para. 74). Therefore, in his view, the involvement of the Canadian bankruptcy court did not divest the Federal Court of jurisdiction.

La réclamation des syndics appelants visant à obtenir le produit de la vente du navire reposait sur leur point de vue que le tribunal de la faillite du Québec « avait compétence exclusive à l'égard des biens de la faillite » dès qu'il était saisi de l'affaire (par. 72). Le juge MacKay n'était pas de cet avis. Au contraire, il a décidé que « les décisions de la présente Cour en matière de saisie d'un navire, de jugement par défaut et de vente du navire ou [. . .] le fait qu'elle tranche la revendication du produit de la vente du navire par un créancier garanti [ne] sont [pas] des procédures de faillite » (par. 74). Il estimait donc que l'intervention du tribunal de faillite canadien ne dépouillait pas la Cour fédérale de sa compétence.

16 As to the Trustees' argument that the Federal Court, even if it had jurisdiction, should in any event defer to the order for the distribution of the proceeds approved by the Quebec Superior Court sitting in Bankruptcy, MacKay J. held that Canadian law "does not establish a process that in any way bars a secured creditor from realizing on the security given by the debtor before its bankruptcy" (para. 80). A maritime lien is a secured claim. Accordingly, "a maritime lien, attaching before bankruptcy of a ship's owner, may be enforced and the claim based upon it may be realized from proceeds of sale of a ship without restriction under the *Bankruptcy and Insolvency Act*, or, with respect to

Au sujet de l'argument des syndics selon lequel, même si elle avait compétence, la Cour fédérale devrait de toute façon s'en remettre à l'ordonnance de répartition du produit de la vente approuvée par la Cour supérieure du Québec siégeant en matière de faillite, le juge MacKay a conclu que la loi canadienne « n'établit pas de processus qui interdit de quelque façon que ce soit à un créancier garanti de réaliser la garantie constituée par le débiteur avant sa faillite » (par. 80). Un privilège maritime est une créance garantie. En conséquence, « un privilège maritime, constitué avant la faillite du propriétaire d'un navire, peut être exécuté et la réclamation qui prend appui sur celui-ci peut se réaliser sur le

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other views, by the courts acting under that Act" (para. 83). MacKay J. thus concluded that Holt and the other secured creditors should have their secured claims paid out of the proceeds of sale in priority to the Trustees. (In the end, the fund was exhausted by the secured claims.)

produit de la vente du navire sans restriction imposée soit par la *Loi sur la faillite et l'insolvabilité*, soit, avec égards pour les opinions contraires, par les tribunaux agissant sous le régime de cette Loi » (par. 83). Le juge MacKay a donc conclu que les réclamations garanties de Holt et des autres créanciers garantis devaient être payées sur le produit de la vente avant tout versement aux syndics. (Finalement, les réclamations garanties ont épuisé le fonds.)

B. *Federal Court of Appeal* (1999), 173 D.L.R. (4th) 493

B. *Cour d'appel fédérale*, [1999] A.C.F. n$^{o}$ 337 (QL)

Noël J.A. observed, at para. 4, that Holt would "derive a distinct legal advantage" from having its claim determined by the Federal Court. Relying on this Court's decision in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, he acknowledged that juridical advantage is but one factor to consider when determining whether a Canadian court should stay its proceedings in favour of a foreign court. However, this factor takes on "considerable significance" (para. 4) when it arises in the normal course of litigation and not as a result of forum shopping. Here there had been a finding that no such forum shopping had occurred. "Having arrested the ship where it was found, the respondent could legitimately expect that Canadian maritime law would apply" (para. 5). Using the words of this Court in *Amchem*, *supra*, Noël J.A. found that Holt's "claim had a 'real and substantial connection' with Canadian maritime law and there was a 'reasonable expectation' that the rights arising thereunder would be enforced" (para. 5). Accordingly, he concluded, MacKay J. did not err in exercising his discretion against a stay.

17 Le juge Noël a fait observer que Holt « bénéficier[ait] d'un net avantage juridique » si sa réclamation était examinée par la Cour fédérale (par. 4). Se fondant sur l'arrêt de notre Cour *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897, il a reconnu que l'avantage juridique n'est qu'un des facteurs dont on peut tenir compte pour décider si un tribunal canadien devrait suspendre ses procédures par déférence pour un tribunal étranger. Cependant, lorsque l'avantage résulte du cours normal du litige et non de la recherche du tribunal le plus favorable, ce facteur revêt une « importance considérable » (par. 4). On a conclu, en l'espèce, qu'une telle recherche du tribunal le plus favorable n'avait pas eu lieu. « Ayant saisi le navire là où il se trouvait, l'intimée pouvait légitimement s'attendre à ce que le droit maritime canadien s'applique » (par. 5). Reprenant les propos de notre Cour dans l'arrêt *Amchem*, précité, le juge Noël a estimé que « la réclamation [de Holt] avait un "lien réel et important" avec le droit maritime canadien et [qu']on pouvait "raisonnablement s'attendre" à ce que les droits en découlant soient exercés » (par. 5). En conséquence, a-t-il conclu, le juge MacKay n'a pas commis d'erreur en exerçant son pouvoir discrétionnaire de refuser la suspension.

With respect to the intervention of the Quebec Superior Court sitting in Bankruptcy, Noël J.A. said "comity also extends to domestic courts" (para. 10). In his view, it was "significant that domestically at least, the secured nature of maritime liens has

18 En ce qui concerne l'intervention de la Cour supérieure du Québec siégeant en matière de faillite, le juge Noël a dit que « [l]es tribunaux internes sont également assujettis à un devoir réciproque de courtoisie » (par. 10). À son avis,

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always been maintained in the context of bankruptcy proceedings without the need for either of the two jurisdictions to supersede one another" (para. 10). By seeking an *ex parte* order from the Quebec Superior Court for the release of the Ship, "the appellants launched what is in effect a collateral attack on MacKay J.'s decision" (para. 12). In Noël J.A.'s view, the proper approach would have been to seek "the assistance of the Federal Court which is the only Court that had jurisdiction over the arrested ship and the respondent's *in rem* claim" (para. 13). The appeal was accordingly dismissed.

il était « significatif qu'en droit interne du moins, le caractère garanti des privilèges maritimes a toujours été reconnu dans les procédures de faillite sans qu'il soit nécessaire qu'une juridiction en supplante une autre » (par. 10). En demandant à la Cour supérieure du Québec de rendre une ordonnance *ex parte* enjoignant de lever la saisie du navire, « les appelants se sont de fait lancés dans une contestation parallèle de la décision du juge MacKay » (par. 12). D'après le juge Noël, il aurait convenu davantage de « s'adresser [. . .] à la Cour fédérale, qui est la seule juridiction compétente sur le navire saisi et sur la réclamation *in rem* de l'intimée » (par. 13). L'appel a donc été rejeté.

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## III. Relevant Statutory Provisions

19 *Federal Court Act*, R.S.C. 1985, c. F-7

**3.** The court of law, equity and admiralty in and for Canada now existing under the name of the Federal Court of Canada is hereby continued as an additional court for the better administration of the laws of Canada and shall continue to be a superior court of record having civil and criminal jurisdiction.

**17.** . . .

(6) Where an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Trial Division has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on the Court.

**22.** (1) The Trial Division has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

**50.** (1) The Court may, in its discretion, stay proceedings in any cause or matter,

(*a*) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(*b*) where for any other reason it is in the interest of justice that the proceedings be stayed.

## III. Dispositions législatives pertinentes

*Loi sur la Cour fédérale*, L.R.C. 1985, ch. F-7

**3.** Tribunal de droit, d'equity et d'amirauté du Canada, la Cour fédérale du Canada est maintenue à titre de tribunal additionnel propre à améliorer l'application du droit canadien. Elle continue d'être une cour supérieure d'archives ayant compétence en matière civile et pénale.

**17.** . . .

(6) La Section de première instance n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

**22.** (1) La Section de première instance a compétence concurrente, en première instance, dans les cas — opposant notamment des administrés — où une demande de réparation ou un recours est présenté en vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution expresse contraire de cette compétence.

**50.** (1) La Cour a le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

*a*) au motif que la demande est en instance devant un autre tribunal;

*b*) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

**2.** In this Act,

. . .

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable;

*Stay of Proceedings*

**69.3** (1) Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

(2) Subject to sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders . . . .

*Scheme of Distribution*

**136.** (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows: . . .

*Jurisdiction of Courts*

**183.** (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

. . .

*Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3

**2.** Les définitions qui suivent s'appliquent à la présente loi.

. . .

« créancier garanti » Personne détenant une hypothèque, un nantissement, une charge, un gage ou un privilège sur ou contre les biens du débiteur ou sur une partie de ses biens, à titre de garantie d'une dette échue ou à échoir, ou personne dont la réclamation est fondée sur un effet de commerce ou garantie par ce dernier, lequel effet de commerce est détenu comme garantie subsidiaire et dont le débiteur n'est responsable qu'indirectement ou secondairement.

*Suspension des procédures*

**69.3** (1) Sous réserve du paragraphe (2) et des articles 69.4 et 69.5, à compter de la faillite d'un débiteur, les créanciers n'ont aucun recours contre le débiteur ou contre ses biens et ne peuvent intenter ou continuer aucune action, exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite, et ce jusqu'à la libération du syndic.

(2) Sous réserve des articles 79 et 127 à 135 et du paragraphe 248(1), la faillite d'un débiteur n'a pas pour effet d'empêcher un créancier garanti de réaliser sa garantie ou de faire toutes autres opérations à son égard tout comme il aurait pu le faire en l'absence du présent article, à moins que le tribunal n'en ordonne autrement . . .

*Plan de répartition*

**136.** (1) Sous réserve des droits des créanciers garantis, les montants réalisés provenant des biens d'un failli sont distribués d'après l'ordre de priorité de paiement suivant : . . .

*Compétence des tribunaux*

**183.** (1) Les tribunaux suivants possèdent la compétence en droit et en équité qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

. . .

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(*b*) in the Province of Quebec, the Superior Court;

IV. Analysis

20 In this appeal we are urged to adopt a "universalist approach" to bankruptcies and insolvencies that affect more than one jurisdiction. I accept at the outset that bankruptcies that engage multiple jurisdictions may not be administered effectively if each national court goes its own way with the assets that happen physically to be within its control. The chaotic fact situation faced by the Trustees in this case, from Singapore to the Bahamas and Israel to New Zealand, is eloquent testimony to the need for judicial cooperation and international comity.

21 Moreover, it must also be freely acknowledged that the connection between this litigation and Canada is relatively weak. None of the parties (including the Ship) resides here. The debt was incurred in the United States. The shipowner resides in Belgium. There are no bankruptcy proceedings in Canada other than those initiated by the appellant Trustees for recognition of various orders of the Belgian bankruptcy court.

22 Canadian courts have become seized with the dispute only because the vagaries of maritime commerce carried the M/V "Brussel" into Canadian waters on March 30, 1996. It was certainly open to the Federal Court to defer in these matters to the bankruptcy court of the bankrupt's domicile. The question is whether, as contended by the appellant Trustees, the Federal Court was *obliged* to do so. If not, did the Federal Court nevertheless commit an error in the exercise of its discretion not to stay the *in rem* action in deference to the Belgian bankruptcy court?

23 For present purposes, I accept the following convenient definitions of the "universalist approach" and the "territorialist approach" (sometimes referred to as the "Grab Rule"):

*b*) dans la province de Québec, la Cour supérieure;

IV. Analyse

Dans le présent pourvoi, nous sommes invités à adopter une « approche universaliste » dans les affaires de faillite et d'insolvabilité ayant des répercussions dans plus d'un ressort. J'admets d'emblée que les faillites mettant en cause plus d'un ressort ne peuvent pas être administrées efficacement si chaque tribunal national gère à sa façon les biens qui sont physiquement sous son contrôle. En l'espèce, la situation factuelle chaotique avec laquelle sont aux prises les syndics, de Singapour aux Bahamas et d'Israël à la Nouvelle-Zélande, témoigne éloquemment de la nécessité de la coopération judiciaire et de la courtoisie internationale.

En outre, il faut bien reconnaître que le lien entre le présent litige et le Canada est relativement faible. Aucune des parties (y compris le navire) n'a son lieu de résidence dans notre pays. La dette a été contractée aux États-Unis. Le propriétaire du navire réside en Belgique. Il n'y a, au Canada, aucune instance en matière de faillite autre que les procédures engagées par les syndics appelants en vue de faire reconnaître diverses ordonnances délivrées par le tribunal de faillite belge.

Les tribunaux canadiens n'ont été saisis du litige que parce que les aléas du commerce maritime ont fait en sorte que le N/M « Brussel » s'est retrouvé en eaux canadiennes le 30 mars 1996. Il était alors certainement loisible à la Cour fédérale de s'en remettre au tribunal de faillite du domicile de la faillie. La question est de savoir si la Cour fédérale était *tenue* de le faire, comme le prétendent les syndics appelants. Dans la négative, la Cour fédérale a-t-elle néanmoins commis une erreur lors de l'exercice de son pouvoir discrétionnaire en ne suspendant pas l'action *in rem* par déférence pour le tribunal de faillite belge?

Aux fins de la présente affaire, je fais miennes les définitions pratiques suivantes de l'« approche universaliste » et de l'« approche territorialiste » (parfois appelée [TRADUCTION] « règle de l'appropriation ») :

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. . . courts and commentators have identified two general approaches to distributing assets in such proceedings. Under the "territoriality" approach, or the "Grab Rule," the court in each jurisdiction where the debtor has assets distributes the assets located in that jurisdiction pursuant to local rules. Under the "universality" approach, a primary insolvency proceeding is instituted in the debtor's domiciliary country, and ancillary courts in other jurisdictions — typically in jurisdictions where the debtor has assets — defer to the foreign proceeding and in effect collaborate to facilitate the centralized liquidation of the debtor's estate according to the rules of the debtor's home country.

(*In re Treco*, 240 F.3d 148 (2d Cir. 2001), at p. 153)

The Federal Court was clearly of the view that it was not in this case choosing between the "universalist" approach and the "Grab Rule". It was making a choice between the conflicting demands of two international systems of commercial dispute resolution, namely the rules of maritime law, with long historical roots in the practicalities of ocean shipping, and more recent legal initiatives to establish coherent rules for the administration of international bankruptcies and insolvencies. In its view, I think correctly, the choice was dictated not by some abstract rule of "universalism" but by what the Federal Court understood to be the specific circumstances and justice of this particular case.

A. *Maritime Law*

Shipping was one of the earliest activities that required international cooperation in the regulation of the rights and obligations of its participants. "For the cradle of our maritime law we must turn to the Mediterranean Sea where the sea commerce has had a continuous history for nearly five thousand years": *Benedict on Admiralty* (7th ed. (looseleaf)), vol. 1, at p. 1-4; and see generally W. Tetley, *Maritime Liens and Claims* (2nd ed. 1998), at pp. 7-8. Maritime lawyers were forced to confront the need for rules to govern international commerce centuries before the "universalist approach" became a key issue in bankruptcy. Seamen, sal-

[TRADUCTION] . . . les tribunaux et les commentateurs ont reconnu deux approches générales applicables à la répartition des éléments d'actif dans le cadre de telles procédures. Selon l'approche territorialiste ou « règle de l'appropriation », le tribunal de chaque ressort dans lequel le débiteur possède des éléments d'actif répartit les éléments d'actif situés dans ce ressort conformément aux règles locales. Selon l'approche universaliste, les procédures d'insolvabilité principales sont engagées dans le pays où est domicilié le débiteur, et les tribunaux secondaires situés dans d'autres ressorts — habituellement les ressorts où le débiteur possède des éléments d'actif — s'en remettent aux procédures engagées à l'étranger et, en fait, collaborent pour faciliter la liquidation centralisée de l'actif du débiteur conformément aux règles en vigueur dans le pays où habite le débiteur.

(*In re Treco*, 240 F.3d 148 (2d Cir. 2001), p. 153)

24 La Cour fédérale était nettement d'avis qu'elle n'avait pas en l'espèce à choisir entre l'approche « universaliste » et la « règle de l'appropriation ». Elle devait plutôt faire un choix entre les exigences opposées de deux systèmes internationaux de règlement des conflits commerciaux, à savoir les règles du droit maritime, qui reposent depuis longtemps sur les considérations pratiques du transport maritime, et les plus récentes initiatives juridiques visant l'établissement de règles cohérentes pour l'administration des affaires de faillite et d'insolvabilité internationales. La Cour fédérale a estimé, à juste titre selon moi, que ce choix était dicté non par une règle abstraite d'« universalisme », mais par sa propre perception de la situation particulière et de ce qui était juste en l'occurrence.

A. *Le droit maritime*

25 Le transport maritime est l'une des premières activités ayant nécessité une coopération internationale en matière de réglementation des droits et des obligations des parties qui s'y livrent. [TRADUCTION] « En ce qui concerne les origines de notre droit maritime, nous devons nous tourner vers la Méditerranée où le commerce maritime existe depuis près de cinq mille ans » : *Benedict on Admiralty* (7e éd. (feuilles mobiles)), vol. 1, p. 1-4, et voir généralement W. Tetley, *Maritime Liens and Claims* (2e éd. 1998), p. 7-8. Les avocats spécialisés en droit maritime ont dû faire face à la nécessité d'établir des règles régissant le commerce

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vors, ship chandlers, repairers and other suppliers of essential goods and services to the ship in foreign ports required some assurance of payment. They looked to the ship. Common rules were essential because suppliers dealt with ships from many countries and the Masters found themselves in distant ports in an age when communications with ship owners were slow and unreliable. In maritime commerce, "rules of practical convenience commanding general assent are a virtual necessity": *Laane and Baltser v. Estonian State Cargo & Passenger Steamship Line*, [1949] S.C.R. 530, *per* Rand J., at p. 545. See also: *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683, at p. 695. Practicality required an *in rem* proceeding against the ship as distinguished from an *in personam* action against the shipowner. The need for predictability and uniformity was so strong that even the common law courts, ever protective of their own ways, ceded jurisdiction to specialized courts of admiralty applying a largely international law of maritime commerce. As Professor Tetley, *supra*, writes, at p. 56:

> [M]aritime law as we know it today is civilian in nature, finding its source in the *lex maritima* (the law maritime) which is a part of the *lex mercatoria* (the law merchant). Maritime law was codified, international law and, in England, it was apart from, and opposed to, its nearly mortal enemy, the common law.

26 The *in rem* interest in ships took many forms, some created by statute, others by mortgage, still others by possession. One of the most ancient and effective forms of security was (and is) the maritime lien. In this action, Holt claims a maritime lien for stevedoring services pursuant to the U.S. *Commercial Instruments and Maritime Liens Act*, 46 U.S.C. § 31342. Broadly speaking, a maritime lien arises without registration or other formality when debts of a specific nature are incurred by or on behalf of a ship. The lien creates a charge which "goes with

international des siècles avant que « l'approche universaliste » devienne une question-clé en matière de faillite. Les marins, sauveteurs, approvisionneurs, réparateurs et autres fournisseurs de biens et services essentiels aux navires se trouvant dans des ports étrangers avaient besoin de certaines garanties de paiement. Ils comptaient sur le navire. Il était essentiel d'établir des règles communes parce que les fournisseurs transigeaient avec des navires en provenance de nombreux pays et que les capitaines se retrouvaient dans des ports éloignés à une époque où la communication avec les propriétaires des navires était lente et peu fiable. Dans le domaine du commerce maritime, [TRADUCTION] « des règles d'utilité pratique requérant un consentement général sont quasi indispensables » : *Laane and Baltser c. Estonian State Cargo & Passenger Steamship Line*, [1949] R.C.S. 530, le juge Rand, p. 545. Voir également : *Q.N.S. Paper Co. c. Chartwell Shipping Ltd.*, [1989] 2 R.C.S. 683, p. 695. Pour des raisons pratiques, il convenait d'intenter une action *in rem* contre le navire au lieu d'une action *in personam* contre le propriétaire du navire. Le besoin de prévisibilité et d'uniformité était si fort que même les tribunaux de common law, toujours jaloux de leurs méthodes, ont cédé leur compétence aux tribunaux d'amirauté chargés d'appliquer un droit largement international en matière de commerce maritime. Comme l'écrit le professeur Tetley, *op. cit.*, p. 56 :

> [TRADUCTION] [L]e droit maritime, tel que nous le connaissons aujourd'hui, est de nature civile et émane de la *lex maritima* (droit maritime) qui fait partie de la *lex mercatoria* (droit commercial). Le droit maritime était un droit international codifié et, en Angleterre, il était séparé de la common law, son ennemi quasi mortel, et s'y opposait.

Le droit réel sur un navire revêtait maintes formes — créé par la loi dans certains cas, il découlait d'une hypothèque ou encore de la possession dans d'autres cas. L'une des formes de garantie les plus anciennes et efficaces était (et est toujours) le privilège maritime. Dans la présente action, Holt invoque un privilège maritime pour des services d'acconage, conformément à la *Commercial Instruments and Maritime Liens Act* américaine, 46 U.S.C. § 31342. D'une manière générale, un privilège maritime prend naissance sans enregistrement

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the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages" (*The Tolten*, [1946] P. 135 (C.A.), *per* Scott L.J., at p. 150). It may be described, in that sense, as a "secret lien".

ou autre formalité dès qu'une dette d'une nature particulière est contractée par un navire ou au nom d'un navire. Le privilège donne naissance à un droit réel [TRADUCTION] « qui suit le navire où qu'il soit, même entre les mains d'un acquéreur à titre onéreux sans préavis, et occupe le même rang que les autres privilèges maritimes, tous ces privilèges ayant préséance sur les hypothèques » (*The Tolten*, [1946] P. 135 (C.A.), le lord juge Scott, p. 150). Dans ce sens, il peut être décrit comme un « privilège occulte ».

27 The reason for this privileged status for maritime lien holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships (as indeed was the case here, where initially Holt named the wrong corporation as ship owner). Merchant seamen will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage. The Master may be embarrassed for lack of funds, but the ship itself is assumed to be worth something and is readily available to provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence. The appellant Trustees' claim to "international comity" in matters of bankruptcy must therefore be weighed against competing considerations of a more ancient and at least equally practical international system — the law of maritime commerce.

Ce statut privilégié des titulaires de privilège maritime existe pour une raison purement pratique. Un navire peut naviguer sous pavillon de complaisance. Il peut être difficile d'en identifier les propriétaires dans un réseau complexe d'entreprises (comme cela s'est produit dans la présente affaire où, au départ, Holt a désigné incorrectement la société propriétaire du navire). Les marins de la marine marchande ne travailleront pas sur un navire à moins que leur salaire ne constitue une créance prioritaire sur le navire. Il en est de même pour ceux dont le travail ou les approvisionnements sont essentiels à la poursuite du voyage. Le capitaine peut être à court d'argent, mais on présume que le navire lui-même a une certaine valeur et qu'il peut facilement constituer une certaine garantie. Cette garantie était et est toujours essentielle au commerce maritime. L'incertitude minerait la confiance. Il faut donc soupeser l'argument de la courtoisie internationale en matière de faillite avancé par les syndics appelants en fonction des considérations opposées d'un système international plus ancien et au moins tout aussi pratique — le droit commercial maritime.

### B. *Foreign Bankruptcy Orders*

### B. *Les ordonnances de faillite délivrées à l'étranger*

28 The appellant Trustees take the position that once the Canadian bankruptcy court was activated on this file, its power and authority occupied the field in relation to matters pertaining to the bankrupt, so to speak, to the exclusion of courts not possessing bankruptcy jurisdiction. This proposition is, in my view, too broad.

Les syndics appelants prétendent que, dès qu'il a été saisi du présent dossier, le tribunal de faillite canadien avait, pour ainsi dire, compétence exclusive sur les questions reliées à la faillite, ce qui avait pour effet d'exclure les tribunaux n'ayant pas compétence en matière de faillite. À mon avis, cette affirmation est trop générale.

29 I propose to make a few preliminary observations about the appellant Trustees' position. More detailed consideration follows.

Je compte formuler quelques observations préliminaires au sujet de la position des syndics appelants. Un examen plus détaillé suivra.

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30 The first preliminary observation is that Antwerp Bulkcarriers, N.V. was not placed in bankruptcy under the laws of Canada. The only proceedings before a Canadian bankruptcy court were for the recognition and implementation of the orders of the Belgian bankruptcy court. Part XIII of the *Bankruptcy and Insolvency Act* (the "Act"), entitled "International Insolvencies", was not yet in force at the time of these events. Nevertheless, Canadian bankruptcy courts have long exercised a jurisdiction to come to the aid of foreign bankruptcy courts where it has been in their power to do so. Part XIII put the stamp of parliamentary approval on an initiative supported by judges and scholarly practitioners, both before and after enactment of Part XIII: see *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165 (Ont. Ct. (Gen. Div.)), at p. 167; *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17 (Ont. Ct. (Gen. Div.)); *Roberts v. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218 (Q.B.), at pp. 224 and 226; *Re Walker* (1998), 5 C.B.R. (4th) 123 (Ont. Ct. (Gen. Div.)); *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.); and see generally J. D. Honsberger, "Canadian Recognition of Foreign Judicially Supervised Arrangements" (1990), 76 C.B.R. (N.S.) 204.

La première observation préliminaire est que la société Antwerp Bulkcarriers, N.V. n'a pas été mise en faillite sous le régime des lois du Canada. Les seules procédures engagées devant un tribunal de faillite canadien visaient à obtenir la reconnaissance et l'exécution des ordonnances du tribunal de faillite belge. La partie XIII de la *Loi sur la faillite et l'insolvabilité* (la « Loi »), intitulée « Insolvabilité en contexte international », n'était pas encore en vigueur à l'époque. Néanmoins, lorsqu'ils sont en mesure de le faire, les tribunaux de faillite canadiens exercent depuis longtemps leur compétence pour prêter concours aux tribunaux de faillite étrangers. La partie XIII constitue une approbation par le Parlement d'une initiative appuyée par les juges et les auteurs de doctrine avant et après l'adoption de cette partie de la Loi : voir *Olympia & York Developments Ltd. c. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165 (C. Ont. (Div. gén.)), p. 167; *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17 (C. Ont. (Div. gén.)); *Roberts c. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218 (B.R.), p. 224 et 226; *Re Walker* (1998), 5 C.B.R. (4th) 123 (C. Ont. (Div. gén.)); *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 (C.S. Ont.); voir également, de façon générale, J. D. Honsberger, « Canadian Recognition of Foreign Judicially Supervised Arrangements » (1990), 76 C.B.R. (N.S.) 204.

31 My second preliminary observation is that the bankruptcy courts in Belgium and Canada had (and have) a legitimate interest in the *in rem* action in the Federal Court. On May 9, 1996, when the Trustees obtained the order of recognition of the Belgian judgment, title to the M/V "Brussel", however heavily encumbered, was still registered in the name of the bankrupt. It is true that the market value of the Ship (ultimately sold for US$4.6 million) was a mere fraction of the first mortgage (about $68 million) held by the Belgian state bank, Société Nationale de Crédit à l'Industrie S.A. ("SNCI"). It is also true that there were maritime liens and statutory charges that ranked ahead of the first mortgage. The bankrupt company nevertheless retained legal title, and to that extent the Ship constituted part of the property of the bankrupt, at least as that term is understood in Canadian law: *Federal Business*

Ma deuxième observation préliminaire est que les tribunaux de faillite en Belgique et au Canada avaient (et ont toujours) un intérêt légitime dans l'action *in rem* intentée devant la Cour fédérale. Le 9 mai 1996, lorsque les syndics ont obtenu l'ordonnance reconnaissant le jugement belge, le titre de propriété du N/M « Brussel », si lourdement grevé fût-il, était toujours enregistré au nom de la faillie. Il est vrai que la valeur marchande du navire (finalement vendu pour 4 600 000 $US) ne représentait qu'une fraction de la première hypothèque (d'environ 68 000 000 $) détenue par la banque d'État belge, la Société Nationale de Crédit à l'Industrie S.A. (« SNCI »). Il est également vrai qu'il existait alors des privilèges maritimes et légaux ayant priorité de rang sur la première hypothèque. La société faillie conservait néanmoins le titre de propriété et, dans cette mesure, le navire

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*Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061.

Counsel for the respondent appeared to consider it dispositive of the appeal to characterize the issue before us as concerning "maritime law" as opposed to "bankruptcy law". The facts here present both aspects, and in my view, with respect, the issue before the Federal Court was one of finding the proper balance of relevant factors on the stay application as opposed to trying to preempt further debate with a "pith and substance" characterization of the nature of the proceeding.

Thirdly, a Canadian bankruptcy court has a responsibility to consider the interests of the litigants before it and other affected parties in this country as well as the desirability of international cooperation and other relevant circumstances. Its function is not simply to rubber stamp commands issuing from the foreign court of the primary bankruptcy. Thus the exigencies of international cooperation were significant to both the Federal Court and the Canadian bankruptcy court, but they were not a factor that necessarily trumped all other factors.

Fourthly, the Canadian bankruptcy court derives its authority from Canadian law. When called upon to lend assistance to foreign bankruptcy courts, Canadian law requires our courts to consider as *one* of the relevant circumstances the juridical advantage which those disadvantaged by deferral to the foreign court would enjoy in a Canadian court. I appreciate that over-emphasis on juridical advantage as a factor would lead to enthronement of the "Grab Rule" because claimants in the Canadian court will inevitably have a good reason why they do not wish to take their chances in the general bankruptcy in the court of the bankrupt's domicile. Nevertheless, all of the relevant factors must be weighed in a stay application and the nature and extent of juridical

faisait partie de ses biens, du moins selon l'interprétation de ce terme en droit canadien : *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061.

32 L'avocat de l'intimée paraissait croire que le pourvoi serait réglé si on considérait que la question qui nous est soumise relève du « droit maritime » au lieu du « droit de la faillite ». Les deux aspects sont présents en l'espèce et j'estime, en toute déférence, qu'il s'agissait pour la Cour fédérale de trouver le juste équilibre entre les facteurs pertinents quant à la demande de suspension et non pas de tenter d'éviter tout autre débat en déterminant la nature des procédures en fonction de leur « caractère véritable ».

33 Troisièmement, un tribunal de faillite canadien doit tenir compte des intérêts des parties qui plaident devant lui et des autres parties touchées au Canada, ainsi que de l'utilité d'une coopération internationale et d'autres circonstances pertinentes. Son rôle ne consiste pas simplement à approuver sans discussion les ordres du tribunal étranger saisi de la faillite principale. Ainsi, les exigences de la coopération internationale étaient un facteur important tant pour la Cour fédérale que pour le tribunal de faillite canadien, mais ce facteur n'éclipsait pas nécessairement tous les autres facteurs.

34 Quatrièmement, la compétence du tribunal de faillite canadien découle du droit canadien. Lorsqu'ils sont appelés à prêter leur concours à des tribunaux de faillite étrangers, nos tribunaux sont tenus, en vertu du droit canadien, de considérer comme étant *une* circonstance pertinente l'avantage juridique dont bénéficieraient devant un tribunal canadien ceux qui sont désavantagés par le recours à un tribunal étranger. Je suis conscient du fait qu'une insistance trop grande sur le facteur de l'avantage juridique mènerait à la consécration de la « règle de l'appropriation », étant donné que les réclamants devant le tribunal canadien auraient inévitablement une bonne raison de ne pas vouloir tenter leur chance dans la faillite générale devant le tribunal du domicile du failli. Toutefois, tous les

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advantage for the various parties was clearly an important factor to throw into the balance.

35 Fifthly, the public policy expressed in our own bankruptcy laws is a relevant consideration. Bankruptcy usually signals at least a temporary "cease fire" against the bankrupt's estate. However, if this had been a Canadian bankruptcy, the statutory stay of a creditor's action would have been of little practical relevance because s. 69.3 of the Act exempts from the statutory stay (with exceptions not relevant here) proceedings by secured creditors to realize on their security. Section 69.3(2)(*a*) would have authorized the Canadian bankruptcy court to order a postponement of no more than six months. The effect of the Canadian bankruptcy court's order in this case was a permanent stay of proceedings for realization of the security of the Ship in Canada.

36 I now turn to the more detailed submissions of the parties.

C. *Issues Raised by the Present Appeal*

37 It is common ground that ordinarily the Federal Court, Trial Division, would have jurisdiction to arrest the Ship, to entertain Holt's claim for debts incurred on the Ship's behalf, to assess the validity of Holt's claim to a maritime lien, to order the appraisal and sale of the Ship and to see the successful secured claimants paid out of the proceeds of sale.

38 The Trustees advance three broad submissions in support of their position that once the shipowner was declared bankrupt on April 5, 1996, the Federal Court was "bound to act in comity with the direction" given by the Belgian bankruptcy court, whose edicts were recognized and accepted by the Canadian bankruptcy court. Firstly, as already mentioned, they say that Canadian courts should follow a "universalist" rather than a "territorialist" approach to bankruptcy. Secondly, they say that a Canadian

facteurs pertinents doivent être soupesés dans le cas d'une demande de suspension, et la nature de même que l'étendue de l'avantage juridique pour les différentes parties constituaient nettement un facteur important qui devait être soupesé.

Cinquièmement, la politique générale énoncée dans nos lois sur la faillite est une considération pertinente. Habituellement, la faillite annonce au moins une suspension temporaire des recours contre l'actif du failli. Cependant, si la faillite était survenue au Canada, la suspension légale de l'action intentée par un créancier aurait été peu pertinente en pratique étant donné que l'art. 69.3 de la Loi soustrait à la suspension légale (sous réserve d'exceptions non applicables en l'espèce) les procédures engagées par les créanciers garantis en vue de réaliser leur garantie. L'alinéa 69.3(2)*a*) aurait permis au tribunal de faillite canadien d'ordonner un report maximum de six mois. En l'espèce, l'ordonnance du tribunal de faillite canadien a eu pour effet de suspendre de façon permanente au Canada les procédures de réalisation de la garantie du navire.

J'examinerai maintenant plus en détail les arguments des parties.

C. *Les questions soulevées par le présent pourvoi*

Nul ne conteste que la Section de première instance de la Cour fédérale aurait normalement compétence pour saisir le navire, examiner la réclamation de Holt relativement aux dettes contractées au nom du navire, déterminer la validité du privilège maritime invoqué par Holt, ordonner l'évaluation et la vente du navire et veiller à ce que les créanciers garantis ayant gain de cause soient payés sur le produit de la vente.

Les syndics avancent trois arguments généraux à l'appui de leur point de vue selon lequel, dès que le propriétaire du navire a été mis en faillite le 5 avril 1996, la Cour fédérale avait [TRADUCTION] « une obligation de courtoisie envers la directive » du tribunal de faillite belge, dont les ordres ont été reconnus et acceptés par le tribunal de faillite canadien. Premièrement, comme nous l'avons vu, les syndics soutiennent que les tribunaux canadiens devraient adopter une approche « universaliste » plutôt que

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court exercising admiralty jurisdiction (the Federal Court) must defer to or at least cooperate with (which in their eyes seems to amount to the same thing) the Canadian court exercising bankruptcy jurisdiction (the Quebec Superior Court). Thirdly, the Trustees say that the response of Canadian courts should be "uniform" by which they appear to mean the Federal Court should have acceded to the request of the Belgian court because the Quebec Superior Court sitting in Bankruptcy had already done so.

« territorialiste » en matière de faillite. Deuxièmement, ils affirment que le tribunal canadien ayant compétence en matière d'amirauté (à savoir la Cour fédérale) devrait s'en remettre au tribunal canadien ayant compétence en matière de faillite (à savoir la Cour supérieure du Québec) ou à tout le moins coopérer avec lui (ce qui à leurs yeux revient au même). Troisièmement, les syndics soutiennent que la réponse des tribunaux canadiens devrait être « uniforme » et, à cet égard, ils semblent vouloir dire que la Cour fédérale aurait dû faire droit à la demande du tribunal belge étant donné que la Cour supérieure du Québec siégeant en matière de faillite l'avait déjà fait.

39 In light of these preliminary observations, I think the Trustees' arguments may be conveniently addressed under the following headings:

À la lumière de ces observations préliminaires, les arguments des syndics peuvent, à mon sens, être commodément abordés sous les rubriques suivantes :

1. Did the respondent Holt possess a valid claim to a maritime lien under Canadian law against the M/V "Brussel" prior to the Belgian bankruptcy of the owners on April 5, 1996?

2. Did Holt thereby enjoy a juridical advantage in Canada that would be in jeopardy if the Federal Court proceedings were stayed in deference to the Belgian bankruptcy court?

3. Did the Federal Court err in treating Holt as a "secured creditor" as that term is understood in Canadian bankruptcy law?

4. Did the Belgian bankruptcy of April 5, 1996 give the Belgian Trustees a valid claim to the Ship?

5. Did the Federal Court of Canada lose jurisdiction to proceed as a result of the various orders of the Quebec Superior Court sitting in Bankruptcy?

6. Even if the Federal Court retained jurisdiction, ought it nevertheless to have deferred to the Belgian bankruptcy court on the basis of "international comity" and the need for an

1. L'intimée Holt pouvait-elle, en droit canadien, invoquer validement un privilège maritime sur le N/M « Brussel » avant la faillite des propriétaires survenue en Belgique le 5 avril 1996?

2. Holt bénéficiait-elle au Canada d'un avantage juridique qui serait compromis si les procédures engagées devant la Cour fédérale étaient suspendues par déférence pour le tribunal de faillite belge?

3. La Cour fédérale a-t-elle commis une erreur en traitant Holt comme un « créancier garanti » selon l'interprétation de cette expression en droit canadien de la faillite?

4. La faillite survenue en Belgique le 5 avril 1996 a-t-elle conféré aux syndics belges un droit de réclamation valide à l'égard du navire?

5. La Cour fédérale du Canada a-t-elle perdu compétence à la suite des diverses ordonnances délivrées par la Cour supérieure du Québec siégeant en matière de faillite?

6. Même si la Cour fédérale avait conservé compétence, aurait-elle dû néanmoins s'en remettre au tribunal de faillite belge au nom de la « courtoisie internationale » et en raison de la nécessité d'une

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integrated "universalist" approach to the bankruptcy?

7. In light of the foregoing, did the Federal Court err in the exercise of its discretion to deny the Trustees' application for a stay of proceedings?

40 I will address each of these issues in turn.

1. Did the Respondent Holt Possess a Valid Claim to a Maritime Lien Under Canadian Law Against the M/V "Brussel" Prior to the Belgian Bankruptcy of the Owners of April 5, 1996?

41 A maritime lien validly created under foreign law will be recognized and given the same priority in Canada as would be given to a maritime lien created in Canada under Canadian maritime law "unless opposed to some rule of domestic policy or procedure which prevents the recognition of the right": *The Strandhill v. Walter W. Hodder Co.*, [1926] S.C.R. 680, *per* Newcombe J., at p. 685. The theory is that "[i]f a maritime lien exists it cannot be shaken off by changing the location of the *res*": *Todd Shipyards Corp. v. Altema Compania Maritima S.A.*, [1974] S.C.R. 1248, at p. 1252.

42 Under U.S. law, as stated, the respondent Holt acquired a maritime lien against the Ship at the moment when services were rendered in U.S. ports. All such services were rendered prior to March 30, 1996. The Ship thus arrived in Canadian waters burdened with a maritime lien. A maritime lien would not have arisen under Canadian law for similar stevedoring services rendered to a ship at a port in Canada, but the proper law giving rise to the debt was U.S. law, not Canadian law.

43 It is Canadian law, once it recognizes the right, that grants the remedy and sets the priorities. At Canadian law, a maritime lien ranks ahead of a ship's mortgage (i.e., the $68 million claim of SNCI). See *Todd Shipyards*, *supra*, at p. 1259, and

approche « universaliste » intégrée en matière de faillite?

7. À la lumière de ce qui précède, la Cour fédérale a-t-elle commis une erreur dans l'exercice de son pouvoir discrétionnaire de refuser la demande de suspension des procédures présentée par les syndics?

J'examinerai ces questions l'une après l'autre.

1. L'intimée Holt pouvait-elle, en droit canadien, invoquer validement un privilège maritime sur le N/M « Brussel » avant la faillite des propriétaires survenue en Belgique le 5 avril 1996?

Un privilège maritime validement créé sous le régime d'une loi étrangère est reconnu et se voit accorder, au Canada, la même priorité qu'un privilège maritime créé au Canada sous le régime du droit maritime canadien, [TRADUCTION] « à moins qu'il n'aille à l'encontre d'une règle quelconque de politique ou de procédure intérieure qui en empêche la reconnaissance » : *The Strandhill c. Walter W. Hodder Co.*, [1926] R.C.S. 680, le juge Newcombe, p. 685. La théorie veut que « [l]orsqu'un privilège maritime existe, on ne [puisse] s'en débarrasser en changeant la chose de place » : *Todd Shipyards Corp. c. Altema Compania Maritima S.A.*, [1974] R.C.S. 1248, p. 1252.

Rappelons qu'en vertu du droit américain, l'intimée Holt a acquis un privilège maritime sur le navire lorsqu'elle a fourni ses services dans des ports américains. Ces services ont tous été fournis avant le 30 mars 1996. Le navire est ainsi arrivé dans les eaux canadiennes grevé d'un privilège maritime. En droit canadien, un tel privilège n'aurait pas pris naissance à la suite de services d'acconage semblables fournis à un navire se trouvant dans un port au Canada, mais le droit qui avait donné naissance à la dette était le droit américain et non le droit canadien.

Une fois qu'il reconnaît l'existence du droit en cause, le droit canadien accorde le recours et établit les priorités. En droit canadien, le privilège maritime a priorité de rang sur l'hypothèque qui grève un navire (soit la créance de 68 000 000 $

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*Marlex Petroleum Inc. v. Har Rai (The)*, [1987] 1 S.C.R. 57, aff'g [1984] 2 F.C. 345 (C.A.).

The appellant Trustees argue that a "universalist" approach to trans-border bankruptcies is a domestic policy opposable to recognition of the U.S. maritime lien in this case within the meaning of the *Strandhill* exception, but I do not think so. Newcombe J. was looking to something offensive about the origin of the right being asserted (as was the case in *Laane and Baltser*, *supra*). There is nothing offensive about the origin of Holt's claim. If stevedoring services had not been rendered, the Ship could not have unloaded its cargo at Gloucester City, New Jersey. If Holt is to be defeated by considerations of "universalism", it will be as a result of a balancing of relevant factors under s. 50 of the *Federal Court Act* which authorizes the court, in its discretion, to stay its own proceedings.

In my view, on the existing state of the law, Holt was entitled to have its maritime lien recognized as such by the Federal Court in these proceedings.

2. Did Holt Thereby Enjoy a Juridical Advantage in Canada that Would Be in Jeopardy if the Federal Court Proceedings Were Stayed in Deference to the Belgian Bankruptcy Court?

There were clear advantages to Holt in having its claim disposed of in Canada. Firstly, at the time the Trustees intervened, Holt's *in rem* action was undefended and speeding to a successful conclusion. According to the anticipated timetable, its claim would be paid in full, plus expenses, within a matter of months. The Belgian bankruptcy was still in the early stages of organization.

Secondly, and more importantly, it seems clear that Holt's claim would not enjoy the same priority in Belgium as it enjoyed under Canadian maritime law.

de la SNCI). Voir *Todd Shipyards*, précité, p. 1259, et *Marlex Petroleum Inc. c. Har Rai (Le)*, [1987] 1 R.C.S. 57, conf. [1984] 2 C.F. 345 (C.A.).

44 Les syndics appelants allèguent qu'en l'espèce une approche « universaliste » en matière de faillites transfrontalières est une politique intérieure opposable à la reconnaissance du privilège maritime américain, au sens de l'exception prévue dans l'arrêt *Strandhill*, mais je ne crois pas que ce soit le cas. Le juge Newcombe exigeait que l'origine du droit revendiqué ait quelque chose d'inconvenant (comme c'était le cas dans l'affaire *Laane and Baltser*, précitée). L'origine de la réclamation de Holt n'a rien d'inconvenant. Si les services d'acconage n'avaient pas été fournis, la cargaison du navire n'aurait pas pu être déchargée à Gloucester City, au New Jersey. Si Holt doit échouer pour des considérations d'« universalisme », ce sera à la suite d'une évaluation de facteurs pertinents fondée sur l'art. 50 de la *Loi sur la Cour fédérale*, qui donne à la cour le pouvoir discrétionnaire de suspendre ses propres procédures.

45 À mon avis, compte tenu de l'état actuel du droit, Holt avait droit en l'espèce à la reconnaissance de son privilège maritime par la Cour fédérale.

2. Holt bénéficiait-elle au Canada d'un avantage juridique qui serait compromis si les procédures engagées devant la Cour fédérale étaient suspendues par déférence pour le tribunal de faillite belge?

46 Holt avait manifestement avantage à ce que sa réclamation soit tranchée au Canada. Premièrement, au moment de l'intervention des syndics, l'action *in rem* de Holt n'était pas contestée et se dirigeait rapidement vers une conclusion favorable. Selon l'échéancier prévu, sa réclamation, incluant les frais, serait entièrement acquittée en quelques mois. La faillite belge en était encore au stade initial de l'organisation.

47 Deuxièmement, et qui plus est, il semble évident que la réclamation de Holt n'aurait pas la même priorité en Belgique que celle dont elle bénéficiait en droit maritime canadien.

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48 In an affidavit sworn in this action on June 5, 1996, the appellant De Roy deposed that the applicable Belgian law "prohibits the arrest or execution by creditors of the debtor's property to enforce preferential/lien claims" (para. 26). De Roy further deposed that Belgian maritime law "gives specific priorities to certain types of claims" (para. 42) but declined to state whether such "priority" claims included that of Holt and other maritime lien holders. In the hearing before Guthrie J. of the Canadian bankruptcy court, M^e^ Édouard Baudry, an experienced admiralty law practitioner arguing for the intervener, SNCI, who supported the appellant Trustees, expressed the common understanding of counsel that Holt would likely be disadvantaged if required to take its claim to Belgium:

Me ÉDOUARD BAUDRY

I would add, though, as my friend will no doubt tell you, that the possibility of an American maritime lien being recognized by Belgian Court is a . . .

THE COURT

Being maintained by the Antwerp Court is slimmer than in here?

Me ÉDOUARD BAUDRY

. . . is a lot slimmer than here.

THE COURT

I can understand that.

Me ÉDOUARD BAUDRY

I think we all . . .

THE COURT

I think that is one of the reasons, if not the major reason, why we're here.

49 Further, according to endnote 5 of the judgment of the Federal Court of Appeal, counsel for both parties conceded on the appeal that it was "unlikely that the respondent's *in rem* rights could subsist in one form or another under Belgian bankruptcy laws" (emphasis added).

Dans un affidavit daté du 5 juin 1996 et produit dans le cadre de la présente action, l'appelant De Roy a déclaré que le droit belge [TRADUCTION] « empêche la saisie des biens du débiteur par les créanciers afin de permettre l'exécution des créances prioritaires ou privilégiées » (par. 26). Monsieur De Roy a en outre déclaré que le droit maritime belge [TRADUCTION] « accorde des priorités particulières à certains types de réclamation » (par. 42), mais il a refusé de dire si la réclamation de Holt et d'autres titulaires de privilège maritime faisait partie de ces réclamations prioritaires. Lors de l'audience devant le juge Guthrie du tribunal de faillite canadien, M^e^ Édouard Baudry, avocat expérimenté en droit maritime, plaidant pour l'intervenante SNCI qui appuyait les syndics appelants, a déclaré que les avocats s'entendaient pour dire que Holt serait probablement désavantagée si elle devait présenter sa réclamation en Belgique :

[TRADUCTION] M^e^ ÉDOUARD BAUDRY

J'ajouterais cependant, comme mon collègue ne manquera pas de vous le dire, que la possibilité qu'un privilège maritime américain soit reconnu par le tribunal belge est . . .

LA COUR

Qu'il soit maintenu par le tribunal d'Anvers, est plus mince qu'elle ne l'est ici?

Me ÉDOUARD BAUDRY

. . . beaucoup plus mince qu'ici.

LA COUR

Je peux comprendre cela.

Me ÉDOUARD BAUDRY

Je pense que nous sommes tous . . .

LA COUR

Je pense que c'est l'une des raisons, sinon la raison principale, de notre présence ici.

En outre, selon la cinquième note de renvoi du jugement de la Cour d'appel fédérale, les avocats des deux parties ont admis en appel qu'il était « peu probable que les droits *in rem* de l'intimée puissent subsister sous une forme ou une autre sous le régime des lois belges sur la faillite » (je souligne).

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While the onus was on the appellant Trustees to establish the grounds for a stay of proceedings, it was up to Holt to prove Belgian law if Holt wished to rely on any difference between the expected treatment of its claim under Belgian law as opposed to Canadian law. The trial judge noted the absence of evidence on this point. However, as the parties were apparently in agreement that Belgian law would not recognize Holt's maritime lien both before Guthrie J. in the Canadian bankruptcy court, and subsequently in the present case before the Federal Court of Appeal, I do not think we should interfere with the Federal Court of Appeal on this factual point. As Guthrie J. pointed out, the reason "we're here" is that Holt's claim enjoys a juridical advantage in the Federal Court of Canada that it would not command in the Belgian bankruptcy court.

50 Même s'il incombait aux syndics appelants d'établir les motifs justifiant une suspension des procédures, il appartenait à Holt de faire la preuve du droit belge si elle souhaitait invoquer une différence quant à la façon dont le droit belge et le droit canadien traiteraient sa réclamation. Le juge de première instance a souligné l'absence d'élément de preuve sur ce point. Cependant, comme les parties paraissent avoir convenu, devant le juge Guthrie du tribunal de faillite canadien et ensuite devant la Cour d'appel fédérale, que le droit belge ne reconnaîtrait pas le privilège maritime de Holt, j'estime que nous ne devrions pas modifier la décision de la Cour d'appel fédérale sur cette question de fait. Comme le juge Guthrie l'a fait remarquer, la raison [TRADUCTION] « de notre présence ici » est que la réclamation de Holt bénéficie devant la Cour fédérale du Canada d'un avantage juridique dont elle ne bénéficierait pas devant le tribunal de faillite belge.

3. Did the Federal Court Err in Treating Holt as a "Secured Creditor" as that Term is Understood in Canadian Bankruptcy Law?

3. La Cour fédérale a-t-elle commis une erreur en traitant Holt comme un « créancier garanti » selon l'interprétation de cette expression en droit canadien de la faillite?

Canadian bankruptcy law takes an expansive view of who is a secured creditor, as confirmed by the relevant provisions in the Act. If Antwerp Bulkcarriers, N.V. had declared bankruptcy in Canada, there is no doubt that Holt would be considered "a person holding a . . . lien . . . against the property of the debtor . . . as security for a debt due" within the definition of "secured creditor" in s. 2 of the Act. Once the Federal Court had determined as a matter of Canadian maritime law that Holt's claim was secured by a maritime lien on the Ship itself, the bankruptcy court would be bound by that determination: *Riordon Co. v. Danforth Co.*, [1923] S.C.R. 319.

51 Le droit canadien de la faillite a une conception large du créancier garanti, comme le confirment les dispositions pertinentes de la Loi. Si Antwerp Bulkcarriers, N.V. avait fait faillite au Canada, nul doute que Holt aurait été considérée comme une « [p]ersonne détenant [. . .] un privilège sur [. . .] les biens du débiteur [. . .] à titre de garantie d'une dette échue », selon la définition de « créancier garanti » figurant à l'art. 2 de la Loi. Une fois que la Cour fédérale avait décidé que la réclamation de Holt était, en droit maritime canadien, garantie par un privilège maritime sur le navire lui-même, le tribunal de faillite était lié par cette décision : *Riordon Co. c. Danforth Co.*, [1923] R.C.S. 319.

If this were a Canadian bankruptcy, Holt would have been entitled to realize on its security irrespective of the bankruptcy. As Gonthier J. said in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 9, "the entire scheme of distribution is '[s]ubject to the rights of secured creditors'". The opening words of s. 136

52 Si la faillite était survenue au Canada, Holt aurait eu le droit de réaliser sa garantie indépendamment de la faillite. Comme le juge Gonthier l'a affirmé dans *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 9, « l'ensemble du plan de répartition est appliqué "[s]ous réserve des droits des créanciers garantis" ».

(under the heading "Scheme of Distribution") establish the priority of claims against the bankrupt's estate subject always "to the rights of secured creditors". L. W. Houlden and G. B. Morawetz state that "[t]he policy of the Act in the case of bankruptcy is not to interfere with secured creditors except in so far as may be necessary to protect the estate as to any surplus on the assets covered by the security" (*The 2001 Annotated Bankruptcy and Insolvency Act* (2000), at p. 346). See also: L. M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" (1999), 84 *Cornell L. Rev.* 696.

53 I appreciate, of course, that "universalism" will not work if every jurisdiction only defers to the law of the primary bankruptcy where that law coincides precisely with the domestic law of the deferring court. The fact remains, however, that Canadian public policy, expressed through the Act, strongly supports the rights of claimants whom we would regard as secured creditors. Our law considers it in the interests of commercial activity generally that secured rights be protected. It seems to me that MacKay J. correctly regarded Holt as a "secured creditor" in bankruptcy terms, and in the exercise of his discretion under s. 50 of the *Federal Court Act*, he was entirely justified in putting considerable weight on that factor.

4. Did the Belgian Bankruptcy of April 5, 1996 Give the Belgian Trustees a Valid Claim to the Ship?

54 Under the Belgian bankruptcy court's order of April 5, 1996, the Trustees were given the duty and power to take possession of the assets of the bankrupt wherever located. At that stage, the Ship was no longer in the possession of the bankrupt shipowner. It was in the possession of the Marshal of the Federal Court at Halifax and subject to further orders of that court.

Le préambule de l'art. 136 (sous la rubrique « Plan de répartition ») établit l'ordre de priorité des créances grevant l'actif du failli, toujours sous réserve « des droits des créanciers garantis ». Selon L. W. Houlden et G. B. Morawetz, [TRADUCTION] « [l]a politique de la loi en matière de faillite est de ne pas faire obstacle aux créanciers garantis sauf dans la mesure où il peut être nécessaire de protéger l'actif quant à tout excédent sur les biens affectés à la garantie » (*The 2001 Annotated Bankruptcy and Insolvency Act* (2000), p. 346). Voir également : L. M. LoPucki, « Cooperation in International Bankruptcy : A Post-Universalist Approach » (1999), 84 *Cornell L. Rev.* 696.

Certes, j'estime que « l'universalisme » ne fonctionnera pas si un tribunal s'en remet au droit en vigueur dans le ressort où survient la faillite principale uniquement lorsque ce droit coïncide exactement avec le droit en vigueur dans le ressort où est situé le tribunal en question. Il reste cependant que la politique générale du Canada, énoncée dans la Loi, est très favorable aux droits des réclamants que nous considérerions comme des créanciers garantis. Notre droit considère qu'il est généralement dans l'intérêt de l'activité commerciale que les droits garantis soient protégés. Il me semble que le juge MacKay a eu raison de considérer Holt comme un « créancier garanti » en matière de faillite. Ainsi, lorsqu'il a exercé le pouvoir discrétionnaire que lui conférait l'art. 50 de la *Loi sur la Cour fédérale*, le juge MacKay était tout à fait justifié d'accorder une importance considérable à ce facteur.

4. La faillite survenue en Belgique le 5 avril 1996 a-t-elle conféré aux syndics belges un droit de réclamation valide à l'égard du navire?

En vertu de l'ordonnance du tribunal de faillite belge datée du 5 avril 1996, les syndics se sont vu attribuer l'obligation et le pouvoir de prendre possession des éléments d'actif de la faillie où qu'ils soient. Dès lors, le navire n'était plus en la possession de son propriétaire failli. Il était en la possession du prévôt de la Cour fédérale à Halifax et était assujetti à d'autres ordonnances de ce tribunal.

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55 In Canada, the bankruptcy order pronounced by the court of the domicile operated as an assignment by operation of law of the moveable assets of the bankrupt shipowner located in Canada, including its interest in the M/V "Brussel", but this assignment is subject to any prior charges upon it recognized by *Canadian* law (J.-G. Castel, *Canadian Conflict of Laws* (4th ed. 1997), at pp. 564-65).

56 In this respect, our conflict of laws rule is the same as the English rule set out by the editors of *Dicey and Morris on the Conflict of Laws* (13th ed. 2000), vol. 2, at p. 1184:

> The general principle of English law is that bankruptcy, or any proceeding in the nature of bankruptcy, in a foreign country whose courts have jurisdiction over a debtor operates as an assignment to the trustee, assignees, curators, syndics or others, who under the law of that country are entitled to administer his property, of all his movables in England, if that is its effect under the foreign law.

See also I. F. Fletcher, *Insolvency in Private International Law* (1999), at pp. 61-62.

As in Canada, the assignment by operation of law of the debtor's property is subject to a number of limitations, one of which as noted is that the property passes subject to existing charges recognized under English law:

> The property in England passes subject to any existing charges upon it recognised by the law of England, even if these charges would be postponed under the law of the place of bankruptcy to the claim of the creditors, and even if under the English bankruptcy the charges would be defeated by the title of the trustee in bankruptcy.

(*Dicey and Morris on the Conflict of Laws*, *supra*, at pp. 1184-85)

57 An illustration of the proposition that the trustee cannot obtain more of an interest than it was in the power of the debtor to assign is in *Galbraith v. Grimshaw*, [1910] A.C. 508 (H.L.). In that case, creditors had obtained judgment in Scotland against a Scottish company and, having had the judgment extended to England, served a garnishee order

Au Canada, l'ordonnance de faillite délivrée par le tribunal du domicile a eu l'effet d'une cession légale des biens meubles du propriétaire failli du navire qui sont situés au Canada, y compris son droit sur le N/M « Brussel », mais cette cession est faite sous réserve de toutes charges antérieures qui peuvent grever les biens en vertu du droit *canadien* (J.-G. Castel, *Canadian Conflict of Laws* (4e éd. 1997), p. 564-565).

À cet égard, notre règle de conflit des lois est identique à la règle anglaise énoncée par les éditeurs de *Dicey and Morris on the Conflict of Laws* (13e éd. 2000), vol. 2, p. 1184 :

> [TRADUCTION] Le principe général du droit anglais veut que la faillite ou toute autre procédure de même nature, survenue dans un pays étranger où les tribunaux ont compétence à l'égard d'un débiteur, agisse comme une cession de tous ses biens meubles situés en Angleterre, en faveur du syndic, des cessionnaires, des curateurs ou des autres personnes qui, suivant le droit en vigueur dans ce pays, ont le droit d'administrer ses biens, si c'est là l'effet du droit étranger.

Voir également I. F. Fletcher, *Insolvency in Private International Law* (1999), p. 61-62.

Comme c'est le cas au Canada, la cession légale des biens du débiteur est sujette à certaines restrictions dont l'une, comme nous l'avons vu, veut que les biens soient transmis sous réserve des charges existantes reconnues par le droit anglais :

> [TRADUCTION] Les biens situés en Angleterre sont transmis sous réserve de toute charge qui les grève en vertu du droit anglais, même si cette charge était subordonnée, en vertu de la loi du lieu de la faillite, à la réclamation des créanciers, et même si en vertu de la faillite anglaise, elle était annulée par le titre du syndic de faillite.

(*Dicey and Morris on the Conflict of Laws*, *op. cit.*, p. 1184-1185)

57 On trouve, dans l'arrêt *Galbraith c. Grimshaw*, [1910] A.C. 508 (H.L.), un exemple de la proposition selon laquelle le syndic ne peut obtenir plus de droits que ceux qui pouvaient être cédés par le débiteur. Dans cette affaire, les créanciers avaient eu gain de cause en Écosse contre une société écossaise et, après avoir obtenu que le jugement soit

on an English firm that was indebted to the Scottish debtor. Two weeks later, the Scottish debtor became bankrupt. The trustee sought to take possession of the garnisheed debt, but was refused by the House of Lords on the principle that the trustee "could not have it unless the bankrupt could himself have assigned it" (p. 511). Accordingly, the trustee was not entitled to receive the debt free of the garnishee order "because the bankrupt could only have assigned it on November 12, subject to the garnishee order" (p. 511). In *Anantapadmanabhaswami v. Official Receiver of Secunderabad*, [1933] A.C. 394, the Privy Council extended the *Galbraith* analysis to debts that were the subject of collection proceedings in progress provided that at the date of the bankruptcy the bankrupt could not have assigned the debt clear of the plaintiff's claim.

exécutoire en Angleterre, ils avaient signifié une ordonnance de saisie-arrêt à une entreprise anglaise endettée envers le débiteur écossais. Deux semaines plus tard, le débiteur écossais faisait faillite. Le syndic a cherché à prendre possession de la créance saisie, mais s'est heurté au refus de la Chambre des lords qui s'est fondée sur le principe selon lequel le syndic [TRADUCTION] « ne pourrait l'obtenir que si le failli lui-même avait pu la céder » (p. 511). En conséquence, le syndic n'avait pas le droit d'obtenir la créance exempte de l'ordonnance de saisie-arrêt [TRADUCTION] « parce que le failli n'aurait pu la céder que le 12 novembre, sous réserve de l'ordonnance de saisie-arrêt » (p. 511). Dans *Anantapadmanabhaswami c. Official Receiver of Secunderabad*, [1933] A.C. 394, le Conseil privé a étendu l'analyse faite dans *Galbraith* aux créances qui faisaient l'objet d'une procédure de recouvrement pourvu que, à la date de la faillite, le failli n'ait pas été en mesure de céder la créance exempte de la réclamation du demandeur.

58 While such a rule may be modified by statute, it has not been so modified in Canada in any way relevant to the question of the foreign bankruptcy before us.

Bien qu'une telle règle puisse être modifiée par un texte législatif, elle n'a subi au Canada aucune modification pertinente quant à la question de la faillite étrangère dont nous sommes saisis.

59 I conclude therefore that on April 5, 1996, the Belgian Trustees acquired under Canadian law the interest of the bankrupt shipowner in the M/V "Brussel" but that its interest was and remained subject to the prior claim of the secured creditors, including the maritime lienholders, who were seeking relief in the Federal Court, Trial Division.

Je conclus donc que, le 5 avril 1996, les syndics belges ont, en vertu du droit canadien, acquis le droit que le propriétaire failli du navire avait sur le N/M « Brussel » mais que ce droit était et demeurait assujetti à la réclamation antérieure des créanciers garantis, y compris les titulaires du privilège maritime qui cherchaient à obtenir réparation devant la Section de première instance de la Cour fédérale.

5. Did the Federal Court of Canada Lose Jurisdiction to Proceed as a Result of the Various Orders of the Quebec Superior Court Sitting in Bankruptcy?

5. La Cour fédérale du Canada a-t-elle perdu compétence à la suite des diverses ordonnances délivrées par la Cour supérieure du Québec siégeant en matière de faillite?

60 The Trustees argue that once the Belgian bankruptcy court issued its order on April 5, 1996, or, at the very latest, when the request for assistance was accepted by the Canadian bankruptcy court, the matter before MacKay J. became one of bankruptcy and thus within the *exclusive* jurisdiction of the Canadian bankruptcy court. I have already rejected the Trustees' notion that once a foreign bankruptcy

Les syndics font valoir qu'une fois que le tribunal de faillite belge a délivré l'ordonnance sollicitant le concours des tribunaux canadiens le 5 avril 1996 ou, au plus tard, lorsque le tribunal de faillite canadien a accueilli cette requête, l'affaire soumise au juge MacKay est devenue une affaire de faillite relevant de la compétence *exclusive* du tribunal de faillite canadien. J'ai déjà rejeté l'idée des syndics

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court is activated it necessarily occupies the field in relation to matters pertaining to the bankrupt in this country. I have also rejected the idea that "international coordination" necessitates the rubber stamping of orders made by the foreign bankruptcy court.

que, dès qu'un tribunal de faillite étranger est saisi d'un dossier, il a nécessairement compétence exclusive sur les questions concernant le failli dans notre pays. J'ai également rejeté l'idée que la « coordination internationale » exige l'approbation sans discussion des ordonnances délivrées par le tribunal de faillite étranger.

The appellant Trustees nevertheless contend that the Federal Court lost jurisdiction because of the combined operation of s. 183(1) of the *Bankruptcy and Insolvency Act* and s. 17(6) of the *Federal Court Act*. Section 183(1) reads as follows:

Les syndics appelants affirment néanmoins que la Cour fédérale a perdu compétence en raison de l'effet conjugué du par. 183(1) de la *Loi sur la faillite et l'insolvabilité* et du par. 17(6) de la *Loi sur la Cour fédérale*. Le paragraphe 183(1) se lit ainsi :

**183.** (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

**183.** (1) Les tribunaux suivants possèdent la compétence en droit et en équité qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

. . .

(*b*) in the Province of Quebec, the Superior Court;

*b*) dans la province de Québec, la Cour supérieure;

(The Trustees commenced their proceedings in Montreal, Quebec, because that was the place of business of the shipowner's agents in Canada.)

(Les syndics ont engagé leurs procédures à Montréal (Québec), parce que c'était le lieu d'affaires des représentants du propriétaire du navire au Canada.)

Section 17(6) of the *Federal Court Act* provides:

Le paragraphe 17(6) de la *Loi sur la Cour fédérale* prévoit ce qui suit :

**17.** . . .

(6) Where an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Trial Division has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on the Court.

**17.** . . .

(6) La Section de première instance n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

The Trustees do not contend that the arrest of the Ship and the adjudication of claims under maritime law are bankruptcy matters. Their position is that the bankruptcy order of the Belgian bankruptcy court, and the follow-up orders of the Canadian bankruptcy court, transformed a maritime matter into one of bankruptcy. The corollary to this argument is that the Federal Court, which has no

Les syndics ne prétendent pas que la saisie du navire et le règlement des réclamations en vertu du droit maritime sont des questions de faillite. Ils estiment que l'ordonnance de faillite délivrée par le tribunal de faillite belge et les ordonnances complémentaires du tribunal de faillite canadien ont transformé une question de droit maritime en une question de faillite. Cet argument a pour corollaire que

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bankruptcy jurisdiction, thereby lost subject-matter jurisdiction in the case.

la Cour fédérale, qui n'a pas compétence en matière de faillite, a de ce fait perdu sa compétence *ratione materiae* dans l'affaire.

64 In my view MacKay J. was not exercising original, ancillary or auxiliary jurisdiction in bankruptcy. If he had, he would have been without jurisdiction and it would not be necessary to have recourse to s. 17(6) of the *Federal Court Act*. This is because s. 17(6) presupposes that the Federal Court *would* have jurisdiction but for that subsection. In *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, at p. 766, this Court concluded that the Federal Court has jurisdiction only if certain conditions are satisfied, including a statutory grant of jurisdiction by the federal Parliament. There has been no such statutory grant of bankruptcy jurisdiction to the Federal Court.

À mon avis, le juge MacKay n'exerçait pas une juridiction de première instance, auxiliaire ou subordonnée en matière de faillite. Si cela avait été le cas, il n'aurait pas eu compétence et il ne serait pas nécessaire de recourir au par. 17(6) de la *Loi sur la Cour fédérale*, parce que ce paragraphe présuppose que la Cour fédérale *serait* a priori compétente. Dans l'arrêt *ITO—International Terminal Operators Ltd. c. Miida Electronics Inc.*, [1986] 1 R.C.S. 752, p. 766, notre Cour a conclu que la Cour fédérale a compétence seulement si certaines conditions sont remplies, notamment s'il y a attribution de compétence par une loi du Parlement fédéral. La Cour fédérale ne s'est pas vu attribuer pareille compétence en matière de faillite.

65 The subject matter of the dispute before MacKay J. was the maritime lien asserted by Holt and the claims of other creditors to security in the Ship. He was dealing with *in rem* claims against the Ship, not *in personam* claims against the shipowner. It was apparent from the SNCI's intervention that its mortgage claim of $68 million would, if allowed, swallow whatever funds might be left after the claims of the maritime lienholders had been satisfied. There was therefore no realistic possibility of any residual funds to which the Trustees could properly lay claim.

Le litige soumis au juge MacKay concernait le privilège maritime invoqué par Holt ainsi que les réclamations par d'autres créanciers d'une garantie sur le navire. Le juge MacKay était saisi de réclamations *in rem* contre le navire et non pas de réclamations *in personam* contre le propriétaire du navire. Il ressortait de l'intervention de la SNCI que sa créance hypothécaire de 68 000 000 $ engloutirait, si on y faisait droit, tous les fonds qui pourraient rester après l'acquittement des réclamations des titulaires de privilège maritime. Il n'y avait donc aucune possibilité réaliste qu'il reste des fonds auxquels les syndics pourraient régulièrement prétendre.

66 The bankruptcy was certainly not irrelevant to the Federal Court proceedings. The Trustees rightly demanded (and were accorded) rights of participation in the proceedings to protect the interest of the bankrupt shipowner. There was a continuing bankruptcy aspect throughout the Federal Court proceedings after April 5, 1996 which MacKay J. acknowledged in his various orders. Nevertheless, having ruled that he would recognize Holt's security interest as a matter of maritime law, and having regard to the priority accorded to secured creditors in the order of the Canadian bankruptcy court dated June

La faillite n'était certainement pas dépourvue de pertinence dans le cadre des procédures engagées devant la Cour fédérale. Les syndics ont à bon droit demandé (et obtenu) le droit de participer aux procédures afin de protéger les intérêts du propriétaire failli du navire. Après le 5 avril 1996, les procédures devant la Cour fédérale ont comporté un aspect « faillite » dont le juge MacKay a tenu compte dans ses diverses ordonnances. Néanmoins, après avoir décidé de reconnaître la garantie de Holt sur le plan du droit maritime et avoir tenu compte de la priorité accordée aux créanciers garantis dans l'ordonnance

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28, 1996, he rightly concluded that there was no jurisdictional barrier to the Federal Court continuing to adjudicate Holt's *in rem* action against the Ship.

6. Even If the Federal Court Retained Jurisdiction, Ought It Nevertheless to Have Deferred to the Belgian Bankruptcy Court on the Basis of "International Comity" and the Need for an Integrated "Universalist" Approach to the Bankruptcy?

I should first of all address the issue of "international comity" as it pertains to the present appeal and then move on to consider some of the more specific approaches that have been devised to solve problems arising from international bankruptcies. I will then outline what I believe is the preferred approach in cases of this kind.

(a) *The Role of International Comity*

In *Zingre v. The Queen*, [1981] 2 S.C.R. 392, Dickson J. (as he then was) commented at p. 401 that "the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect".

Subsequently, in *Spencer v. The Queen*, [1985] 2 S.C.R. 278, at p. 283, Estey J. accepted as accurate the following definition of international comity:

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws: *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-64.

The Canadian bankruptcy court in this case did not have a monopoly in the determination of what level of "deference and respect" was owed to the Belgian bankruptcy court. Within its own

du tribunal de faillite canadien en date du 28 juin 1996, il a conclu à juste titre qu'aucune entrave juridictionnelle n'empêchait la Cour fédérale de continuer d'instruire l'action *in rem* de Holt contre le navire.

6. Même si la Cour fédérale avait conservé compétence, aurait-elle dû néanmoins s'en remettre au tribunal de faillite belge au nom de la « courtoisie internationale » et en raison de la nécessité d'une approche « universaliste » intégrée en matière de faillite?

67 Je vais examiner d'abord la question de la « courtoisie internationale » qui s'applique au présent pourvoi. Par la suite, j'analyserai certaines approches plus particulières qui ont été conçues pour régler les problèmes résultant des faillites internationales. Je vais enfin exposer l'approche qui, selon moi, doit être privilégiée en pareils cas.

a) *Le rôle de la courtoisie internationale*

68 Dans l'arrêt *Zingre c. La Reine*, [1981] 2 R.C.S. 392, p. 401, le juge Dickson (plus tard Juge en chef) affirme que « les tribunaux d'un ressort donneront effet aux lois et aux décisions judiciaires d'un autre, non parce qu'ils y sont tenus, mais par déférence et respect mutuels ».

69 Subséquemment, dans l'arrêt *Spencer c. La Reine*, [1985] 2 R.C.S. 278, p. 283, le juge Estey reconnaît la justesse de la définition suivante de la courtoisie internationale :

> [TRADUCTION] La « courtoisie » au sens juridique n'est ni une question d'obligation absolue d'une part ni de simple politesse et bonne volonté de l'autre. Mais c'est la reconnaissance qu'une nation accorde sur son territoire aux actes législatifs, exécutifs ou judiciaires d'une autre nation, compte tenu à la fois des obligations et des convenances internationales et des droits de ses propres citoyens ou des autres personnes qui sont sous la protection de ses lois : *Hilton v. Guyot*, 159 U.S. 113 (1895), aux pp. 163 et 164.

70 En l'espèce, le tribunal de faillite canadien n'avait pas le monopole pour ce qui était de décider quelle mesure « de déférence et de respect » était due au tribunal de faillite belge. Certes, il pouvait

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bankruptcy jurisdiction, of course, it could and did make that determination. Insofar as Holt's claim was "integrally connected to maritime matters", it lay within the jurisdiction of the Federal Court (*Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 73) and it was for that court to decide whether to defer to the Belgian bankruptcy court "having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws".

prendre cette décision en vertu de sa propre compétence en matière de faillite, et il l'a fait. Dans la mesure où la réclamation de Holt était « entièrement liée aux affaires maritimes », elle relevait de la compétence de la Cour fédérale (*Succession Ordon c. Grail*, [1998] 3 R.C.S. 437, par. 73) et il appartenait à cette cour de décider si elle devait s'en remettre au tribunal de faillite belge « compte tenu à la fois des obligations et des convenances internationales et des droits de ses propres citoyens ou des autres personnes qui sont sous la protection de ses lois ».

71 In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, the Court expanded on the definition of international comity by noting that the twin objectives sought by private international law in general and the doctrine of international comity in particular were order and fairness. This was reiterated in *Hunt v. T&N PLC*, [1993] 4 S.C.R. 289, at p. 325, and again in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1058, where the Court gave preeminence to the objective of order:

> While, no doubt, as was observed in *Morguard*, the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice.

Dans l'arrêt *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077, la Cour a élargi la définition de la courtoisie internationale en soulignant que le droit international privé, en général, et la règle de la courtoisie internationale, en particulier, poursuivaient un double objectif d'ordre et d'équité. Cela a été réitéré dans l'arrêt *Hunt c. T&N PLC*, [1993] 4 R.C.S. 289, p. 325, et de nouveau dans l'arrêt *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022, p. 1058, où la Cour a donné préséance à l'ordre :

> S'il ne fait aucun doute, ainsi qu'il a été souligné dans l'arrêt *Morguard*, que l'ordre et l'équité sont les principes fondamentaux du droit international privé, l'ordre vient en premier. L'ordre est une condition préalable de la justice.

72 It has been, of course, the objective of international maritime law for centuries to create conditions of order and fairness for those engaged in maritime commerce.

Bien sûr, le droit maritime international vise, depuis des siècles, à créer un climat d'ordre et d'équité pour ceux qui se livrent au commerce maritime.

(b) *The "Universalist" Approach*

b) *L'approche « universaliste »*

73 The Trustees argue that to achieve the twin objectives of order and fairness in an international insolvency, it is necessary to adopt the "universalist" approach because in fairness "the claims of creditors can be finally determined only by the court of the debtor's domicile in accordance with the law of that place" (Castel, *supra*, at p. 553). They advocate a "close networking between courts on an international level" (factum, at para. 36).

Les syndics allèguent que, pour réaliser ce double objectif d'ordre et d'équité en matière d'insolvabilité internationale, il est nécessaire d'adopter l'approche « universaliste » parce qu'en toute équité [TRADUCTION] « les réclamations des créanciers ne peuvent être définitivement réglées que par le tribunal du domicile du débiteur conformément au droit en vigueur à cet endroit » (Castel, *op. cit.*, p. 553). Ils préconisent [TRADUCTION] « l'établissement entre les tribunaux d'un réseau serré d'entraide internationale » (mémoire, par. 36).

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In the case at bar the debtor's domicile was Belgium, and the Trustees contend that the Federal Court erred in not requiring Holt and the other secured creditors to pursue their claims in that country. The Trustees also argue that as the Quebec Superior Court decided to come to the aid of the Belgian bankruptcy court, the Federal Court ought, as a matter of "domestic" comity, to have deferred to that decision.

74 En l'espèce, le débiteur était domicilié en Belgique, et les syndics soutiennent que la Cour fédérale a commis une erreur en n'exigeant pas que Holt et les autres créanciers garantis déposent leurs réclamations dans ce pays. Les syndics font également valoir que, puisque la Cour supérieure du Québec avait décidé de prêter son concours au tribunal de faillite belge, la Cour fédérale devait, par courtoisie « nationale », s'en remettre à cette décision.

There is much to be said for the proposition that primary insolvency proceedings having been instituted in Belgium, other jurisdictions where the bankrupt possessed assets should cooperate to the extent permitted by their respective laws with the Belgian courts. The need for such international cooperation in bankruptcy and insolvency has been evident for a very long time, though the ever-continuing ascendency of multi-national enterprises and acceleration towards a global economy have made the underlying problems more acute. As long ago as 1883, in the case of *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527 (1883), the United States Supreme Court said, at p. 539:

> Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries.

75 Il y a beaucoup à dire au sujet de la proposition selon laquelle, étant donné que les procédures principales d'insolvabilité ont été engagées en Belgique, les autres ressorts où la faillie possède des éléments d'actif devraient coopérer avec les tribunaux belges dans la mesure permise par leurs lois respectives. La nécessité d'une telle coopération internationale en matière de faillite et d'insolvabilité se fait sentir depuis fort longtemps, même si la montée constante des entreprises multinationales et l'accélération de la mondialisation de l'économie ont accentué les problèmes sous-jacents. Dès 1883, dans l'affaire *Canada Southern Railway Co. c. Gebhard*, 109 U.S. 527 (1883), la Cour suprême des États-Unis affirmait, à la p. 539 :

> [TRADUCTION] À moins que toutes les parties en cause, où qu'elles résident, ne puissent être liées par l'entente qu'on cherche à légaliser, l'initiative peut échouer. Tous les créanciers du pays peuvent être liés. Ce qu'il faut, c'est lier ceux qui sont à l'étranger. Dans ces circonstances, l'esprit véritable de la courtoisie internationale commande que des initiatives de cette nature, légalisées au pays, soient reconnues dans d'autres pays.

The essence of the universalist approach advocated by the Trustees is that there ought to be a primary bankruptcy proceeding, title to assets locally situated should be vested in the foreign representative of the bankrupt estate, creditors should not be permitted to realize on a foreign debtor's assets in the local courts outside the framework of the primary bankruptcy, and orders made in foreign bankruptcy proceedings should be recognized and enforced elsewhere.

76 L'approche universaliste préconisée par les syndics veut essentiellement qu'il y ait des procédures principales en matière de faillite, que le titre de propriété des biens situés sur place soit dévolu au représentant étranger de l'actif du failli, que les créanciers ne soient pas autorisés à réaliser les biens d'un débiteur étranger devant les tribunaux locaux en dehors du cadre de la faillite principale, et que les ordonnances délivrées dans le cadre de procédures de faillite à l'étranger soient reconnues et mises à exécution ailleurs.

Professor J. S. Ziegel contrasts the "universalist" approach to the "territorialist" approach, ear-

77 Le professeur J. S. Ziegel oppose l'approche « universaliste » à l'approche « territorialiste »,

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lier referred to as the "Grab Rule", and concludes that most jurisdictions exhibit elements of both approaches:

> International insolvency jurists have long classified countries and their conflict of laws rules according to their willingness to recognize and give effect to foreign insolvency orders and judgments. Those regimes that are hospitable to extending such recognition are labelled universalist; those that deny such recognition are classified as territorialist. Common law countries are often described as belonging among the universalist families, while civil law systems are believed to be territorialist.
>
> However, the pigeonholing is misleading. Common law countries differ as widely in their international insolvency rules as do civil law jurisdictions. On closer examination it will be found that some of the jurisdictions that claim to be universalist only practise a very diluted form of universalism while countries labelled as territorialist in fact extend varying measures of recognition to foreign insolvency orders and foreign insolvency representatives.

("Ships at Sea, International Insolvencies, and Divided Courts" (1998), 50 C.B.R. (3d) 310. See also *In re Treco*, *supra*, and Castel, *supra*, at pp. 553-54.)

78 Traditionally, only some of the key components of the universalist approach have been reflected in Canadian law. While our courts generally favour a process of universal distribution and recognize a foreign trustee's title to property, they also permit concurrent bankruptcies and protect the vested rights of what we regard as secured creditors under Canadian law. With respect to the latter, the usual Canadian position has been that a foreign trustee in bankruptcy should have no higher claim on the secured assets of a bankrupt than if the bankruptcy had occurred here. In a true universalist system the question of encumbrances would be settled by the law of the place of the bankruptcy (which may, as in this case, produce a result contrary to Canadian maritime law).

79 Further, Canadian law has always recognized that initiation of foreign bankruptcy proceedings

désignée plus haut comme étant la « règle de l'appropriation », et conclut que des éléments des deux approches se retrouvent dans la plupart des ressorts :

> [TRADUCTION] Les juristes spécialisés en insolvabilité internationale classent depuis longtemps les pays et leurs règles de conflit des lois en fonction de leur volonté de reconnaître et de mettre à exécution les ordonnances et les jugements en matière d'insolvabilité rendus à l'étranger. Les régimes qui sont favorables à cette reconnaissance sont dits universalistes, et ceux qui sont contre sont dits territorialistes. Les pays de common law sont souvent considérés comme faisant partie de la famille des universalistes, alors que les régimes de droit civil ont la réputation d'être territorialistes.
>
> Toutefois, cette catégorisation est trompeuse. Les pays de common law se distinguent autant entre eux par leurs règles d'insolvabilité internationale que le font les pays de droit civil. Un examen plus attentif montrera que certains pays qui se disent universalistes ne pratiquent qu'une forme très diluée d'universalisme alors que les pays dits territorialistes reconnaissent plus ou moins les ordonnances en matière d'insolvabilité délivrées à l'étranger et les représentants étrangers en la matière.

(« Ships at Sea, International Insolvencies, and Divided Courts » (1998), 50 C.B.R. (3d) 310. Voir aussi *In re Treco*, précité, et Castel, *op. cit*., p. 553-554.)

Traditionnellement, seuls quelques éléments-clés de l'approche universaliste ont marqué le droit canadien. Bien que nos tribunaux favorisent généralement une procédure de répartition universelle et reconnaissent le titre de propriété d'un syndic étranger, ils permettent également les faillites concomitantes et protègent les droits acquis de ce que nous considérons comme des créanciers garantis en droit canadien. Dans ce dernier cas, on estime habituellement au Canada qu'un syndic de faillite étranger ne doit pas avoir plus de droits sur les éléments d'actif garantis d'un failli que si la faillite était survenue dans notre pays. Dans un véritable régime universaliste, la question des charges serait réglée par la loi du lieu de la faillite (ce qui peut, comme en l'espèce, entraîner un résultat contraire au droit maritime canadien).

En outre, le droit canadien a toujours reconnu que l'engagement de procédures de faillite à

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does not prevent concurrent insolvency proceedings in Canada: see Castel, *supra*, at p. 565; *Allen v. Hanson* (1890), 18 S.C.R. 667; *Re Breakwater Co.* (1914), 33 O.L.R. 65 (H.C.), and *Re E. H. Clarke & Co.*, [1923] 1 D.L.R. 716 (Ont. S.C.). The existence of two sets of proceedings obviously raises the spectre of conflicting decisions or approaches, although as noted in 1890 by Ritchie C.J. of this Court in *Allen*, *supra*, at p. 674, it is "the duty of the courts of both countries to see no conflict should arise". Conflict avoidance can take many forms, including dismissing or staying Canadian proceedings. Section 43(7) of the *Bankruptcy and Insolvency Act* permits the court to dismiss a petition if it has "sufficient cause". This requirement may be satisfied if the debtor has been declared bankrupt elsewhere. In fact, the courts have stayed liquidation proceedings where bankruptcy proceedings are on foot in a foreign jurisdiction: *Re Stewart & Matthews, Ltd. and The Winding-Up Act* (1916), 10 W.W.R. 154 (Man. K.B.). Similarly, in an appropriate case, the Federal Court can avoid conflict by staying its proceedings pursuant to s. 50 of the *Federal Court Act*.

l'étranger n'empêche pas l'engagement de procédures d'insolvabilité concomitantes au Canada : voir Castel, *op. cit.*, p. 565; *Allen c. Hanson* (1890), 18 R.C.S. 667; *Re Breakwater Co.* (1914), 33 O.L.R. 65 (H.C.), et *Re E. H. Clarke & Co.*, [1923] 1 D.L.R. 716 (C.S. Ont.). L'existence de deux séries de procédures fait naître manifestement le spectre de décisions ou d'approches contradictoires même si, comme le faisait remarquer, en 1890, le juge en chef Ritchie de notre Cour dans l'arrêt *Allen*, précité, p. 674, [TRADUCTION] « les tribunaux des deux pays [sont] tenus de veiller à ce qu'aucun conflit ne survienne ». Les conflits peuvent être évités de plusieurs façons, notamment par le rejet ou la suspension des procédures au Canada. Le paragraphe 43(7) de la *Loi sur la faillite et l'insolvabilité* autorise le tribunal à rejeter une pétition pour une « cause suffisante ». Cette condition peut être remplie si le débiteur a été mis en faillite ailleurs. En fait, les tribunaux ont suspendu des procédures de liquidation au moment où des procédures de faillite étaient en cours dans un ressort étranger : *Re Stewart & Matthews, Ltd. and The Winding-Up Act* (1916), 10 W.W.R. 154 (B.R. Man.). De même, lorsqu'une affaire s'y prête, la Cour fédérale peut éviter un conflit en suspendant ses procédures conformément à l'art. 50 de la *Loi sur la Cour fédérale*.

80

In short, Canada has adhered to a middle position (dignified by the name "plurality approach") which recognizes that different jurisdictions may have a legitimate and concurrent interest in the conduct of an international bankruptcy, and that the interests asserted in Canadian courts may, but not necessarily must, be subordinated in a particular case to a foreign bankruptcy regime. The general approach reflects a desire for coordination rather than subordination, with deference being accorded only after due consideration of all the relevant circumstances rather than automatically accorded because of an abstract "universalist" principle. As pointed out by Professor Castel, *supra*, at pp. 554-55:

Bref, le Canada a adopté un point de vue intermédiaire (qualifié d'« approche pluraliste ») qui consiste à admettre que différents ressorts peuvent avoir un intérêt légitime et concomitant dans le déroulement d'une faillite internationale, et que les droits réclamés devant les tribunaux canadiens peuvent mais ne doivent pas nécessairement être subordonnés à un régime de faillite étranger dans un cas particulier. Cette approche générale témoigne d'un désir de coordination plutôt que de subordination, où l'on ne fait preuve de déférence qu'après avoir bien examiné toutes les circonstances pertinentes, et non pas automatiquement en fonction d'un principe « universaliste » abstrait. Comme l'a souligné le professeur Castel, *op. cit.*, p. 554-555 :

Under the doctrine of plurality which prevails in Canada, each country has the right, if it deems it advisable, to allow bankruptcy proceedings to begin in its territory by virtue of its bankruptcy law. The court applies its

[TRADUCTION] Selon la règle de la pluralité appliquée au Canada, chaque pays a le droit, s'il le juge utile, de permettre que des procédures de faillite soient engagées sur son territoire sous le régime de sa loi

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own substantive law. Thus, bankruptcies may be initiated in a number of countries with respect to the same debtor. In Canada, this rigid doctrine is partially tempered by close cooperation with foreign courts.

81 The question is whether, as argued by the appellant Trustees, this orientation in Canada ought now to be changed to a more "universalist" approach.

(c) *The 1997 Amendments to the Act*

82 In April 1997 Parliament enacted Part XIII of the *Bankruptcy and Insolvency Act*, entitled "International Insolvencies". It applies only to bankruptcy proceedings initiated after September 30, 1997, and thus has no direct application here. Nevertheless, it is worth noting that Parliament has continued the diluted universalism (or "plurality approach") adopted by Canadian courts under the common law. There is now, under Part XIII, specific authority to come to the aid of foreign courts and "foreign representatives" in the administration and adjudication of insolvencies that have international dimensions. There is also authority for Canadian courts, under s. 271(1), to request "the aid and assistance of a court, tribunal or other authority in a foreign proceeding". The objective of these provisions is to facilitate the coordination of foreign and domestic insolvency proceedings. Nevertheless, there is no rule requiring Canadian courts to refrain from entertaining concurrent proceedings. On the contrary, concurrent proceedings are anticipated as Canadian courts are given authority under s. 268(3) to make orders that will result in a *coordination* of domestic and foreign proceedings, not the *elimination* of one in preference to the other. By authorizing a Canadian court under subs. (2) to limit the domestic trustee's authority to property situated in Canada, Parliament obviously anticipated that in certain cases a territorialist approach would be acceptable. The amendments provide specifically that a court is not compelled to enforce any order made by a foreign court: s. 268(6).

sur la faillite. Le tribunal applique ses propres règles de fond. Ainsi, des procédures de faillite peuvent être engagées dans plusieurs pays à l'égard du même débiteur. Au Canada, cette règle rigide est partiellement tempérée par une étroite collaboration avec les tribunaux étrangers.

La question est de savoir si cette orientation canadienne doit maintenant céder le pas à une approche plus « universaliste », comme l'ont fait valoir les syndics appelants.

c) *Les modifications apportées à la Loi en 1997*

En avril 1997, le législateur a adopté la partie XIII de la *Loi sur la faillite et l'insolvabilité*, intitulée « Insolvabilité en contexte international ». Cette partie ne s'applique qu'aux procédures de faillite engagées après le 30 septembre 1997 et n'a donc aucun impact direct en l'espèce. Il importe néanmoins de souligner que le législateur a maintenu l'universalisme dilué (ou « approche pluraliste ») adopté par les tribunaux canadiens sous le régime de la common law. Il existe désormais, en vertu de la partie XIII, une autorisation particulière de prêter concours aux tribunaux étrangers et aux « représentants étrangers » dans l'administration et le règlement des insolvabilités ayant des dimensions internationales. Les tribunaux canadiens sont également autorisés, en vertu du par. 271(1), à demander « le concours d'une cour, d'un tribunal ou d'une autre autorité à l'étranger ». Ces dispositions ont pour objet de faciliter la coordination des procédures d'insolvabilité engagées à l'étranger et au pays. Néanmoins, aucune règle n'empêche les tribunaux canadiens d'instruire des procédures concomitantes. Au contraire, les procédures concomitantes sont prévues étant donné que le par. 268(3) habilite les tribunaux canadiens à rendre des ordonnances qui entraîneront une *coordination* des procédures engagées au pays et à l'étranger, et non l'*élimination* des unes au profit des autres. En autorisant, au par. (2), le tribunal canadien à limiter le pouvoir du syndic canadien aux biens situés au Canada, le législateur s'attendait visiblement à ce que l'approche territorialiste soit acceptable dans certains cas. Les modifications prévoient spécifiquement qu'un tribunal n'est pas tenu de mettre à exécution les ordonnances délivrées par un tribunal étranger : par. 268(6).

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Moreover, s. 269 explicitly denies extraterritorial reach to foreign stay orders. It says that a foreign stay of proceedings "does not apply in respect of creditors who reside or carry on business in Canada with respect to property in Canada unless the stay of proceedings is the result of proceedings taken in Canada".

83 De plus, l'art. 269 prévoit explicitement que les ordonnances de suspension des procédures à l'étranger n'ont aucune portée extraterritoriale. Aux termes de ce paragraphe, la suspension des procédures à l'étranger « n'est opposable aux créanciers qui résident ou font affaires au Canada en ce qui touche les biens du débiteur situés au Canada que si elle résulte de procédures intentées au Canada ».

It thus appears that Canadian public policy, expressed as recently as 1997 by Parliament, endorses the plurality approach developed over the years by the courts.

84 Il appert donc que la politique générale du Canada, énoncée dès 1997 par le législateur, entérine l'approche pluraliste établie au fil des ans par les tribunaux.

(d) *The Preferred Approach*

d) *L'approche privilégiée*

Given the almost infinite variations in circumstances that can occur in an "international bankruptcy", the pragmatism of the "plurality" approach continues to recommend itself. International coordination is an important factor, but it is not necessarily a controlling factor.

85 Vu la variété quasi infinie des circonstances qui peuvent entourer une « faillite internationale », le pragmatisme de l'approche pluraliste continue de s'imposer. La coordination internationale est un facteur important, mais elle ne constitue pas nécessairement un facteur déterminant.

Where a stay is sought of Canadian proceedings in deference to a foreign bankruptcy court, the Canadian court before which the stay application is made (in this case the Federal Court) ought to be mindful of the difficulties confronting the bankruptcy trustees in the fulfilment of their public mandate to bring order out of financial disorder and the desirability of maximizing the size of the bankrupt estate. These objectives are furthered by minimizing the multiplicity of proceedings, and the attendant costs, and the possibility of inconsistent decisions in relation to the same claims or assets.

86 Lorsqu'un tribunal canadien (en l'occurrence la Cour fédérale) est saisi d'une demande de suspension de ses procédures par déférence pour un tribunal de faillite étranger, il doit être conscient des difficultés auxquelles sont confrontés les syndics de faillite dans l'accomplissement de leur mandat public de rétablir l'ordre dans un désordre financier, et de l'intérêt de maximiser la taille de l'actif du failli. Ces objectifs peuvent être atteints en réduisant au minimum la multiplicité des procédures et les coûts qui s'y rattachent, ainsi que la possibilité que les mêmes réclamations ou les mêmes éléments d'actif fassent l'objet de décisions incompatibles.

Nevertheless, courts must have regard to the need to do justice to the particular litigants who come before them as well as to the public interest in the efficient administration of bankrupt estates. It would be inappropriate to elevate any one consideration to a controlling position in the exercise of a bankruptcy court's discretion to dismiss a petition under s. 43(7) *or* to stay proceedings under Part XIII of the Act *or* in the Federal Court's decision to stay proceedings under s. 50 of

87 Toutefois, les tribunaux doivent tenir compte de la nécessité de rendre justice aux parties qui se présentent devant eux, ainsi que de l'intérêt qu'a le public dans l'administration efficace de l'actif du failli. Il ne conviendrait pas qu'une considération soit qualifiée de déterminante par un tribunal de faillite qui exerce son pouvoir discrétionnaire de rejeter une pétition fondée sur le par. 43(7) *ou* de suspendre des procédures en vertu de la partie XIII de la Loi, *ou encore* par la Cour fédérale lorsqu'elle

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the *Federal Court Act*. Discretion should not be thus predetermined. The desirability of international coordination is an important consideration. In some cases, it may be the controlling consideration. The courts nevertheless have to exercise their discretion to stay or not to stay domestic proceedings according to all of the relevant facts of a particular case.

décide de suspendre des procédures en vertu de l'art. 50 de la *Loi sur la Cour fédérale*. Le pouvoir discrétionnaire ne doit pas être ainsi prédéterminé. L'utilité de la coordination internationale est certes une considération importante. Dans certains cas, elle peut être déterminante. Les tribunaux doivent néanmoins exercer leur pouvoir discrétionnaire de suspendre ou de ne pas suspendre les procédures engagées au pays en tenant compte de tous les faits pertinents de l'affaire.

7. In Light of the Foregoing, Did the Federal Court Err in the Exercise of its Discretion to Deny the Trustees' Application for a Stay of Proceedings?

7. À la lumière de ce qui précède, la Cour fédérale a-t-elle commis une erreur dans l'exercice de son pouvoir discrétionnaire de refuser la demande de suspension des procédures présentée par les syndics?

88 The dollars and cents issue in this case should not be obscured entirely by the scholarly debate between universalists, pluralists and territorialists. The Trustees advocate a "universalist" approach because it is in their interest, acting on behalf of all creditors, to take the proceeds of sale of the Ship home to Belgium for distribution according to Belgian law. It is clearly not in the respondent's interest, because it appears that Holt's claim would not enjoy under Belgian law the priority it has under Canadian law. If Holt is obliged to defend variations of the "territorialist" position, it is because it seems that is the only way its claim will be paid in full on a timely basis or perhaps at all.

La question monétaire en l'espèce ne doit pas être totalement éclipsée par le débat doctrinal entre les universalistes, les pluralistes et les territorialistes. Les syndics préconisent une approche « universaliste » parce que, du fait qu'ils agissent pour le compte de tous les créanciers, il est dans leur intérêt de rapatrier en Belgique le produit de la vente du navire pour le répartir conformément au droit belge. Une telle mesure n'est manifestement pas dans l'intérêt de l'intimée puisqu'il appert que, en droit belge, la réclamation de Holt ne bénéficierait pas de la priorité dont elle bénéficie en droit canadien. Si Holt doit défendre des variantes de l'approche « territorialiste », c'est parce qu'il semble que ce soit la seule façon de voir sa réclamation acquittée en totalité en temps opportun ou peut-être même tout simplement acquittée.

89 The Federal Court's authority to stay proceedings is found, as noted, in s. 50 of the *Federal Court Act*:

**50.** (1) The Court may, in its discretion, stay proceedings in any cause or matter,

(*a*) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(*b*) where for any other reason it is in the interest of justice that the proceedings be stayed.

Le pouvoir de la Cour fédérale de suspendre des procédures est, comme nous l'avons vu, conféré par l'art. 50 de la *Loi sur la Cour fédérale* :

**50.** (1) La Cour a le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

*a*) au motif que la demande est en instance devant un autre tribunal;

*b*) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

The principles on which the discretion should be exercised in this type of case were authoritatively settled in *Amchem*, *supra*. Sopinka J., speaking

Les principes qui doivent sous-tendre l'exercice du pouvoir discrétionnaire dans ce type d'affaire ont été établis péremptoirement dans l'arrêt

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for the Court, posed the question at p. 920, "is there a more appropriate jurisdiction based on the relevant factors", to which he added at p. 921, "the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff" (emphasis in original).

*Amchem*, précité. Le juge Sopinka, s'exprimant au nom de la Cour, s'est demandé, à la p. 920, si « un autre tribunal serai[t] plus approprié, compte tenu des facteurs pertinents », ce à quoi il a ajouté, à la p. 921, qu'« il faut établir clairement qu'un autre tribunal est plus approprié pour que soit écarté celui qu'a choisi le demandeur » (souligné dans l'original).

*Amchem* was a purely private piece of litigation involving product liability claims related to exposure to asbestos. International bankruptcies have a public aspect, because it is in the public interest to facilitate the speedy resolution of the fallout from a financial collapse. This does not change the *Amchem* analysis. It is simply to emphasize an important public aspect of this case that was not present in the *Amchem* fact situation.

90 L'affaire *Amchem* était un litige purement privé où il était question d'actions en responsabilité du fait du produit liées à une exposition à l'amiante. Les faillites internationales comportent un aspect public, car il est dans l'intérêt public de faciliter le règlement rapide des retombées d'un effondrement financier. Cela ne change rien à l'analyse prévue dans l'arrêt *Amchem*. Il s'agit simplement de souligner que la présente affaire comporte un aspect public important, qui était absent dans l'affaire *Amchem*.

The "natural forum" is the one to which the action has the most real and substantial connection (*Amchem*, at pp. 916 and 935). Relevant circumstances include not only issues of public policy (as in this case) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigating in one forum or the other, and the discouragement of forum shopping. In short, within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.

91 Le « ressort logique » est celui avec lequel l'action a le lien le plus réel et le plus important (*Amchem*, précité, p. 916 et 935). Les circonstances pertinentes comprennent non seulement les questions de politique générale (comme en l'espèce) mais également la possibilité que la suspension des procédures fasse perdre au demandeur un avantage juridique à tel point qu'il en résulterait une injustice, le ou les endroits où les parties exploitent leur entreprise, l'avantage de soumettre un litige dans un ressort ou un autre et les frais qui s'y rattachent, et la nécessité de dissuader les parties de rechercher un tribunal favorable. Bref, dans le contexte global d'une politique générale, toute injustice que subirait le demandeur si son action était suspendue doit être appréciée en fonction de toute injustice qui serait causée au défendeur si l'action pouvait suivre son cours. Ces facteurs doivent soigneusement être soupesés.

In addressing the issue of a stay, MacKay J. acknowledged the importance of comity and international coordination in a proper case. Having done so, he went on to place primary emphasis on the fact he was dealing with an *in rem* action by secured creditors against a ship which at the time of the bankruptcy the Federal Court had already arrested

92 En examinant la question de la suspension, le juge MacKay a reconnu l'importance de la courtoisie et de la coordination internationale lorsqu'une affaire s'y prête. Il a ensuite insisté principalement sur le fait qu'il était saisi d'une action *in rem* intentée par des créanciers garantis contre un navire dont la Cour fédérale avait déjà ordonné la saisie au moment de

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and at the time of the interventions of the Canadian bankruptcy court (June 11 and June 28, 1996) he had already ordered appraised and sold. Moreover, the order dated June 28 had expressly made the interest of the appellant Trustees subject "to the rights, if any, of any creditors with claims secured under the laws of Canada, as by law provided".

la faillite, et dont il avait déjà ordonné l'évaluation et la vente au moment des interventions du tribunal de faillite canadien (11 juin et 28 juin 1996). En outre, l'ordonnance du 28 juin avait expressément assujetti l'intérêt des syndics appelants aux [TRADUCTION] « droits des créanciers dont les réclamations sont garanties sous le régime des lois du Canada, conformément à la loi ».

93 The appellants' strongest argument is that the dispute is but weakly connected to Canada. This Court, however, in *Antares Shipping Corp. v. The Ship "Capricorn"*, [1977] 2 S.C.R. 422, recognized that lack of substantive connections to *any* particular jurisdiction, including its home port, is a feature of ships engaged in international maritime commerce. In that case, the Court refused to stay proceedings *in rem* in which three Liberian corporations contested in Canada the ownership of a Liberian registered ship. Liberia, of course, is a flag of convenience. Ships registered there may never have occasion to "go home". In *Antares Shipping*, the only connection to Canada was that the ship was arrested at the suit of one of the Liberian corporations while it was in Canadian waters. Ritchie J., speaking for the majority, recognized that ocean-going ships present a particular problem. At p. 453, he adopted the following observations of Lord Simon, dissenting, in *The Atlantic Star*, [1973] 2 All E.R. 175 (H.L.), at p. 197:

L'argument le plus solide des appelants veut que le litige ne soit que faiblement lié au Canada. Cependant, dans l'arrêt *Antares Shipping Corp. c. Le navire « Capricorn »*, [1977] 2 R.C.S. 422, notre Cour a reconnu que l'absence de lien important avec *un* ressort particulier, y compris leur port d'attache, est une caractéristique des navires qui servent au commerce maritime international. Dans cette affaire, la Cour a refusé de suspendre les procédures *in rem* dans lesquelles trois sociétés libériennes contestaient au Canada la propriété d'un navire immatriculé au Libéria. Bien entendu, le pavillon du Libéria est un pavillon de complaisance. Les navires qui y sont immatriculés n'auront peut-être jamais l'occasion de « rentrer à la maison ». Dans *Antares Shipping*, le seul lien qui existait avec le Canada était que le navire avait été saisi à la demande d'une des sociétés libériennes, alors qu'il était en eaux canadiennes. Le juge Ritchie, s'exprimant au nom de la majorité, a reconnu que les navires de haute mer posent un problème particulier. À la page 453, il a fait siennes les observations suivantes de lord Simon, dissident, dans *The Atlantic Star*, [1973] 2 All E.R. 175 (H.L.), p. 197 :

> Ships are elusive. The power to arrest in any port and found thereon an action in rem is increasingly required with the custom of ships being owned singly and sailing under flags of convenience. A large tanker may by negligent navigation cause extensive damage to beaches or to other shipping: she will take very good care to keep out of the ports of the 'convenient' forum. If the aggrieved party manages to arrest her elsewhere, it will be said forcibly (as the appellants say here): 'The defendant has no sort of connection with the forum except that she was arrested within its jurisdiction.' But that will frequently be the only way of securing justice.

> [TRADUCTION] Les navires se dérobent facilement. Le pouvoir de les saisir dans n'importe quel port et d'intenter une action in rem est de plus en plus nécessaire, compte tenu de la coutume de la propriété unique des navires et l'usage des pavillons de complaisance. Un grand pétrolier, naviguant avec négligence, peut causer des dommages considérables aux plages ou à d'autres navires; il évitera soigneusement les ports situés dans le ressort d'un tribunal « compétent ». Si la partie lésée parvient à le saisir ailleurs, on opposera énergiquement (comme le font les appelantes en l'espèce) que : « Le défendeur n'a aucun lien avec le tribunal, si ce n'est qu'il a été saisi dans son ressort. » Mais souvent, ce sera la seule façon d'obtenir justice.

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Belgium is not a "flag of convenience" like Liberia but the principle remains the same. The "real and substantial connection" test must take into account the special lifestyle of ocean-going freighters.

Le pavillon de la Belgique n'est pas un « pavillon de complaisance » comme l'était le pavillon du Libéria, mais le principe demeure le même. Le critère du « lien réel et important » doit tenir compte du « mode de vie » particulier des cargos.

As to the appellants' allegation that Holt was engaged in "forum shopping", the further observations of Lord Simon quoted in *Antares Shipping*, at p. 453, are also apposite:

94 Quant à l'allégation des appelants selon laquelle Holt était à la « recherche du tribunal le plus favorable », les observations suivantes de lord Simon, citées dans *Antares Shipping*, p. 453, sont également pertinentes :

'Forum-shopping' is, indeed, inescapably involved with the concept of maritime lien and the action in rem. Every port is automatically an admiralty emporium. This may be very inconvenient to some defendants; but the system has unquestionably proved itself on the whole as an instrument of justice.

[TRADUCTION] La « recherche d'un tribunal » est de fait inévitablement liée au concept du privilège maritime et à l'action *in rem*. Chaque port constitue automatiquement un choix possible en matière d'amirauté. Cela peut être très ennuyeux pour certains défendeurs; mais de façon générale, le système sert incontestablement les fins de la justice.

With respect to juridical advantage, the trial judge stated that "there simply was no evidence of the comparative status of the plaintiff's claim under Belgian and Canadian law" (para. 76). On appeal, as mentioned, the Federal Court of Appeal noted that "both parties concede [that it was] unlikely that [Holt's] *in rem* rights could subsist in one form or another under Belgian bankruptcy laws" (endnote 5). The apparent concession at the hearing before the Federal Court of Appeal only adds to the weight of the arguments earlier accepted by MacKay J. to allow the *in rem* action to proceed.

95 En ce qui a trait à l'avantage juridique, le juge de première instance a dit que « la Cour n'a été saisie d'aucun élément de preuve comparant le statut de la réclamation de la demanderesse en droit belge et en droit canadien » (par. 76). En appel, comme nous l'avons vu, la Cour d'appel fédérale a fait remarquer que les « deux parties admettent [qu'il était] peu probable que les droits *in rem* de [Holt] puissent subsister sous une forme ou une autre sous le régime des lois belges sur la faillite » (note de renvoi 5). Cette concession manifeste lors de l'audience devant la Cour d'appel fédérale ne fait que s'ajouter au poids des arguments précédemment acceptés par le juge MacKay pour autoriser la poursuite de l'action *in rem*.

If, contrary to the concession in the Federal Court of Appeal, we were to assume in the Trustees' favour that there was no juridical advantage to Holt or other secured creditors in keeping alive the *in rem* action in Canada, it means that there would equally be no advantage to the Trustees in moving the proceedings to Belgium. The same secured creditors would (on that assumption) exhaust the proceeds of the sale of the Ship, but pay the additional penalty of the cost of duplicative proceedings in Belgium. To talk of the benefits of the "universalist" approach to international bankruptcies in such circumstances is illusory.

96 Si, contrairement à la concession faite devant la Cour d'appel fédérale, nous devions présumer, au profit des syndics, que Holt ou les autres créanciers garantis n'avaient aucun avantage juridique à poursuivre l'action *in rem* au Canada, cela signifierait que les syndics n'auraient également aucun avantage à déplacer les procédures en Belgique. Les mêmes créanciers garantis (selon cette présomption) épuiseraient le produit de la vente du navire, mais devraient assumer les frais additionnels liés à la répétition des mêmes procédures en Belgique. Dans ces circonstances, parler des avantages de l'approche « universaliste » en matière de faillites internationales est illusoire.

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97 The trial judge also placed reliance on the convenience to the U.S. creditors of litigating in Canada rather than Belgium. This factor is relevant (*Amchem*, *supra*, at p. 917) but would not, I think, be of great weight if the appellant Trustees had been able to show that justice required deference to the court of the domicile of the bankrupt.

98 In summary, the trial judge considered the relevant factors in reaching his conclusion that the Federal Court was the appropriate forum to resolve the respondent's claim. He committed no error of principle and did not refuse "to take into consideration a major element for the determination of the case": *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 588; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 77. In the absence of error, we are not entitled to interfere with the exercise of his discretion.

V. Conclusion

99 The appeal is dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellants: Brisset Bishop, Montréal.*

*Solicitors for the respondent: McInnes Cooper & Robertson, Halifax, Nova Scotia.*

Le juge de première instance a également souligné qu'il était avantageux pour les créanciers américains d'engager des procédures au Canada plutôt qu'en Belgique. Ce facteur est pertinent (*Amchem*, précité, p. 917), mais je ne pense pas qu'il aurait une grande importance si les syndics appelants avaient pu établir que la justice exigeait de s'en remettre au tribunal du domicile de la faillie.

En résumé, le juge de première instance a tenu compte des facteurs pertinents pour conclure que la Cour fédérale était le tribunal compétent pour régler la réclamation de l'intimée. Il n'a commis aucune erreur de principe et n'a pas refusé « de tenir compte d'un élément prépondérant en l'espèce » : *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561, p. 588; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, p. 77. En l'absence d'erreur, nous n'avons pas le droit d'intervenir dans l'exercice de son pouvoir discrétionnaire.

V. Conclusion

Le pourvoi est rejeté avec dépens.

*Pourvoi rejeté avec dépens.*

*Procureurs des appelants : Brisset Bishop, Montréal.*

*Procureurs de l'intimée : McInnes Cooper & Robertson, Halifax, Nouvelle-Écosse.*

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Federal Court Cour fédérale

**Date: 20160526**

**Docket: T-1683-14**

**Citation: 2016 FC 570**

2016 FC 570 (CanLII)

**Montreal, Quebec, May 26, 2016**

**PRESENT: The Honourable Mr. Justice Harrington**

**BETWEEN:**

**BALLANTRAE HOLDINGS INC.**

**Plaintiff**

**and**

**THE OWNERS AND ALL THOSE INTERESTED IN THE SHIP "PHOENIX SUN" AND THE SHIP "PHOENIX SUN"**

**Defendants**

**JUDGMENT AND REASONS**

[1] If things seem too good to be true; they probably aren't good and probably aren't true. So it is with the schemes of Mengu Pasinli. His plan was to buy the Canadian ship, the PHOENIX SUN, then under arrest at the port of Sorel; render her sufficiently seaworthy for one last voyage; find a cargo to carry overseas and then sell her in Turkey for scrap. When all was said and done, he projected a profit in excess of $1,000,000.

[2] On November 26, 2013, he, through one of his companies, Goldrich Waters International Shipping Ltd. of Hong Kong, purchased the PHOENIX SUN from the acting marshal in admiralty for $1,050,000. The ship was then deleted from the Canadian registry. He had borrowed that entire amount from the plaintiff, Ballantrae Holdings Inc., which took out a mortgage and other security. Thereafter he hired a crew in Turkey, and a Canadian welder to work on the ship. He persuaded others to pay the crew's passage to Canada, and ship chandlers to provide necessaries on credit. Some of the crew's wages and some of the claims of the ship chandlers were paid by others. It seems that Mr. Pasinli is not out of pocket at all.

[3] It all came to nought. The PHOENIX SUN was never rendered seaworthy. In fact she never left her berth. Creditors refused to advance further sums. The crew was left penniless and hungry. They were fed by the good people of Sorel.

[4] On July 29, 2014, Ballantrae filed an action *in rem* and *in personam* in this court. The following day the PHOENIX SUN was arrested. She was later sold by the acting marshal on November 12, 2014, for $682,500.

[5] In addition to Ballantrae, various creditors had filed caveats and in accordance with directions of the Court have filed their claims. As is the practice the evidence consists of affidavits and cross-examinations. The only exception is the Master and crew whose evidence was taken *de bene esse*. Not everyone contested the claims of the other creditors. For instance, it was clear that there were sufficient funds available to pay in full the crew and the necessaries men who enjoyed a maritime lien. Unfortunately the proceeds of this sale do not nearly approach

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the amount of the claims, so the issues at the hearing in Montreal on April 7 and 8, 2016, were the validity of the claims and the ranking of priorities. I will set out the claims in order of the ranking the claimants assert, leaving aside claims which had been struck before the hearing and the claim of Jarud Corporation Limited which was discontinued during the hearing. The defendant owners did not participate.

[6] When there are insufficient funds to meet the claims of all the creditors they must persuade the Court that their claims enjoy priority. Otherwise valid claims rank *pari passu*.

[7] There is no statute or single case which establishes an exhaustive list of priorities. Limiting myself to this case there are four groups of claims. I need not deal with maritime liens *inter se* or possessory liens.

[8] The first group, enjoying the highest priority, are the claims for costs incurred in converting the ship into a fund available for distribution to the creditors. These are the Marshal's fees and disbursements and the costs of the party which brought the ship to sale.

[9] The second group consists of maritime liens and those liens created by statute which enjoy the same status.

[10] Mortgages came next. One complication is that Ballantrae's mortgage was not registered.

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[11] The rest of the claims consist of alleged equitable charges. Some of these claimants may simply be entitled to arrest the ship in an action *in rem* and do not enjoy priority. Some may have claims against the shipowner which do not sound in admiralty at all.

[12] Furthermore, on occasion when the interests of justice so require, our court in the exercise of its admiralty and equitable jurisdiction may alter the traditional ranking.

[13] This case also raises the issues of both pre-sale and post-sale interest. Some, but not all, of the claims carry with them an agreed contractual rate of interest. The fund on deposit in court earns interest, but at a paltry rate.

[14] These reasons are broken down as follows:


| | |
|---|---|
| Alleged Priorities | paragraphs 15 - 23 |
| Skylane Worldwide Ltd. | paragraphs 24 - 32 |
| The Marshal | paragraph 33 |
| Ballantrae's Costs of Sale | paragraphs 34-38 |
| The Twelve Seafarers | paragraphs 39 -61 |
| Mustafa Hakan Etiz | paragraphs 62 - 67 |
| La Ville de Sorel-Tracy | paragraphs 68 - 79 |
| The Necessaries Men | paragraphs 80 -83 |
| Ian Hamilton | paragraphs 84 - 97 |
| Ballantrae | paragraphs 98 - 103 |
| The Mortgage | paragraphs 104 - 121 |
| Ontario *Personal Property Security Act* | paragraphs 122 - 130 |
| Federal Court Jurisdiction | paragraphs 131 - 147 |
| Interest | paragraphs 148 - 154 |
| Costs | paragraphs 155 - 163 |
| *Official Languages Act* | paragraph 164 |


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Priorities

[15] The claim with the highest priority is without doubt the claim by the acting marshal for his fees and expenses in the amount of $39,106.37.

[16] The second ranking claim would be that of Ballantrae Holdings Inc. for its costs incurred in converting steel into cash. At the hearing its solicitors tentatively asserted $25,000, but were called upon to furnish better particulars. They have now come up with a claim of $42,419.37.

[17] The next ranking claims would be those of the Master and crew members of the PHOENIX SUN (the twelve seafarers) for wages and other remuneration or benefits arising out of their employment. Their best arguable case, converting the principal amount of their claim which is in US dollars to Canadian dollars as of the judgment date (assuming no difference in exchange between the hearing date and the judgment date), is $180,716.68.

[18] There is another alleged crew member, Mr. Mustafa Hakan Etiz, who entered into an employment contract with the owners as a fitter/duty officer. He also asserts a mariner's maritime lien in the amount of $50,875.

[19] The next ranking claim, if well founded, is that of la Ville de Sorel-Tracy for berthage in the principal amount of $75,460.01 and for the supply of electricity in the principal amount of $22,407.02. The interest claimed thereon shall be dealt with later in these reasons. It claims a high ranking statutory lien in accordance with section 122 of the *Canada Marine Act*. Failing

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that it claims a statutory lien in virtue of section 139 of the *Marine Liability Act*. Finally, if those provisions, on which more shall be said, do not apply, it submits that if it only has an ordinary right *in rem*, the Court in the exercise of its admiralty and equitable jurisdiction should grant it a higher priority.

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[20] Next follows the claims of three necessaries men, Blue Water Agencies Limited, Pronova Systems Limited, and 185888 Canada Inc. (formerly North Star Ship Chandler Inc.). The principal amount of their claims totals $59,571.63. As a result of the enactment of section 139 of the *Marine Liability Act*, all three enjoy a statutory lien, which carries with it the priority of a maritime lien.

[21] Mr. Ian Hamilton and his company, Through Logistics Corp, claim $240,578.47. Mr. Hamilton paid to get the crew from Turkey to Canada, paid some of their wages and paid some of the claims of the ship chandlers. They claim a lien pursuant to section 139 of the *Marine Liability Act* for part of the claim, and an equitable charge over the balance.

[22] Skylane Worldwide Limited asserted a registered Panamanian mortgage, and has claimed USD 1,350,000 which at the hearing, based on an exchange rate of 1.28, was CAD 1,728,000.

[23] The last and remaining creditor is Ballantrae. It lent Mr. Pasinli the $1,050,000 needed to purchase the PHOENIX SUN. It entered into security agreements including a mortgage which, due to a breach of contract on the part of the defendants, was never registered. It nevertheless asserts it has a security interest in virtue of the mortgage. It also asserts priority rights as the

holder of a registered personal property security interest pursuant to the Ontario *Personal Property Security Act*. At the heart of Ballantrae's claim is a loan agreement with Trenton Shipping and Trading Limited, of which Mr. Pasinli represented himself as the sole shareholder. The plan was that Trenton would buy the PHOENIX SUN. However, for reasons Mr. Pasinli did not fully disclose, he had the bill of sale made out to another company of which he claimed to be the sole shareholder, Goldrich Waters International Shipping Co. Ltd. Mr. Pasinli, Trenton, Goldrich, and other Pasinli companies were all *prête-noms*, one for the other, and no distinction should be drawn amongst them.

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[24] Thus, the principal amount of the claims asserted at the opening of the hearing on April 7, was $3,496,669.83 against a fund of $682,500.

Skylane's Claim Dismissed

[25] Skylane has prevented the orderly and timely development of this case. It constantly missed deadlines and obtained extensions. It was called upon to file evidence as to the validity of its mortgage under Panamanian law. Finally Prothonotary Morneau ordered it to file its evidence as to Panamanian law, failing which its claim would be struck. It failed to do so. Mr. Hamilton and his company thereafter moved that the claim be struck.

[26] A few days before the scheduled hearing on April 7, Skylane's solicitors stated that they should no longer be considered as Skylane's counsel of record. I pointed out that under Rule 125 they were required to make a formal motion. At the opening of the hearing a motion was ready, but had not been served. I declined to accept it for filing. The Court frowns upon last-minute

motions of this sort and in any event even if granted it could only have taken effect after Skylane was served in the British Virgin Islands. The hearing, which had been scheduled for some time, was not to be postponed.

[27] I then granted Mr. Hamilton's motion with costs against Skylane.

[28] As stated during the hearing there were at least two other reasons why Skylane's claim should be struck. The first was that the only evidence as to the validity of its mortgage under Panamanian law was the expert evidence of Eduardo Antonio Real Solis, a Panamanian attorney. His evidence, which in no way was contradicted, and which the Court accepts, is that for several reasons Skylane's alleged mortgage was null and void and of no effect.

[29] The third reason is that the alleged mortgage was entered into November 11, 2014. The PHOENIX SUN had been under arrest in this court since July 30, 2014, and had been advertised for sale by auction the following day, November 12, 2014.

[30] A shipowner cannot deal with a ship under arrest in such a way as to dissipate its value to the then existing creditors.

[31] I referred to the *obiter* remarks of Mr. Justice Forest of the Quebec Superior Court in *Security National Bank c Fournier* (24 February 1976), Montreal 05-000357-75. Peripheral to the claim in that action which was on loan guarantees, the ship in question, the *Atlantean I* had been sold by the Small Claims division of the Quebec Provincial Court while she was under

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arrest in this court. Mr. Justice Forest was of the view that the alleged sale was null and of no effect. In the circumstances he had no need to cite the cases which he said had been put before him.

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[32] Those authorities would have included the *Cella*, (1888) 13 PD 82, where Lopes L.J. said at page 88:

> From the moment of the arrest the ship is held by the court to abide the result of the action, and the rights of parties must be determined by the state of things at the time of the institution of the action, and cannot be altered by anything which takes place subsequently.
>
> (As quoted by Brandon J. as he then was, in *The Monica S.*, [1967] 3 All ER 740 at 754)

The Marshal's fees and disbursements

[33] The acting marshal's fees and disbursements of $39,106.37 have already been paid out by court order, without interest.

Ballantrae's costs

[34] It is well established that the costs of the moving party, usually, as in this case, the plaintiff, in bringing the ship to sale rank with Marshals' costs: McGuffie, Fugeman & Gray, *British Shipping Laws: Admiralty Practice*, vol 1 (London, UK: Stevens & Sons, 1964) at para 1574; Chircop et al, eds, *Canadian Maritime Law*, 2nd ed (Toronto: Irwin Law, 2016) at 263–265. The underlying philosophy is that all creditors benefit from a fund against which they can

claim, and hopefully receive payment. However, the costs of Ballantrae, and the others, in asserting their own claims and contesting the claims of others do not fall into this category.

[35] There is one caveat in this case. Long after the sale, Prothonotary Morneau ordered Ballantrae to prepare a "joint record for adjudication and ranking of claims". These three volumes were of great assistance to the Court, and I daresay to all parties, and so Ballantrae should receive some compensation.

[36] Ballantrae claims $42,419.37 on a solicitor-client basis. It points out that Mr. Justice MacKay ordered solicitor-client costs in *Holt Cargo Systems Inc v The Ship Brussel et al*, 185 FTR 1, 2000 FCJ No 197 (FCTD) (QL). However, it is rare for costs to be awarded on a solicitor-client basis. I see no reason why I should not apply the default provision of Tariff B, Column III, mid-range.

[37] Mr. Hamilton suggests that since Ballantrae is receiving some funds from a guarantor, the equitable doctrine of Marshaling should apply. I disagree. Such sums as it may receive from guarantors of the shipowners' debt simply reduce the capital amount of that debt. Any such payment does not relate to the costs of bringing the ship to sale.

[38] Ballantrae is entitled to the preparation of and filing of the statement of claim, affidavit to lead warrant, warrant of arrest, the motion to sell, appearances on motions including attending at the sale and preparing the joint record. I grant it 40 units at $140 per unit, or $5,600. I accept its

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disbursements in the amount of $5,819.60 – of which $5,252.74 is subject to Ontario HST of 13% – for a total of $12,830.46.

The Claim of the Twelve Seafarers

[39] The contracts of the Master and eleven crew members called for payment of wages and benefits in US dollars. Most of their claim is beyond doubt. However, there are three unresolved issues. They were promised a retainer or stand-by fee of one-third of a month's salary for not working on the ship. Although this claim is perfectly valid against the owners, does it benefit from a maritime lien? The second issue is the length of their employment contract. The third is the date on which their claim should be converted into Canadian dollars. They submit that in the circumstances the conversion should be at the date of judgment (or at the date of hearing) rather than on the date of breach. On the breach day rule, the US dollar was worth CAD 1.10. On the judgment day (or hearing day) the rate would be CAD 1.28.

[40] The Master and crew submit that they suffered a loss in the rate of exchange due to delays in obtaining a hearing date. In equity they should be compensated.

[41] As stated during the hearing, I am not prepared to depart from the breach day rule. This court is not a currency speculator. Our dollar goes up and our dollar goes down against the US dollar, the Euro and the Special Drawing Rights of the International Monetary Fund. At times the breach day rule will benefit claimants, other times not.

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[42] Furthermore the breach day rule is the rule set down by the Supreme Court (*Gatineau Power Company v Crown Life Insurance Company*, [1945] SCR 655). In *NV Bocimar SA v Century Insurance Co*, (1984) 53 NR 383, [1984] FCJ No 510 (FCA) (QL) (*The Hasselt*), Mr. Justice Hugessen, speaking for the Federal Court of Appeal, held it was not open to that court to change the rule adopted by the Supreme Court. That decision was reversed in the Supreme Court, but not on this point: [1987] 1 SCR 1247, [1987] SCJ No 39 (QL).

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[43] I am bound by the rule of *stare decisis*. In *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331, the Supreme Court set out the narrow circumstances in which a lower court might not follow the decisions of a higher court:

> [44] The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42).

[44] There is nothing new in this case. Currencies go up and currencies go down.

[45] It is unfortunate that there has been a delay in paying the crew members. That delay was attributable to parties who had departed the scene by the time of the hearing. It was clear that parts of the claim of the Master and crew were unassailable and so I ordered the immediate payment out of $62,775.54 in principal plus interest of $407.67. It should be noted that the other

parties were prepared to consent to a higher interlocutory payout, but I had to study the evidence with respect to the termination of the contract.

[46] Ballantrae, supported by Mr. Hamilton, contests two parts of the claim by the Master and the eleven crew members. Each claims a retainer or stand-by fee of one-third of a month's wages. The crew members were supposed to be dispatched to the ship earlier than they were. In consideration of their not seeking employment elsewhere, Mr. Pasinli promised this additional payment. The issue is not whether the promise was made; I accept that it was. The issue is whether this portion of the claim benefits from a maritime lien. In my opinion, it does not.

[47] The second issue is the date employment was terminated. Ballantrae submits that the cut-off date should be September 21, 2014, the date on which the crew left the ship and returned to Turkey. The twelve seafarers submit that under the terms of their contract they were entitled to further payment. I agree.

[48] It should be mentioned that neither they, nor anyone else, is claiming the cost of repatriation from Canada to Turkey. It appears that an unnamed Good Samaritan paid their way but does not seek compensation from the fund generated by the sale of the ship.

[49] Turning now to the retainer fees, they total some USD 11,766.69.

[50] The courts both here and elsewhere have been increasingly generous when it comes to crew wages, which include emoluments as set out in section 22(2)(o) of the *Federal Courts Act*

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and sections 2 and 86 of the *Canada Shipping Act, 2001*. See also Tetley, *Maritime Liens and Claims*, 2nd ed (Montreal: Yvon Blais, 1998), ch 8.

[51] Counsel for the seafarers submits that the retainer or stand-by fee was an integral part of their employment contracts, even though not reduced to writing. Reliance was placed on a general statement by Fisher J. in *Mobil Oil New Zealand Ltd v The ship "Rangiora" (No 2)*, [2000] 1 NZLR 82 (HC), that wages should include "any form of payment which has been promised in return for the seafarers' agreement to work on the ship". It was submitted that this New Zealand case is in line with Canadian jurisprudence particularly the decision of Madam Justice Snider in *Canadian Imperial Bank of Commerce v Le Chene No. 1*, 2003 FC 873. Madam Justice Snider accepted that the scope of the seamen's maritime lien has evolved and expanded to meet the ever changing nature of their employment.

[52] Both the *Rangiora* and *Le Chene No. 1* relate to termination of employment issues after the seamen joined the ship in question. There are many reasons why a seaman may be employed and paid before joining a specific ship. A prudent shipowner may well wish to provide training in its policies and procedures and alert the prospective crew to the intricacies and particularities of the ship in question. While I am prepared to accept that the Master and crew have a claim *in personam* against the owners and *in rem* against the ship, they do not benefit from a maritime lien arising from a promise that they not work elsewhere.

[53] Turning now to the length of employment, as noted by Madam Justice Snider in *Le Chene No. 1*, our law has evolved with respect to entitlements after the ship and crew have

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parted company. The owner may have gone into formal liquidation or wrongfully dismissed the crew.

[54] In this case, the first six crew members (Messrs. Karasu, Ergun, Cenik, Meral, Guray and Ucman) signed on the ship in Canada on April 6, 2014, four more (Captain Ozkan and Messrs. Kan, Ates and Kaan) on April 12, 2014 and the remaining two (Messrs. As and Gumusoz) on June 2, 2014. All signed a "Seafarer Employment Agreement" with Menpas Shipping and Trading Inc., a Pasinli company which acted, among other things, as the crewing agent. Each was "employed for a period of 2+2+2 months (at shipowner's option) commencing on the date of embarking to the ship at Sorel --".

[55] It was further provided that unless a notice of termination was given before the end of each two-month period, the contract was prolonged for another two months. The required notice if given by the shipowner was seven days; if given by the seafarers, fifteen days. No formal notice, so called, was ever given.

[56] The crew were paid through to the end of June 2014 and should have received their July wages by August 5th. Nevertheless, Mr. Pasinli assured them they would eventually be paid and so they continued to work the ship until they left on September 21, 2014.

[57] Mr. Pasinli was served with the seafarers' caveat and motion to have their evidence taken *de bene esse* on September 9, 2014. Both the notice of motion and the supporting affidavit of the Master, Semih Ozkan, stated that all twelve were scheduled to leave Canada and return to

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Turkey on September 21, 2014. In the circumstances, I find that the service of the motion upon Mr. Pasinli on September 9th served as constructive notice of termination of employment.

[58] On that basis, the contracts of the six crew members who arrived on April 6th and the four who arrived on April 12th were extended on August 6th and August 12th respectively. As no timely termination notice was given during the second term, the third two-month employment term came into play so that they are entitled to compensation to October 6 and to October 12, 2014. Based on *Le Chene No. 1*, it matters not whether compensation for the period after they left the ship on September 21, 2014 is characterized as severance pay, wrongful dismissal or simply completion of the contract.

[59] Unfortunately, the situation with respect to the remaining two crew members who joined on June 2nd is somewhat different. The initial two-month period ended August 2nd and the second on October 2nd. They gave notice within the required fifteen days and so are only entitled to four months' payment, all told, while the first ten crew members are entitled to six months' payment.

[60] I shall calculate the principal amount to which each is entitled, before subtracting the amounts in principal ordered to be paid out on April 11, 2016. I have also taken into account that each of the twelve members was paid $100.00 after July 1, 2014 by Mr. Hamilton and that, furthermore, Captain Ozkan is entitled to additional back pay, due to a change of position, of USD 818.67 and Mr. Ucman is entitled to back pay of USD 532.00.

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[61] On that basis, Captain Ozkan is entitled to $28,741.89 less the earlier payment out by the Court of $13,448.34 leaving a balance owing in principal of $15,293.55. Likewise the rest of the crew is owed, in Canadian dollars:

| Crew Member | Total Owed | - Already Paid | = Remaining Owed |
|---|---|---|---|
| Mr. Karasu | $26,246.77 | - $12,550.00 | = $13,696.77 |
| Mr. Ergun | $9,560.49 | - $4,538.50 | = $5,021.99 |
| Mr. Kan | $7,351.61 | - $3,273.50 | = $4,078.11 |
| Mr. As | $6,641.93 | - $3,273.50 | = $3,368.43 |
| Mr. Cenik | $5,169.35 | - $2,430.00 | = $2,739.35 |
| Mr. Gumusoz | $6,641.93 | - $3,273.50 | = $3,368.43 |
| Mr. Meral | $5,169.35 | - $2,430.00 | = $2,739.35 |
| Mr. Guray | $6,925.81 | - $3,273.50 | = $3,652.31 |
| Mr. Ates | $5,127.13 | - $2,261.50 | = $2,865.63 |
| Mr. Kaan | $12,754.03 | - $5,719.00 | = $7,035.03 |
| Mr. Ucman | $12,604.71 | - $6,304.20 | = $6,300.51 |

<u>Mustafa Hakan Etiz</u>

[62] According to his evidence, Mr. Etiz joined the PHOENIX SUN on December 7, 2013, and worked through until June 16, 2014. He signed a “Seafarer Employment Contract” in the same form as did the Master and the crew members. He was said to be employed as a “fitter/duty officer”. He claims unpaid wages of $50,875 and asserts a maritime lien.

[63] Mr. Etiz had no qualifications whatsoever which would allow him to serve as a duty officer. Furthermore, he was not going to sail with the ship if, as and when she ever departed Sorel. He was self-represented throughout and acted through a Turkish-English interpreter. His evidence was extremely vague. When there was no work onboard he carried out unspecified tasks ashore for Mr. Pasinli. He did not state what these tasks were and gave no breakdown as to how his time was divided between ship and shore.

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[64] He may possibly have served as a watchman from time to time before the Master and crew began to arrive in April 2014. On the other hand, he slept ashore, which detracts from his submissions.

[65] Nevertheless, he was a qualified welder and did some work on the ship's piping.

[66] I find he was not a crew member at all. It seems that only one crew member was even aware of his existence. He was shore labour. He has no maritime lien and does not benefit from section 139 of the *Marine Liability Act*. He was an employee. He was not carrying on business.

[67] Giving him every benefit of the doubt, I fix his onboard work at $25,000. He has a statutory right *in rem* for that amount with no priority. To the extent he was a watchman he was not a crew member (*Jorgensen v The Christina*, [1926] Ex CR 110). To the extent he was a welder he was shore labour (*MacBeth v Chislett*, [1910] AC 220). The balance of his claim could only be considered after all maritime claims are met. However by that time the fund will be exhausted.

Ville de Sorel-Tracy

[68] The city of Sorel-Tracy, through its organization La Société des parcs industriels Sorel-Tracy, claims $105,402.31 comprising unpaid berthage of $81,441.83 and unpaid electricity in the amount of $23,960.48. The claims in principal are for $75,460.01 and $22,407.02, respectively. I have no hesitation in finding that the owners and the ship are liable in that amount. What is in dispute is the ranking which should be given the city's claim. It asserts the

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priority of a maritime lien, only subservient to crew wages, in accordance with section 122(1) of the *Canada Marine Act* which provides:

| | |
|---|---|
| 122 (1) A port authority, the Minister or a person who has entered into an agreement under subsection 80(5), as the case may be, has at all times a lien on a ship and on the proceeds of its disposition for an amount owing to the port authority, the Minister or the person, and the lien has priority over all other rights, interests, claims and demands, other than claims for wages of crew members under the Canada Shipping Act, 2001, if the amount is owing in respect of | 122 (1) L'administration portuaire, le ministre ou la personne qui a conclu une entente en vertu du paragraphe 80(5) est toujours titulaire d'un privilège sur le navire et sur le produit de toute disposition qui en est faite, pour sa créance; ce privilège a priorité sur tous autres droits et créances, quelle qu'en soit la nature, à la seule exception des créances salariales des membres de l'équipage, visées par la Loi de 2001 sur la marine marchande du Canada, dans les cas suivants : |
| (a) fees and interest in respect of the ship or goods carried on the ship; or | a) pour défaut de paiement des droits et des intérêts exigibles à l'égard du navire ou de sa cargaison; |
| (b) damage to property caused by the ship or through the fault or negligence of a member of the crew of the ship acting in the course of employment or under the orders of a superior officer. | b) pour dommages causés à des biens par le navire ou par la faute ou la négligence d'un membre de son équipage agissant dans l'exercice de ses fonctions ou sous les ordres d'un officier supérieur. |

[69] Unfortunately the city it is not a "Port Authority" as defined in section 2, as it was not incorporated or continued under that Act. Section 80(5) gives the Minister certain powers to make agreements with respect to parts of the Saint Lawrence Seaway. However, Sorel is not within the Seaway.

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[70] The city also submitted, in the alternative, that it is entitled to a maritime lien in virtue of section 139(2) of the *Marine Liability Act* which provides:

| | |
|---|---|
| 139 (2) A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise | 139 (2) La personne qui exploite une entreprise au Canada a un privilège maritime à l'égard du bâtiment étranger sur lequel elle a l'une ou l'autre des créances suivantes : |
| (a) in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or | a) celle résultant de la fourniture — au Canada ou à l'étranger — au bâtiment étranger de marchandises, de matériel ou de services pour son fonctionnement ou son entretien, notamment en ce qui concerne l'acconage et le gabarage; |
| (b) out of a contract relating to the repair or equipping of the foreign vessel. | b) celle fondée sur un contrat de réparation ou d'équipement du bâtiment étranger. |

[71] Unfortunately for the city its claim does not fall within section 139 of the *Marine Liability Act* either. Mr. Hamilton submitted that the city was not carrying on business as it was a non-profit organization. I am not prepared to so find. Many not-for-profit organizations, such as mutual insurance companies, well known in marine insurance circles, carry on business.

[72] The next question is whether the city provided services for the PHOENIX SUN's operation or maintenance. I find it did not. Section 22(2) draws a distinction between necessaries and dock charges. Sections 22(2)(m) and (s) read:

| | |
|---|---|
| (m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance | m) une demande relative à des marchandises, matériels ou services fournis à un navire pour son fonctionnement ou |

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| | |
|---|---|
| of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage; | son entretien, notamment en ce qui concerne l'acconage et le gabarage; |
| (s) any claim for dock charges, harbour dues or canal tolls including, without restricting the generality of the foregoing, charges for the use of facilities supplied in connection therewith. | s) une demande de remboursement des droits de bassin, de port ou de canaux, notamment des droits perçus pour l'utilisation des installations fournies à cet égard. |

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[73] Section 139 of the *Marine Liability Act* was intended to put Canadian necessaries men such as ship chandlers, bunker suppliers and stevedores on equal footing with those, such as their American counterparts, who enjoy maritime liens under their own laws. Previously, necessaries men had a statutory right *in rem*, with no priority, if they had contracted with the shipowner. If they knew they were contracting with the charterer they had no action *in rem* and no right to arrest the ship (*Marlex Petroleum Inc v The Ship Har Rai and the Shipping Corp of India*, [1984] 2 FC 345 (FCA), affm'd [1987] 1 SCR 57; *Holt Cargo Systems Inc v ABC Containerline NV (trustee of)*, 2001 SCC 90, [2001] 3 SCR 907 (the *Brussel*).

[74] If there were any doubt at all about Parliament's intention, one need only read the House of Commons debates for February 25, 2009, as well as the Senate sponsor's speech.

[75] It is true that section 22(2)(s) of the *Federal Courts Act* is somewhat peculiar in that, like a maritime lien, port charges survive the sale of the ship (section 43(3) of the *Federal Courts Act*). However, Parliament would have had to have been much more direct and specific before granting ports a statutory lien equivalent to a maritime lien.

[76] Although it follows that under the traditional ranking the city has only a statutory right *in rem*, without priority, it is well recognized that this Court in the exercise of its admiralty and equitable jurisdiction, if the interests of justice so require, may alter the traditional ranking. For instance in *Osborn Refrigeration Sales and Service Inc v The Atlantean I*, [1979] 2 FC 661 (FCTD), Mr. Justice Walsh referred to fuel deliveries having been made after an arrest, which were essential to preserve the ship in severe winter conditions, and hence tended to preserve the security of the mortgage creditor. Furthermore, if upon the arrest, Ballantrae, or others, had moved to have the Marshal put in possession both berthage and the supply of electricity would have ranked as Marshal's costs.

[77] The authorities were reviewed in considerable depth by the late Prothonotary Hargrave in *Fraser Shipyard and Industrial Centre Ltd v Expedient Marine Co*, (1999) 170 FTR 1, 1999 FCJ No 947 (QL), varied but not on this point (1999), 170 FTR 57, [1999] FCJ No 1212 (FCTD) (QL). I also touched upon the issue in *Nordea Bank v The Kinguk*, 2007 FC 434.

[78] Prior to Goldrich's purchase of the PHOENIX SUN, berthage and electricity had been paid by the then acting marshal in admiralty under the previous arrest.

[79] While it could be argued that it was necessary for the PHOENIX SUN to lie alongside as she was a dead ship, and could hardly have gone to anchor, I am not prepared to go so far. In the circumstances I find it plain and obvious that the mass of creditors have benefitted from the supply of electricity. Consequently, I rank the city's claim for the supply of electricity in the amount of $22,407.02 immediately after the claims of the Master and crew. The balance of

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$75,460.01 benefits from a statutory right *in rem*, but enjoys no priority. Pre-sale interest will be dealt with later.

The Necessaries Men

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[80] Unlike the Ville de Sorel-Tracy, the three ship chandlers who filed claims do benefit from section 139 of the *Marine Liability Act*. The PHOENIX SUN had been deleted from the Canadian registry and so was not a Canadian ship. The principal amounts of their claims are not in controversy and they rank after the claims of the Master and crew, and that part of la Ville de Sorel-Tracy's claim referred to above.

[81] Blue Water Agencies Limited's claim is for the supply of necessaries being foodstuffs and provisions in the amount of $9,041.78. It was also claiming interest at the rate of 24% per annum from July 11, 2014, and administrative fees, bringing the claim to $12,511.44. However, it is no longer claiming pre-sale interest, which for reasons set out in another portion hereof, I would not have granted anyway. It is entitled to the principal amount of $9,041.78.Likewise Pronova Systems Inc. provided necessaries in the amount of $28,182.15. It also claimed, but is now waiving, interest at 24% per annum from December 29, 2013, which included administrative fees. Furthermore, it acknowledges that Mr. Hamilton had paid $2,000.00 against one of the invoices. I fix its claim in the principal amount of $26,182.15.

[82] The third ship chandler is 185888 Canada Inc. (formerly North Star Ship Chandler Inc.), currently in bankruptcy. The principal amount of its claim, which is not contested, is $24,347.70. However, unlike the other two chandlers it is claiming the invoice interest rate of 24% per

annum from April 11, 2014, including administrative fees. I fix the principal amount of its claim at $24,347.70, without interest prior to the date on which the funds deposited in Court on the purchase of the PHOENIX SUN began to earn interest. I disallow its claim for pre-sale interest payable from the fund.

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Ian Hamilton and Through Logistics Corp.

[83] Mr. Hamilton had a business relationship with Mr. Pasinli and his many companies. He incorporated Through Logistics Corp. to give partial effect to that relationship. In the circumstances I draw no distinction between Mr. Hamilton and his company.

[84] The claim falls into four categories:

a) Rental of Mr. Hamilton's van to transport crew and spare parts. $13,250 is claimed in principal, supported by the lien at section 139 of the *Marine Liability Act*;

b) Advances directly to the PHOENIX SUN's crew and service providers in the amount of $130,963.71. Priority under section 139 is again claimed;

c) Advance of monies to Mr. Pasinli and his companies for the specific purpose of paying for the supply of goods, materials and services to the PHOENIX SUN. $48,244.76 is claimed. Mr. Hamilton asserts an equitable charge which he submits outranks a statutory right *in rem*; and

d) General payments to Mr. Pasinli and his companies in the amount of $48,120.00 to be used to assist in the maintenance and upkeep of the PHOENIX SUN and expenses relating to the crew. Again an equitable charge is asserted.

[85] Interest is claimed at the rate of 4.9% per annum.

[86] Ballantrae does not contest the amounts owing. However, it asserts that Mr. Hamilton was in a joint venture with Mr. Pasinli and his companies and therefore is only entitled to payment out of the fund after all third party creditors have been paid. Nothing will be left over and so Mr. Hamilton is out of luck, and remains out of pocket.

[87] At the heart of Ballantrae's submissions is a written agreement dated May 2, 2013, between Menpas Shipping and Trading Inc. and Mr. Hamilton. Menpas was another one of Mr. Pasinli's companies which appears to have acted as ship manager and crewing agent. It was specifically agreed "that the project is a joint venture between Ian Hamilton and Mengu Pasinli". Decisions were to be made jointly. The ship would be purchased, repaired to a suitable standard for a last voyage, registered under the Panamanian flag, carry an eastbound cargo to the Mediterranean and then be sold for scrap, all at a total profit estimated to be in excess of $1,000,000. The profit was to be divided equally.

[88] Mr. Hamilton signed the agreement but says he never returned it to Mr. Pasinli as it was evident that he could not fulfill his part of the bargain. The sums he advanced were really by way of loans at the interest rate of 4.9% per annum.

[89] In February 2014, Mr. Hamilton e-mailed Mr. Pasinli under the subject "Ian Hamilton investments to date", which were some $85,000.00. Mr. Pasinli replied "cash investments are o.k.". Notice the word "investments".

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[90] In August 2014, (which is after Ballantrae arrested the PHOENIX SUN) Mr. Hamilton e-mailed Mr. Mengu to say "the total amount I have loaned to date --".

[91] Mr. Hamilton submits that in determining whether or not there was a partnership or joint venture, one must not only consider the documentary evidence but also the surrounding facts including what the parties actually did (*Backman v Canada*, [2001] 1 SCR 367 at para 25).

[92] Mr. Hamilton never knew the ship was purchased in the name of Goldrich, had never heard of Ballantrae until after the arrest and was not privy to joint financial records or a joint bank account. What Mr. Hamilton is really saying is that he did not insist upon his rights.

[93] I am afraid all of this is wishful thinking on Mr. Hamilton's part. He was hoodwinked by Mr. Pasinli, as were all the other creditors. What he did was lend money to the joint venture. Had the venture been fruitful, after taking care of expenses, including funds advanced by Mr. Hamilton, the profits would be split 50/50. There was nothing in the record to indicate that the relationship was changed by mutual agreement and that Mr. Hamilton renounced the profit motive which got him into this arrangement in the first place. Mr. Pasinli's breach of contract did not convert the joint venture into a series of loans.

[94] The Court did not benefit from seeing Mr. Hamilton, or any of the other witnesses (apart from Mr. Etiz), but this does not prevent me from making adverse credibility findings. Although Mr. Justice O'Halloran, speaking for the British Columbia Court of Appeal in *Faryna v Chorny*, [1952] 2 DLR 354, [1951] BCJ No 152 (QL), was dealing with the assessment by the Trial Judge

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of a witness who had actually appeared before him, his remarks still hold true. The test of credibility is this:

> 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.

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[95] In the *Hasselt*, above, the Court of Appeal was of the view that it was in as good a position to assess expert witnesses as the trial judge, as the evidence was in written form. However the Supreme Court disagreed: [1987] 1 SCR 1247, 1987 SCJ No 39 (QL).

[96] Thus Mr. Hamilton is equated with the owner and is only entitled to claim against such funds as would be left over after third party creditors were paid (the *Kinguk*, above). Unfortunately, there is nothing left for Mr. Hamilton, which, of course, does not prevent him from pursuing Mr. Pasinli and his companies *in personam*.

Ballantrae Holdings Inc.

[97] Ballantrae, an investment company and lender of funds, entered into a loan agreement with Trenton Shipping and Trading Limited to finance its purchase of the PHOENIX SUN. The principal amount of the loan was $1,050,000.00, with interest at 20% per annum, compounded monthly. The operative loan agreement was dated November 22, 2013, superseding earlier loan agreements of October 21, 2013 and November 8, 2013. The loan was guaranteed by Goldrich International Shipping Co., and by Mr. Pasinli. For reasons not stated, although Trenton, a Canadian company, was originally designated to purchase the ship, the bill of sale was taken out

in the name of Goldrich. In addition, Trenton was to obtain a guarantee and general security agreement from Goldrich.

[98] Other security took the form of a marine vessel mortgage-collateral to loan agreement and the registration of a financing statement under the Ontario *Personal Property Security Act*.

[99] The loan was supposed to be short term, seventy-five days. No payments were made and so Ballantrae took action *in rem* and *in personam* for the amount owing, including interest and costs. I will only deal with the principal amount of the claim under this heading.

[100] The ship was deleted from the Canadian registry and was supposed to be registered in Panama, along with the mortgage. It did not turn out that way. Ballantrae filed the uncontested affidavit of a Panamanian attorney, Eduardo Antonio Real Solis. His opinion is that the procedures for registering the PHOENIX SUN under the Panamanian flag, as well as the Skylane mortgage, were never correctly and timely completed and therefore have no legal effect. All that happened is that the PHOENIX SUN was "flagged" under a special temporary registry for ships which undertake a single voyage, such as a voyage to a scrapyard. No steps were ever taken to register Ballantrae's mortgage. Indeed, it appears that it could not have been registered in Panama. After her deletion from the Canadian registry, the PHOENIX SUN was an unregistered ship.

[101] Ballantrae nevertheless claims a security interest in virtue of the mortgage, and via registration under the Ontario *Personal Property Security Act*.

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[102] Counsel for Mr. Hamilton suggested that at best Ballantrae has an equitable charge in virtue of the unregistered mortgage and that this Court cannot take cognizance of security registered under the Ontario *PPSA*. Furthermore, even if that provincial statute forms part of Canadian Maritime Law, on the facts of this case it does not give Ballantrae any advantage over other creditors.

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The Mortgage

[103] The Court is first called upon to determine the nature of Ballantrae's security under the mortgage contract. Is it a legal mortgage, although unregistered, or is it an equitable mortgage? Does it outrank or is it outranked by statutory rights *in rem* or rank *pari passu*?

[104] Counsel for Mr. Hamilton submitted that Ballantrae benefits from an equitable mortgage which will rank *pari passu* with that portion of the Hamilton claim which is not secured by section 139 of the *Marine Liability Act*, and that both those claims outrank ordinary creditors *in rem* (such as Mr. Etiz). He referred to the decision of Mr. Justice Cullen in *Lewmar Marine Limited v C & C Industries Ltd* (1991), 44 FTR 49 (FCTD), and more particularly the opinion of Professor William Tetley referred to therein. Paradoxically, the case had also been cited by Ballantrae to support its proposition that this Court has jurisdiction to entertain claims by provincially secured creditors.

[105] The *Lewmar* decision is not really on point, but Mr. Justice Cullen referred to the first edition of Professor Tetley's *Maritime Liens and Claims* (London, UK: *Business Law Communications*, 1985), where he said at page 213:

> Equitable mortgages (including unregistered mortgages) rank after registered mortgages even if the existence of the equitable mortgage was known to the registered mortgagee at the time of registration.
>
> The equitable mortgage will however rank ahead of a necessaries man who brings an action *in rem* after the date of the mortgage.

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[106] As authority Professor Tetley cited the decision of Mr. Justice Langton in first instance in the *Zigurds*, [1932] P 113, also reported at (1932) 43 Ll LR 387.

[107] With the greatest respect, I do not think that a non-registered mortgage is necessarily an equitable mortgage, although it will rank after a registered mortgage.

[108] The *Zigurds* has to be read with great care. It dealt with three distinct judicial sales, the sale of the ship, the sale of pending freight and the sale of demurrage. Each had its own set of creditors. Clamoring for the freight were Casper Edgar & Co., an English ship agent and necessaries man and Alfred Harris Smith, the holder of a registered legal mortgage. Both claimed to be assignees of the freight. Mr. Justice Langton held that the mortgage creditor properly laid claim to the freight because its equitable assignment pre-dated Casper Edgar's equitable assignment.

[109] However, Mr. Justice Langton was reversed in appeal [1933] P. 87, (1933) 45 Ll LR 1. The Court held that the notice given by Casper Edgar to the receivers of the cargo had constituted sufficient notice of the assignment. They were the first to give actual notice and so were entitled to the freight. That decision was affirmed by the House of Lords, [1934] AC 209,

(1933) 47 Ll LR 267. The case relating to the freight had nothing to do with the relative rankings of mortgage creditors and necessaries men.

[110] There was a separate contest for payment out of the proceeds of the ship between the same mortgage creditor and a German necessaries man, Kohlen Co., who claimed a maritime lien under German law and submitted that at the very least in equity it should be given priority over the mortgagee. Mr. Justice Langton ranked the mortgage creditor ahead of the necessaries man as a matter of procedure. That dispute did not proceed further. An English ship repairer also submitted the traditional ranking should be altered, but did no better ((1932) 43 Ll LR 156).

[111] The result with respect to the German necessaries man may well have been different in Canada. On this point, the *Zigurds* was completely in line with the English position that a claim is characterized in accordance with the law of the forum, not the proper law of the transaction. This point was clearly reiterated by the Privy Council in *Bankers' Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle)*, [1981] AC 221, [1982] 2 Lloyds' Rep 325.

[112] On the contrary, in Canada, if under the proper law a necessaries man enjoys a maritime lien he will be given that priority (the *Har Rai* and the *Brussel*, above). I had occasion to review the authorities in *World Fuel Services Corp v Nordems (The)*, 2010 FC 332, 366 FTR 118, aff'd 2011 FCA 73, [2012] 4 FCR 183. In Canada a necessaries man only enjoyed a statutory right *in rem*, with no priority, and had no action *in rem* at all if it knew it was dealing with a charterer, rather than a shipowner. As discussed above, it was this unfairness which led to the enactment of section 139 of the *Marine Liability Act*.

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[113] Although the *Zigurds* is not helpful, a case which is very much on point is the *Shizelle*, [1992] 2 Lloyd's Rep 444, a decision of the English Admiralty Court. The plaintiffs financed the purchase of the yacht *Shizelle* on the terms of a loan agreement and marine mortgage. The yacht and mortgage were to be registered. However neither was.

[114] The purchaser then sold the *Shizelle* to the defendants allegedly free and clear of liens and encumbrances. The issue was whether the purchasers, who were innocent purchasers for value without notice, held the yacht free and clear of the mortgage.

[115] Deputy Judge Hamilton referred to doctrine to the effect that an unregistered mortgage was equivalent to an equitable mortgage, and referred to the view expressed by Professor Tetley. On that basis, the purchasers would have prevailed.

[116] However the learned judge disagreed. He was of the view that a mortgage of chattels at common law, before the intervention of any statute, did not require any formality, such as registration. The mortgage was a legal mortgage, not an equitable mortgage, even though it was not registered. It was opposable to a *bona fide* purchaser for value without notice.

[117] In this case, the PHOENIX SUN was not registered in any country. If the *Shizelle* mortgage is opposable to a *bona fide* purchaser for value without notice, it certainly follows that a non-registered legal mortgage outranks equitable charges and statutory rights *in rem*.

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[118] In the second edition of his *Maritime Liens and Claims*, from 1998, Professor Tetley reiterated his view that a non-registered mortgage constitutes an equitable mortgage. At p 481, in a footnote, he referred to the *Shizelle* as a "controversial decision". It may be but I agree with it.

[119] In my opinion, Ballantrae holds an unregistered legal mortgage on the PHOENIX SUN. Although it would face difficulties in ranking against a subsequently registered legal mortgage, that is not the case here as Skylane's mortgage has been struck. Ballantrae's claim outranks equitable charges, if any, the claims of holders of statutory rights *in rem*, as well as Mr. Hamilton's claims.

[120] Ballantrae was called upon to report which sums, if any, it has, or will, recover from the various guarantors. It appears likely it will recover $199,500 from one of the guarantors. This does not affect its entitlement to the balance of the fund generated by the sale of the PHOENIX SUN. It would of course be relevant if it pursues the *in personam* portion of its action to judgment.

Ontario *Personal Property Security Act*

[121] In addition to the execution of mortgage documents, Ballantrae was given security under the Ontario *Personal Property Security Act* which, it submits, also gives it priority over ordinary creditors *in rem*. Mr. Hamilton has mounted a vigorous challenge to this proposition. He emphasizes that Canadian Maritime Law is federal law, not provincial law, and is uniform throughout Canada. The Federal Court may only apply such provincial law as is incidentally relevant. The cornerstone of this submission is the decision of the Supreme Court in *ITO* –

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*International Operators v Miida Electronics*, [1986] 1 SCR 752 (the *Buenos Aires Maru*). The Ontario *PPSA* is a provincial statute of general application applying to marine and non-marine property alike. Since it creates security interests in property it can hardly be considered incidental.

[122] Mr. Hamilton adds that even if this Court could take cognizance of and apply the *PPSA* Ballantrae would gain no benefit as the requirements of that Act were never met.

[123] The PHOENIX SUN was never in Ontario at any relevant time and was never intended to be brought into Ontario. The unwavering intention of her owners was to sail her from Sorel, Quebec, to Turkey and there sell her for scrap.

[124] The short answer is that Mr. Hamilton is right. The *PPSA* contains conflict of law provisions. In order for the perfection and priorities provisions of that Act to apply, the collateral, such as the PHOENIX SUN being tangible personal property, must have been in Ontario, or have recently arrived in Ontario and then be perfected. For the purposes of this case it is sufficient to say that the rules relating to the perfection of the security are based on the location of the property, and not on the debtor's or creditor's residence (RSO 1990, c P.10, ss 5–7). If any provincial statute were relevant it would have been the provisions of the *Civil Code of Quebec* relating to hypothecs on moveable property (Articles 2714, 3012). There was no registration under Quebec law.

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[125] However the point raised is so important to this Court's jurisdiction and was so well argued on behalf of Ballantrae and Mr. Hamilton that I am compelled to comment.

[126] Section 22(3)(d) of the *Federal Courts Act* provides:

| | |
|---|---|
| 22. (3) For greater certainty, the jurisdiction conferred on the Federal Court by this section applies | 22. (3) Il est entendu que la compétence conférée à la Cour fédérale par le présent article s'étend : |
| (d) in relation to all mortgages or hypothecations of, or charges by way of security on, a ship, whether registered or not, or whether legal or equitable, and whether created under foreign law or not. | d) à toutes les hypothèques ou tous les privilèges donnés en garantie sur un navire — enregistrés ou non et reconnus en droit ou en equity — , qu'ils relèvent du droit canadien ou du droit étranger. |

[127] The Ontario *PPSA* is capable of creating a charge by way of security on a ship. For present purposes, it is not necessary to consider federal paramountcy or interjurisdictional immunity.

[128] In *Tropwood AG et al v Sivaco Wire & Nail Co et al*, [1979] 2 SCR 157 (the *Tropwood*), the Court was dealing with a cargo claim arising on a shipment from France to Montreal governed by the *Hague Rules* as in force in France. The issue was whether the Federal Court could apply French law. The *Hague Rules* as in force in Canada only applied to bill of lading shipments from Canadian parts. Chief Justice Laskin stated at pages 166–167:

> What is raised by the appellant, shortly put, is whether it is open to the Federal Court, in exercising its jurisdiction in the matter brought before it, to determine, pursuant to conflict of law rules of the forum, a choice of law rule to govern the determination of the suit. In the present case, the Federal Court has jurisdiction over the appellant and over the cause of action and there is a body of law which it can apply. It is my opinion that this body of law embraces

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> conflict rules and entitles the Federal Court to find that some foreign law should be applied to the claim that has been put forward. Conflicts rules are, to put the matter generally, those of the forum. It seems quite clear to me that section 22(3) of the *Federal Courts Act*, which I have already referred to, envisages that the Federal Court, in dealing with a foreign ship or with claims arising on the high seas may find it necessary to consider the application of foreign law in respect of the cause of action before it.

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[129] If this Court may take into account foreign law, it certainly may take into account provincial law.

Federal Court Jurisdiction

[130] The greater question still remains. Is the Ontario *PPSA* incidental? I can only conclude it is and thus, even absent section 23, may be applied by this Court. This is the only way the *Buenos Aires Maru* can be reconciled with the later Supreme Court decisions in *Ordon Estate v Grail*, [1998] 3 SCR 437, and *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53 (the *Ryan's Commander*).

[131] In *Ordon*, the Supreme Court enumerated four factors to take into consideration in determining whether a provincial statute is applicable in a maritime negligence action;

a) Does the subject matter of the action fall within the exclusive federal power over navigation and shipping?

b) If yes, is there a counterpart under existing Canadian Maritime Law?

c) If not, should the *lex non scripta* of Canadian Maritime Law be changed?

d) If the *lex non scripta* should not be changed, a provincial law of general application is inapplicable if it indirectly regulates Canadian Maritime Law in that it alters rules which Parliament has exclusive competence to amend. This is interjurisdictional immunity. The provincial statute must be read down.

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[132] This leads us to the *Ryan's Commander*. The Ryan brothers were Newfoundland fishermen who died in a maritime accident. Their heirs brought suit in the Supreme Court of Newfoundland and Labrador against the employer. Section 6(2) of the *Marine Liability Act* specifically provides that a dependant may bring a claim "under circumstances that would have entitled the person, if not deceased, to recover damages". However the Newfoundland and Labrador's *Workplace Health, Safety and Compensation Act*, like other provincial statutes, bars a fault-based negligence action in favour of a no-fault compensation scheme. The Supreme Court, in overturning the Court of Appeal, held that the Newfoundland statute trumped the federal statute.

[133] Unfortunately, the Supreme Court offered no guidance as to whether or not the result would have been the same had the heirs taken action in the Federal Court which, after all, has concurrent jurisdiction. Mr. Hamilton submits that a provincial statute which bars a federal cause of action is hardly "incidental". Since the Federal Court may only apply provincial law in limited circumstances, the result could vary depending upon the choice of forum. This is a scenario simply too shocking to contemplate!

[134] The Supreme Court considered *Ordon* in great detail. On the first point it held that *Ryan's Commander* was also a maritime negligence action, in pith and substance, a federal matter.

[135] On the second point, there was no federal counterpart. There is a federal *Merchant Seamen Compensation Act*, but it specifically does not cover fishermen.

[136] On the third point, the *lex non scripta* of the Canadian Maritime Law could hardly be changed because the *lex scripta* specifically gave the heirs a cause of action.

[137] *Ordon* was distinguished on the fourth point. In *Ordon*, it was held that a provincial law of general application was not applicable if it indirectly regulated Canadian Maritime Law. The provincial statute had to be read down based upon interjurisdictional immunity.

[138] In *Ryan's Commander* the Supreme Court, like in *Ordon*, stated at para 53 that "the present appeal involves reliance on provincial law in relation to a maritime negligence action".

[139] The Court then focussed on interjurisdictional immunity. Subsequent to *Ordon*, the Court had developed a two-pronged test. The first is to determine whether a provincial law trenches on the protected "core" of federal competence. If so, rather than just "affect" the core, as suggested in *Ordon*, the provincial law must "impair" it for interjurisdictional immunity to apply (*Ryan's Commander* at paras 54 and following; *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3; *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536).

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[140] The Supreme Court went on to hold that the Newfoundland statute did indeed trench on the core of federal power over navigation and shipping. However it concluded that the statute did not "impair" the exercise of federal power over navigation and shipping. At para 63 it pointed out that workers' compensation schemes have been applied in the maritime context for close to a century.

[141] I can only conclude that the application of "incidental" provincial law in the maritime context is much broader than I, for one, had thought.

[142] I revert back to the words of Mr. Justice McIntyre in the *Buenos Aires Maru* at p 782:

> The Federal Court is constituted for the better administration of the laws of Canada. It is not, however, restricted to applying federal law in cases before it. Where a case is in "pith and substance" within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties; see *Kellogg Co. v. Kellogg*, [1941] S.C.R. 242, where, in a case involving a dispute over patent rights, the effect of an employment contract had to be considered in the Federal Court, and see as well: *McNamara Construction (Western) Ltd. v. The Queen, supra*, where Laskin C.J. suggested that the provincial law of contribution indemnity may be applied by the Federal Court where jurisdiction is otherwise founded on federal law.

[143] Post *Buenos Aires Maru* the Supreme Court did not find it necessary to apply provincial contributory negligence statutes as it "incrementally" changed the *lex non scripta* of Canadian Maritime Law (*Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210).

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[144] If I am right in this interpretation and the Federal Court would have applied provincial law in *Ryan's Commander* notwithstanding section 6(2) of the *Marine Liability Act*, how can the *Ryan's Commander* be reconciled with *Quebec North Shore Paper v CP Limited*, [1977] 2 SCR 1054? That case taught us that it is not enough that the subject matter of an action fall within a federal legislative power and that jurisdiction has been given to the Federal Court. In addition there must be actual applicable federal law at the core of the dispute. *Quebec North Shore* was characterized as a case based on interprovincial trade and commerce. There was no federal law. However, because of the definition of Canadian Maritime Law in section 2 of the *Federal Courts Act*, there is federal maritime law which includes the law which would have been administered by our predecessor court, the Exchequer Court, had it had unlimited jurisdiction in maritime and admiralty matters, co-extensive with Parliament's legislative power over navigation and shipping. Thus, if as in *Ryan's Commander*, and in this case, the dispute is one which in its pith and substance is based on Canadian Maritime Law, the Federal Court may apply provincial law. Obviously, "incidental" does not mean unimportant.

[145] I conclude that this Court may take cognizance of the Ontario *PPSA* not only under section 23 of the *Federal Courts Act* but also in virtue of the *Buenos Aires Maru* and the *Ryan's Commander*.

[146] After deducting the Marshal's costs of $39,106.37, Ballantrae's costs of $12,830.46, the crew claims of $132,935.00, la Ville de Sorel-Tracy's claim of $22,407.02, Blue Water's of $9,041.78, Pronova's of $26,182.15, and 185888 Canada's of $24,347.70, which total $266,850.48, Ballantrae is entitled to the balance of the $682,500.00 being $415,649.52.

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Interest

[147] Section 36 of the *Federal Courts Act* speaks to prejudgment interest, but subsection 7 thereof specifically provides that this section does not apply to cases which arise under Canadian Maritime Law. Post-judgment interest is covered by section 37 of the Act. If the cause of action arose in a province, then the provincial law is incorporated and applied. Otherwise, the Court applies an interest rate it considers reasonable in the circumstances. Some of the claims, such as that of la Ville de Sorel-Tracy and the ship's necessaries men appear to have arisen in Quebec. Others, such as the claims of the crew and Ballantrae did not, at least not in their entirety. In the circumstances, and taking into account the great wealth of jurisprudence relating to interest on the funds generated by the sale of a ship, I shall apply what I consider to be reasonable.

[148] In Canadian Maritime Law prejudgment interest is a function of damages, left to the discretion of the Court (*Bell Telephone Company of Canada v The Mar-Tirenno*, [1974] 1 FC 294 (FCTD); *Kuehne + Nagel Ltd v Agrimax Ltd*, 2010 FC 1303). The Court in its discretion may decide not to apply the contractual rate agreed between the parties (*Mount Royal/Walsh Inc v The Jensen Star*, 17 FTR 289, [1988] FCJ No 141 (FCTD) (QL), varied but not on this point [1990] 1 FC 199, 1989 FCJ No 450 (FCA) (QL), leave to appeal to SCC refused, 21593 (23 November 1989) (QL)).

[149] The Court more often than not applies a commercial rate but, given that commercial rates are very low at the moment, sometimes applies the legal rate of 5%. Any award of prejudgment interest would, in effect, be taken out of Ballantrae's pocket, as I have ordered that it shall

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receive whatever is left over after payments out to the Marshal, Ballantrae as to costs, the Master and crew, la Ville de Sorel-Tracy, and the necessaries men.

[150] In the circumstances, I consider it appropriate that no prejudgment interest be awarded. It must be borne in mind that none of the claimants has actually obtained a judgment *in personam* against the shipowners. In such a case they certainly would have been entitled to prejudgment interest, but not against the fund.

[151] As to post-judgment interest, it is customary to award interest at the rate paid by the Court on funds on deposit. The *Kinguk*, above, is but one example. This is exactly what I did on the first payment to the crew.

[152] Interest on the deposit in court accumulates monthly. Since it is not clear when payments out will be made, payment of interest should be at the same proportion the award in principal bears to the amount on deposit, factoring in the fact that the payment out to the Marshal of $39,106.37 carried no interest with it. For example, Ballantrae's claim in principal is $415,649.52. By dividing that sum by $643,393.63 (the $682,500.00 deposit minus the $39,106.37 paid to the Marshal), it should be awarded 64.603% of the total accumulated interest. To take another example, Captain Ozkan's claim in principal is $28,741.89. That is 4.467% of the principal balance of the proceeds of sale, and thus Captain Ozkan shall receive 4.467% of the accumulated interest. The $87.33 of interest he was awarded on April 11, 2016, shall have to be deducted therefrom, as will the previous payments of interest to the rest of the crew.

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[153] On that basis payment of accumulated interest is as follows:

| | | |
|---|---|---|
| (a) | The Marshal | nil |
| (b) | Ballantrae's costs | 1.994% |
| (c) | The Twelve Seafarers: | |
| | (i) Captain Ozkan | 4.467% less $87.33 |
| | (ii) Mr. Karasu | 4.079% less $81.50 |
| | (iii) Mr. Ergun | 1.486% less $29.47 |
| | (iv) Mr. Kan | 1.143% less $21.26 |
| | (v) Mr. As | 1.032% less $21.26 |
| | (vi) Mr. Cenik | 0.803% less $15.78 |
| | (vii) Mr. Gumusoz | 1.032% less $21.26 |
| | (viii) Mr. Meral | 0.803% less $15.78 |
| | (ix) Mr. Guray | 1.076% less $21.26 |
| | (x) Mr. Ates | 0.797% less $14.69 |
| | (xi) Mr. Kaan | 1.982% less $37.14 |
| | (xii) Mr. Ucman | 1.959% less $40.94 |
| (d) | La Ville de Sorel-Tracy | 3.483% |
| (e) | Blue Water | 1.405% |
| (f) | Pronova | 4.069% |
| (g) | 185888 Canada Inc (North Star) | 3.784% |
| (h) | Ballantrae | 64.603% |

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Costs

[154] The only party seeking payment of costs from the fund on deposit in Court is Ballantrae, for well-founded reasons. The only other claim with respect to costs is by Mr. Hamilton, who seeks costs from Jarud, which only discontinued its claim on the first day of the hearing.

[155] Jarud had filed a claim through counsel. It then gave notice that it intended to represent itself through its president, Mr. Rudnick. This notice was meaningless as Rule 120 of the *Federal Courts Rules* provides that a corporation shall be represented by a solicitor unless the Court, in special circumstances, grants it leave to be represented by an officer. Jarud made no such motion.

[156] Nevertheless, its claim was still in the record and would have had to have been considered by the Court absent the discontinuance. Jarud was a middle man which essentially claimed a finders fee. However, it also asserted that it was entitled to priority pursuant to section 139 of the *Marine Liability Act*. Consequently it was in the interests of both Mr. Hamilton and Ballantrae to contest the claim, which they did.

[157] Mr. Hamilton's motion was in writing pursuant to Rule 369. It is customary to give the respondent 10 days to reply. As nothing had been heard from Jarud I directed the Registry to communicate with its President, Mr. Rudnick. This resulted in a letter from Mr. Rudnick, not served upon the other parties, and which he asked to be kept confidential. Naturally, I directed the Registry not to accept the letter for filing.

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[158] I might have been open to allow Jarud to respond through its President with respect to a claim against it, as opposed to its claim against the fund. However, the Court does not deal with "confidential" letters which in any event was hardly responsive to the Hamilton claim for costs.

[159] Rule 402 provides that unless otherwise ordered or agreed when a motion has been abandoned the other party is entitled to costs. On the other hand, the Court is somewhat loathe to put roadblocks in the way of discontinuances.

[160] A small portion of Mr. Hamilton's efforts did relate to Jarud's claim. However, the main focus was asserting his own claim, and defeating the claims of others, or submitting that they were not entitled to priority.

[161] It is somewhat ironic that Mr. Hamilton's claim was dismissed outright. Yet Ballantrae is not seeking costs as against it.

[162] In the circumstances, I award Mr. Hamilton $1,000.00 against Jarud, all in.

*Official Languages Act*

[163] La Ville de Sorel-Tracy's written and oral submissions were in French. The other parties pleaded in English. Section 20 of the *Official Languages Act* provides that final judgments should be issued simultaneously in both English and French when the proceedings were conducted in whole or in part in both official languages. However the section goes on to provide that a judgment may be first issued in one language if simultaneous publication would, among

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other things, result in an injustice or hardship to any party. The twelve seafarers were in dire straits. Given that it will probably take a few months for a translation, their counsel moved that judgment be first issued in one language, with a translation to follow. Counsel for the other parties, particularly la Ville de Sorel-Tracy, kindly agreed.

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## JUDGMENT

For reasons given;

**UPON MOTION** for payment out of the sum of $682,500, being the proceeds of the sale of the PHOENIX SUN together with accumulated interest thereon;

**TAKING INTO ACCOUNT THAT** the acting Marshal, by order dated December 16, 2014, has already been paid his fees and expenses in the amount of $39,106.37, without interest and that, by order dated April 11, 2016, the twelve seafarers have already been paid a total amount in principal of $62,775.54 with accumulated interest of $407.67;

**THIS COURT ORDERS** the following payments:

1. To Ballantrae Holdings Inc. by way of costs $12,830.46 with 1.994% of accumulated interest;

2. To the twelve seafarers:

| | | |
|---|---|---|
| i. | Captain Oskan | $15,293.55 + 4.467% of accumulated interest less $87.33 |
| ii. | Mr. Karasu | $13,696.77 + 4.079% of accumulated interest less $81.50 |
| iii. | Mr. Ergun | $5,021.99 + 1.486% of accumulated interest less $29.47 |
| iv. | Mr. A. R. Kan | $4,078.11 + 1.143% of accumulated interest less $21.26 |
| v. | Mr. As | $3,368.48 + 1.032% of accumulated interest less $21.26 |
| vi. | Mr. Cenik | $2,739.35 + 0.803% of accumulated interest less $15.78 |
| vii. | Mr. Gumusoz | $3,368.48 + 1.032% of accumulated interest less $21.26 |
| viii. | Mr. Meral | $2,739.35 + 0.803% of accumulated interest less $15.78 |
| ix. | Mr. Guray | $3,652.31 + 1.076% of accumulated interest less $21.26 |
| x. | Mr. Ates | $2,865.63 + 0.797% of accumulated interest less $14.69 |
| xi. | Mr. A. Kaan | $7,035.03 + 1.982% of accumulated interest less $37.14 |
| xii. | Mr. Ucman | $6,300.51 + 1.959% of accumulated interest less $40.94 |

3. To Ville de Sorel-Tracy $22,407.22 + 3.483% of accumulated interest

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4. To Blue Water Agencies Ltd. $9,041.78 + 1.405% of accumulated interest

5. To Pronova Systems Inc. $26,182.15 + 4.069% of accumulated interest

6. To 185888 Canada Inc. $24,347.70 + 3.784% of accumulated interest

7. To Ballantrae Holdings Inc. $415,649.52 + 64.603% of accumulated interest

Payments may be made to the Solicitors of Record, in trust.

"Sean Harrington"

Judge

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**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-1683-14 |
| **STYLE OF CAUSE:** | BALLANTRAE HOLDINGS INC v THE OWNERS AND ALL THOSE INTERESTED IN THE SHIP "PHOENIX SUN" AND THE SHIP "PHOENIX SUN" |
| **PLACE OF HEARING:** | MONTREAL, QUEBEC |
| **DATE OF HEARING:** | APRIL 7-8, 2016 |
| **JUDGMENT AND REASONS:** | HARRINGTON J. |
| **DATED:** | MAY 26, 2016 |

**APPEARANCES:**

| | |
|---|---|
| David G. Colford | FOR THE PLAINTIFF |
| Vanessa Major | Blue Water Agencies Limited, Pronova Systems Inc. and 185888 Canada Inc. |
| Gary H. Waxman, Lionel Lieber | Semih Ozkan, Akpinar Kaan, Serdar Recep Karasu, Ufuk Ucman, Ersin Ergun, Ali Riza Kan, Zekai As, Serhat Cenik, Mehmet Gumusoz, Mesut Meral, Seydi Guray and Umut Ates |
| William M. Sharpe, Marcos Cervantes-Laflamme | Ian Hamilton and Through Logistics Corp. |
| Christian Crevier | Ville de Sorel-Tracy |
| Shahzad Siddiqui | Skylane Worldwide Limited |
| Mustafa Hakan Etiz | (on his own behalf) |
| No one appeared | FOR THE DEFENDANT |

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**SOLICITORS OF RECORD:**

| | |
|---|---|
| BRISSET BISHOP<br>Montreal, Quebec | FOR THE PLAINTIFF |
| DE MAN, PILLET<br>Montreal, Quebec | Blue Water Agencies Limited, Pronova Systems Inc. and 185888 Canada Inc |
| GARY H. WAXMAN<br>Montreal, Quebec | Semih Ozkan, Akpinar Kaan, Serdar Recep Karasu, Ufuk Ucman, Ersin Ergun, Ali Riza Kan, Zekai As, Serhat Cenik, Mehmet Gumusoz, Mesut Meral, Seydi Guray and Umut Ates |
| WILLIAM M. SHARPE<br>Toronto, Ontario | Ian Hamilton and Through Logistics Corp. |
| FRAPPIER CREVIER TREMPE<br>Sorel-Tracy, Quebec | Ville de Sorel-Tracy |
| ABRAHAMS LLP<br>Toronto, Ontario | Skylane Worldwide Limited |

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## Appendix X

Richard A. Spellacy – Monitor's Determination of Claim

Grant Thornton

**January 19, 2024**

**Grant Thornton Ltd**
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Richard A. Spellacy, Master Marnier
130 LeMarchant Road, Suite 201
St. John's, NL A1C 2H2
Attention: Richard Spellacy
*via email:* dspellacy@nf.aibn.com; deborahljhutchings@gmail.com

Dear Mr. Spellacy

**Re: *Companies' Creditors Arrangement Act* proceedings of 92834 Newfoundland and Labrador Inc. – Claims Identification Process**

Pursuant to the Claims Identification Order, dated October 25, 2023 issued by the Supreme Court of Newfoundland and Labrador (the "**Court**"), Grant Thornton Limited, in its capacity as the Court-appointed monitor (the "**Monitor**") of 92834 Newfoundland and Labrador Inc. was authorized to administer a claims identification process (the "**Claims Identification Process**") to identify creditor(s) and amount of claims that have a priority to the first secured creditor Bridging Finance Inc. and Bridging Income Fund LP (formerly Sprott Bridging Income Fund LP) (collectively, "**Bridging**"). The Claims Identification Order governed the filing and identification of all claims against 92834 Newfoundland and Labrador Inc., Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., CFI Newspar Holdings Inc. and Newspar (a General Partnership) (collectively, "**CFI**").

Paragraph 28 of the Claims Identification Order empowers the Monitor to, among other things, accept, revise, or disallow each claim and determine the priority asserted by the claim, subject to further determination by the Court if the claimant disputes the Monitor's determination.

The Monitor hereby confirms receipt of the claim of Richard A. Spellacy, Master Marnier dated November 24, 2023 for a Pre-Filing Secured Claim of $68,000.00 and a Restructuring Secured Claim of $46,350.00 (total of $114,350).

The claim of November 24, 2024 is materially different than the proof of claim dated September 2, 2022 which was supported by an affidavit of Mr. Spellacy and used to support a caveat. In the September 2, 2022 claim, Mr. Spellacy claimed $252,900, however, in the November 24, 2023 claim Mr. Spellacy is seeking $114,350.

Given the November 24, 2023 claim was filed pursuant to the Claims process, and is subsequent to the September 2, 2022 claim, we will be using that claim.

Mr. Spellacy has not provided any written confirmation that he was ever appointed as master of the barge by CFI, or that the appointment was ongoing.

Your Pre-Filing Secured Claim of $68,000.00 and Restructuring Secured Claim of $46,350 (total of $114,350) is **DISALLOWED**. The Monitor will **NOT** be including this amount for distribution in its next Court application set for January 25, 2024.

The Monitor is applying to the Court for, among other things, a distribution of available proceeds to Bridging and CFI's accepted priority creditors on January 25, 2024. Should you wish to dispute the Monitor's determination of your claim, the Monitor requests you provide the Monitor with notice of such objection at least 2 days prior to the January 25, 2024 Court application.

Application materials for the January 25, 2024 Court appearance and the Monitor's Eleventh Report will be posted on the Monitor's website at www.GrantThornton.ca/CFI once available.

Yours truly,

**GRANT THORNTON LIMITED**
In its Capacity as Court-appointed Monitor of
92834 Newfoundland and Labrador Inc.

Per:
Phil Clarke, CPA, CA, CIRP, LIT
Senior Vice President

**Appendix Y**

Richard A. Spellacy – Notice of Appeal

**DEBORAH L.J. HUTCHINGS LAW**
**Deborah L.J. Hutchings, K.C.**
**Barrister, Solicitor and Notary**
61 Parsonage Drive
St. John's, NL A1A 0J6

(709) 726-3082 (Home) – (709) 682-3278 (Mobile)

February 14, 2024

By Email: CanadaFluorspar@ca.gt.com

Grant Thornton Limited – The Court Appointed Monitor of
92834 Newfoundland and Labrador Inc.
Nova Centre, North Tower
1675 Grafton Street, Suite 1000
Halifax, Nova Scotia B3J 0E9

Dear Sir:

**Re: Our Client – Richard A. Spellacy ("Spellacy")**
**The Debtor – 92834 Newfoundland and Labrador Inc./Canada Fluorspar (NL) Inc.**
**Notice of Appeal – Assessment of Claim by Monitor**

In connection with the above noted matter, on behalf of Spellacy we enclose herewith and in compliance with the Order of Justice A. MacDonald dated January 25, 2024, our client's Notice of Appeal.

Since the Supreme Court of Newfoundland and Labrador, General Division (St. John's) is closed today due to a winter storm, we shall file the same with the Court tomorrow. In the event that the Court is closed as well tomorrow, we shall advise you, accordingly.

Trusting that all of the foregoing is found to be in order.

Yours very truly,

Deborah L. J. Hutchings Law
Per: Deborah L.J. Hutchings, K.C

cc. Geoffrey L. Spencer, McInnes Cooper

**2023 01G 0841**
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** an Appeal of the Assessment of Grant Thornton Limited, as Court-appointed Monitor (the "**Monitor**") of Canada Fluorspar (NL) Inc. ("**CFI**") and of 92834 Newfoundland and Labrador Inc. ("**92834**" or the "**Company**") denying the Priority Claim of Richard A. Spellacy ("**Spellacy**") for Master's Wages and resulting Master's Lien against CFI

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

## NOTICE OF APPEAL

**TAKE NOTICE THAT** pursuant to the Order dated January 25, 2024 of the Honourable Justice A. MacDonald in proceedings before this Honourable Court bearing number 2022 01G 0709, Spellacy hereby appeals from the Assessment/Decision of the Monitor dated January 19, 2024 wherein the Monitor disallowed Spellacy's priority claim for master's wages and resulting master's lien, and disallowed the inclusion of Spellacy's said claim in the Monitor's proposed distribution of the proceeds from the sale of the assets/shares of CFI pursuant to the CCAA proceedings in the within matter.

**AND THAT** the grounds of the proposed appeal are:

1. The Monitor erred in fact and law in failing to find that Spellacy has met his burden of proving that, prior to the appointment of a trustee in bankruptcy for CFI under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, ("**BIA**") and prior to the appointment of the Monitor under the CCAA, Spellacy was appointed by CFI to act as master of the Barge H-404 (the "**Barge**") for the purpose of operating the ballast tank system;

2. The Monitor erred in fact and law in failing to find that before the proceedings were commenced under the BIA and the CCAA, wages were due and owing by CFI for the work Spellacy performed for CFI as a master for the Barge, from which the outstanding master's wages give rise to a master's lien and a priority claim in the within matter against CFI's assets, including the Barge, and the proceeds therefrom;

3. The Monitor erred in fact and law by dismissing Spellacy's priority claim for master's wages and master's lien against CFI and the Barge, respectively; and

4. Such further grounds as the evidence and law may indicate and this Honourable Court may permit.

**AND THAT** Spellacy will ask that the Assessment/Decision appealed from be reversed, rescinded or varied as follows:

1. That the Assessment/Decision of the Monitor disallowing Spellacy's priority claim and Master's Lien against CFI and the Barge be set aside in its entirety and an order from this Honourable Court be entered, accordingly; and

2. Spellacy shall have his costs of this Appeal and in the proceedings below; and

3. Such just and equitable relief that this Honourable Court deems appropriate in the circumstances.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 14th day of February, 2023.

**DEBORAH L.J. HUTCHINGS LAW**

Per: _____

DEBORAH L. J. HUTCHINGS, K.C.
Solicitor for the Appellant, Spellacy
*Whose address for service is*
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**TO:** Phil Clarke, CPA, CA, CIRP, LIT
**GRANT THORNTON LIMITED**
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**AND TO:** Geoffrey L. Spencer
**MCINNES COOPER**
Solicitor for GRANT THORNTON LIMITED
in its Capacity as Court-Appointed Monitor
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**AND TO:** Supreme Court of Newfoundland and Labrador
General Division
Registry, St. John's
Duckworth Street
St. John's, NL A1C 6C9