SUPERIOR COURT

(*Commercial Division*)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

DATE: December 7, 2016

PRESIDED BY THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

WABUSH IRON CO. LIMITED
Debtor/Respondent

And
FTI CONSULTING CANADA INC.
Monitor

And
ROYAL BANK OF CANADA
Creditor/Petitioner

JUDGMENT ON ROYAL BANK OF CANADA'S AMENDED MOTION TO LIFT STAY OF PROCEEDINGS WITH RESPECT TO WABUSH IRON CO. LIMITED (#405)

INTRODUCTION

[1] A creditor makes a motion to lift the stay of proceedings under the *Companies' Creditors Arrangement Act*[1] for the limited purpose of compelling the production of evidence by the debtor.

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1 R.S.C., 1985, c. C-36.

CONTEXT

[2] Cliffs Mining Company was the managing agent for Wabush Mines, an unincorporated joint venture of Stelco Inc., Dofasco Inc. and Wabush Iron Co. Limited.[2]

[3] In 1996, Cliffs entered into a lease with Royal Bank of Canada for equipment to be used by Cliffs in the operation of the Wabush mine in Labrador,[3] and another lease for equipment to be used in Quebec.

[4] Disputes arose between RBC and Cliffs in 2003 with respect to the exercise of the option to purchase under the leases. Cliffs, as managing agent for Wabush Mines, instituted an action against RBC in the Supreme Court of Newfoundland and Labrador on October 9, 2003 to compel RBC to accept a certain payment in exchange for ownership of the Labrador equipment.[4] RBC instituted an action against Cliffs, Stelco, Dofasco, Wabush Iron and Wabush Mines in Quebec Superior Court in 2004 claiming the higher contractual value of the Quebec equipment.[5]

[5] The Quebec Court of Appeal maintained RBC's Quebec action in 2010.[6]

[6] On February 13, 2014, RBC filed a counterclaim against Cliffs in the Newfoundland action claiming the higher contractual value of the equipment.[7] In its defence, Cliffs disclaimed any personal liability for the acts or omissions of Wabush Mines, and pleaded that any relief sought by RBC must be against the members of Wabush Mines.[8]

[7] On January 19, 2015, RBC applied for leave to amend its counterclaim to add Stelco, Dofasco and Wabush Iron as defendants by counterclaim.[9] On May 15, 2015, RBC issued interrogatories to Cliffs, Stelco, Dofasco and Wabush Iron.[10]

[8] On May 20, 2015, Wabush Iron and a number of related parties filed for Court protection under the CCAA. The Initial Order issued by this Court included a stay of proceedings, which has been renewed from time to time and is still in force today.

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2 Exhibit A to the affidavit of Gary Ivany sworn on October 15, 2014, which is itself Exhibit A to the Ivany affidavit sworn on July 14, 2016 filed in support of RBC's motion.
3 Exhibit C to the October 15, 2014 Ivany affidavit.
4 Court file 2003 01T No. 3807.
5 Court file 200-17-005035-043.
6 2010 QCCA 1126.
7 Exhibit 1 to Clifford T. Smith's affidavit sworn November 4, 2016.
8 Exhibit 2 to Smith's affidavit.
9 Exhibit 1 in support of the motion.
10 Exhibit 5 to Smith's affidavit.

[9] Dofasco and Cliffs provided answers to the May 2015 interrogatories[11] but Wabush Iron refused to answer without first having the stay of proceedings lifted. Further interrogatories were issued to Cliffs on June 21, 2016, to which Cliffs provided answers.[12]

[10] On December 18, 2015, RBC filed a proof of claim against Wabush Iron in the CCAA proceedings.

[11] On August 15, 2016, RBC filed a motion before this Court to lift the stay of proceedings and permit it to add Wabush Iron as a defendant by counterclaim in the Newfoundland action.

[12] On October 6, 2016, RBC issued written interrogatories to Wabush Iron in relation to the Newfoundland action.[13] These are narrower than the May 2015 interrogatories, as a result of the answers obtained from other parties. The interrogatories focus on whether Dofasco, Stelco and Wabush Iron authorized Cliffs to exercise the option to purchase the equipment in 2003. Wabush Iron refused to answer the October 2016 interrogatories without first having the stay of proceedings lifted.

[13] Meanwhile, on October 7, 2016, the monitor in the CCAA proceedings allowed in part RBC's claim against Wabush Iron in the amount of $5,224,485.26. RBC did not appeal from that decision.

[14] As a result, RBC no longer seeks to make Wabush Iron a party to the Newfoundland action. It amended its motion to limit the lifting of the stay of proceedings to compelling Wabush Iron, in the context of the Newfoundland action, to:

a) answer the written interrogatories;

b) produce relevant documents; and

c) make available a representative for discovery.

[15] Wabush Iron and the monitor contest the motion.

ISSUES

[16] The motion raises the following issues:

1. Does the stay of proceedings under the Initial Order prevent RBC from compelling Wabush Iron to provide evidence?

2. If so, should the Court lift the stay of proceedings?

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11 Exhibits 6 and 7 to Smith's affidavit.
12 Exhibit 8 to Smith's affidavit.
13 Exhibit 5 in support of the motion.

ANALYSIS

1. Scope of the stay of proceedings

[17] Section 11.02(1) and (2) CCAA provide as follows:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
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> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (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.
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> (Emphasis added)

[18] Pursuant to Section 11.02(1) CCAA, the Initial Order included the following paragraphs:

> 7. **ORDERS** that, until and including June 19, 2015, or such later date as the 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 Wabush CCAA Parties or affecting the business operations and activities of the Wabush CCAA Parties (the "**Business**") or the Property (as defined below), including as provided in paragraph 11 hereinbelow except with leave of this Court. Any and all Proceedings currently under way against or in respect of the Wabush CCAA Parties or affecting the Business or the Property of the Wabush CCAA Parties are hereby stayed and suspended pending further order of this Court, the whole subject to subsection 11.1 CCAA.

> **15.** **ORDERS** that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, including, but not limited to modifications of existing rights and events deemed to occur pursuant to any agreement to which any of the Wabush CCAA Parties is a party as a result of the insolvency of the Wabush CCAA Parties and/or these CCAA proceedings, any events of default or non-performance by the Wabush CCAA Parties or any admissions or evidence in these CCAA proceedings, of any individual, natural person, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Wabush CCAA Parties, or affecting the Business, the Property or any part thereof are hereby stayed and suspended except with leave of this Court.
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> (Emphasis added)

[19] The stay period has been extended on several occasions pursuant to Section 11.02(2) CCAA and now expires on January 31, 2017.

[20] The language of Section 11.02(1) and (2) CCAA and of paragraphs 7 and 15 of the Initial Order (as extended) is very broad. The notion of "proceedings" clearly includes judicial proceedings such as an action by an unsecured creditor against the debtor to collect a debt, or a proceeding by a secured creditor to enforce its rights against the debtor's property. The Courts have interpreted "proceedings" broadly to also cover extra-judicial proceedings which could prejudice an eventual arrangement, and as including a mere procedural step that is part of a larger action or special proceeding.[14]

[21] In the present case, Wabush Iron is merely being asked to provide evidence. That evidence will not be used against Wabush Iron. The liability of Wabush Iron under the lease agreements has been definitively settled by the monitor accepting in part RBC's proof of claim and RBC not appealing from that partial acceptance. The evidence may be used against Cliffs, but the stay is not intended to protect third parties, even if the third party is a related party.

[22] However, even if the Court concludes that the production of evidence would not prejudice an eventual arrangement, such that the stay of proceedings does not apply to prevent RBC from serving interrogatories on Wabush Iron and obtaining relevant documents and from requiring that a representative of Wabush Iron produce evidence on discovery, that does not put an end to the inquiry.

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[14] *Nortel Networks Corp. (Re)*, 2010 ONSC 1304, par. 36-39, appeal dismissed, 2014 ONCA 464; *Hawkair Aviation Services Ltd. (Re)*, 2006 BCSC 669, par. 27; *Toronto Stock Exchange Inc.* v. *United Keno Hill Mines Ltd.*, [2000] O.J. No. 1814, par. 11.

[23] If the interrogatories are served on Wabush Iron and it does not respond, the next step is for RBC to bring a motion in the context of the Newfoundland action to compel it to respond. Given the position taken by Wabush Iron on this motion, that outcome appears likely.

[24] If that happens, there is a judicial proceeding against Wabush Iron and the stay of proceedings clearly comes into play.

[25] As a result, the Court will treat this as a matter to which the stay of proceedings applies.

2. Lifting the stay of proceedings

[26] The Court has discretion to lift the stay. Section 11.02(1) and (2) CCAA include the limitation "until otherwise ordered by the court", and paragraphs 7 and 15 of the Initial Order includes the limitation "except with leave of this Court".

[27] RBC asks the Court not only to lift the stay but also to order Wabush Iron to answer the interrogatories, produce documents and make available a representative to be examined on discovery. The Court expresses some doubt as to whether it has jurisdiction to render such orders in a Newfoundland action. In any event, the Court is of the view that it should not do so. The Court does not have sufficient knowledge of the Newfoundland action to assess whether such orders are appropriate. At most, the Court will lift the stay of proceedings and allow RBC to make a motion to the Newfoundland Court asking the Newfoundland Court to issue those orders.

[28] The Courts have highlighted that the stay should be given a broad interpretation in order to achieve its goals.[15] Similarly, the stay should only be lifted in circumstances where to do so is consistent with the goals of the stay.

[29] The purpose of the stay of proceedings is to promote the reorganization and restructuring of the debtor by maintaining the *status quo*, giving the debtor some breathing room, protecting the debtor from the claims of the creditors and preserving the debtor's assets for the benefit of all of the creditors and other stakeholders. It prevents an aggressive creditor from obtaining an advantage over other creditors during the restructuring process, and allows for all claims to be determined in summary fashion through the claims procedure under the CCAA.

[30] Various cases set out the test for lifting the stay. The Court adopts the following statements from the decision of Justice Pepall in *Canwest*:

> [32] As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor

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[15] *Canwest Global Communications Corp. (Re)*, 2009 CanLII 70508, par. 28; *Hawkair*, *supra* note 14, par. 14-18.

R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.

[33] Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.* and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.[16]

(Emphasis added)

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[16] Canwest, *supra* note 15 par. 32-33. See also *Homburg Invest Inc. (Arrangement relatif à)*, EYB 2012-201097 (C.S.), par. 21.

[31] In the circumstances of this case, the Court should consider the balance of convenience or the relative prejudice to the parties. The merits of the action may also be relevant.[17]

[32] The balance of convenience involves weighing the importance of the evidence sought to the petitioner's case versus the expense and inconvenience to the third party in obtaining the evidence.

[33] The Court notes that the balance of convenience test that it would undertake in the CCAA context includes many of the factors that the Newfoundland Court would apply in deciding whether to order a party to respond to interrogatories under Rule 31 of the *Rules of the Supreme Court, 1986*,[18] which provides in part:

> **31.01.** (1) A party may serve upon an adverse party written interrogatories in Form 31.01A to be answered by the adverse party, or if the adverse party is a body corporate, partnership or association, by an officer or agent thereof, and subject to rule 31.03, the adverse party, officer or agent shall answer each interrogatory to the best of his or her personal knowledge or from information available to him or her through any person.
>
> (2) A party may serve upon any person who is not a party, interrogatories to be answered by that person, or if that person is a body corporate, partnership or association, by an officer or agent thereof, and subject to rule 31.03, the person shall answer each interrogatory to the best of his or her personal knowledge and, if necessary, by adding any explanatory information, provided the party shall serve a copy of the interrogatories and answers upon any adverse party forthwith upon receipt of the same.
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> **31.02.** (1) Interrogatories shall relate to the same matters as may be dealt with by an examination for discovery under rule 30.08.
>
> (2) Unless the Court otherwise orders to protect a party or person interrogated from annoyance, expense, embarrassment or oppression, the number of interrogatories or sets of interrogatories to be served is not limited.
>
> (3) Unless the Court otherwise orders, the interrogatories may be served at any time after the pleadings are closed within the meaning of rule 14.22.
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> (4) Where interrogatories are to be served on two or more persons or are required to be answered by an officer or agent of a person, a note at the end of the interrogatories shall state which of the interrogatories each person is required to answer.

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17 *ICR Commercial Real Estate (Regina) Ltd.* v. *Bricore Land Group Ltd.*, 2007 SKCA 72, par. 68; *Sino-Forest Corp. (Re)*, 2012 ONSC 6275, par. 16.

18 SNL 1986, c. 42, Schedule D.

> **31.03.** (1) Unless the Court otherwise orders, interrogatories shall be answered separately and fully under oath as in Form 31.03A, and the answer shall be served on the party giving the interrogatories within ten days of their receipt.
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> (2) An objection to answering any interrogatory may only be taken on the ground of privilege or that it is not relevant to the subject matter involved in the proceeding, but not that it is outside of the scope of the pleadings, and the objection shall be made in the affidavit in answer.
>
> **31.04.** If a person on whom interrogatories have been served fails to answer any one or more of them or answers insufficiently, the Court may, upon such terms as are just, make an order requiring that person to answer or to answer further, either by affidavit or oral examination, or to answer any other interrogatory.
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> [...]
>
> (Emphasis added)

[34] In relation to Rule 31 and the authorities submitted jointly by the parties, the Court notes the following:

- The Rules are to be interpreted liberally to effect full disclosure;[19]
- The non-party's obligation is limited to answering each interrogatory to the best of his or her personal knowledge (Rule 31.01(2)). The non-party is not required to inform himself or herself by consulting others;[20]
- The person can object to answering on the ground that "it is not relevant to the subject matter involved in the proceedings" (Rule 31.03(2)). The interrogatories must in some manner be connected with or of assistance to the interrogating party in relation to a live issue in dispute, and will be considered unnecessary if the matter has been conceded or has not been raised as an issue in the pleadings.[21] Further, the interrogatories will be refused if the issue is "much too remote to have any bearing on the outcome of the case";[22]
- The Court has an overriding discretion to place limits on the interrogatories to protect the person interrogated from "annoyance, expense, embarrassment or oppression" (Rule 31.02(2)).[23] The Court can also refuse interrogatories if

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19 *Szeto* v. *Field*, 2009 NLTD 8, p. 8-9.

20 Derek Green and Christopher P. Curran, Q.C., "Rules of Court. Annotated (Selected Pre-Trial and Post-Trail Procedures)" in The Law Society of Newfoundland and Labrador, *Bar Admission Course. Practice and Procedure*, 2007, p. 31-8.

21 Green and Curran, *supra* note 20, p. 31-8.

22 *Joyce* v. *Western Toyota Limited*, 2008 NLTD 137, par. 23.

23 Green and Curran, *supra* note 20, p. 31-5.

they are "scandalous", "not *bona fide*", "vexatious" or "prolix" or if they place a "disproportionate burden" on the person;[24] and

- If the person fails to answer, the Court may, "upon such terms as are just", order the person to answer (Rule 31.04).

[35] In the CCAA context, the additional but overriding consideration is the impact of the proceedings on the CCAA process, and whether they put that process at risk. That notion is interpreted broadly, as whether the proceedings would seriously impair the ability of the debtor to continue in business or the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.[25]

[36] RBC argues that its claim against Cliffs and the remaining members of Wabush Mines has significant merit. It says that Wabush Iron's evidence is fundamental to this claim and that it has exhausted all other avenues with parties and non-parties to obtain the evidence. It adds that it has narrowed its request as much as possible.

[37] RBC argues that if the stay is not lifted, it will be denied this evidence and its case against Cliffs and the remaining members of Wabush Mines will be prejudiced.

[38] Wabush Iron argues that the evidence is not necessary and that RBC is testing an assertion that is not being made. It also argues that RBC has not exhausted all other avenues to obtain the evidence. The specific questions set out in the October 2016 interrogatories have not been put to Cliffs, Dofasco or Stelco.

[39] Moreover, Wabush Iron argues that lifting the stay of proceedings would place an extremely onerous and costly burden on it. It explains that there are currently no Wabush Iron directors, officers, employees or representatives with first-hand knowledge of the events, and that previous attempts to contact former Wabush Iron representatives in the context of this case have been unsuccessful. It estimates that the total cost for the documentary search could be in the tens of thousands of dollars, that it could take weeks if not months, and that it likely will not turn up any relevant evidence.

[40] RBC argues that this inconvenience to Wabush Iron and the time and cost involved is limited. It adds that Wabush Mines has been aware of this litigation and the Quebec action for years and has had ample opportunity to gather evidence. It argues that any inconvenience to Wabush Iron is outweighed by the prejudice that RBC would suffer if the motion is dismissed and it is denied access to the evidence.

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[24] *Attorney-General of Newfoundland* v. *Churchill Falls (Labrador) Corp. Co.* (1982), 34 Nfld & P.E.I.R. 507 (TD), par. 5, 19-20, 38; Green and Curran, *supra* note 20, p. 31-9.

[25] *Hawkair*, *supra* note 14, par. 19-20.

[41] The Court is of the view that the Newfoundland Court is in a better position to evaluate whether the evidence which is being sought is relevant to a live issue in the Newfoundland action, whether there are other avenues to obtain the evidence, whether the request is reasonable and whether the notion of proportionality favours the issuance of the order or not.

[42] However, this Court is in the best position to undertake the analysis of the potential impact of this order on the CCAA process. Accordingly, the Court will limit its analysis to the question of whether the order which is being sought puts the restructuring process at risk. If it does, the Court will refuse the order. If it does not, the Court will lift the stay, and will leave it to the Newfoundland Court to assess whether it should order Wabush Iron to answer the interrogatories, produce documents and produce a representative to be examined out of court, by balancing the potential harm to RBC of not having the evidence against the potential inconvenience and expense that searching for the information and disclosing it would cause to Wabush Iron.

[43] Wabush Iron does not argue that this motion puts the CCAA process at risk, but suggests that the expense is an unnecessary burden on Wabush Iron and will reduce the amounts to be distributed to its creditors.

[44] This is not like *Hawkair*, where the union brought an application for certification against the debtor. In that case, Justice Burnyeat held:

> [34] I am satisfied that the filing of the Certification Application has and will seriously impair the ability of the Company to focus and concentrate on its efforts to bring forward a plan of reorganization. While I am not satisfied that the Certification Application will seriously impair the ability of the Company to carry on business, it is clear that the management of the Company does not have the financial or personnel resources to deal with the Certification Application on its own. In a small company such as this, I am satisfied that there are insufficient resources to carry through with the submissions and negotiations which will be required if a collective agreement is to be reached on the assumption that Certification will be granted. I am satisfied that the Company will be better able to handle such an application once the reorganization has taken place as the Company will then know with certainty the economic status of the Company. I am also satisfied that one of the purposes of the stay of proceedings provided under s. 11 of the Act is to allow time and energy to be directed towards the preparation and presentation of a plan of reorganization in a timely manner. There have already been a number of delays and extensions of deadlines to present a Plan. If the Company is required to follow through with the Application for Certification and, if there is certification, the negotiations for a contract, the purpose of providing a Plan of Reorganization on a timely basis will be thwarted. The Plan is now scheduled to be before all parties by June 9, 2006. If the Union is in a position to proceed with the Certification Application, no certainty will be available regarding the status of the employees until late in the year at the

> earliest. That can hardly be described as a Plan which is presented to all parties on a timely basis.[26]

[45] The Court is of the view that the prejudice to Wabush Iron is limited to matters of inconvenience and expense, which can properly be considered by the Newfoundland Court in deciding whether to issue the order.

FOR THESE REASONS, THE COURT:

[46] **GRANTS** Royal Bank of Canada's Amended Motion to Lift the Stay of Proceedings with respect to Wabush Iron Co. Limited (#405);

[47] **LIFTS** the stay of proceedings in respect of Wabush Iron Co. Limited to permit Royal Bank of Canada to apply in the proceedings in Newfoundland and Labrador bearing Court File No. 2003 01T 3807 for an order compelling Wabush Iron Co. Limited to:

a. answer the interrogatories served on October 6, 2016 and produce documents relevant to such answers; and

b. make available a representative with knowledge of the matters raised in the interrogatories or who would inform himself or herself to that effect for discovery in the Newfoundland action;

[48] **THE WHOLE, with costs.**

Stephen W. Hamilton, J.S.C.

Mtre Peter Kalichman
IRVING MITCHELL KALICHMAN
For the Debtor/Respondent

Mtre Sylvain Vauclair
WOODS, s.e.n.c.r.l.
For the Monitor

Mtre Joe J. Thorne
STEWART McKELVEY LAWYERS
For the Creditor/Petitioner

Date of hearing: November 10, 2016

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26 *Supra* note 14, par. 34.