Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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 TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

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PART I—OVERVIEW

1. Dow Corning Corporation ("**DCC**") opposes the Applicants' motion to (i) approve the sale of certain assets (the "Purchased Assets") to QSI Partners Ltd. (the "**Proposed Transaction**") pursuant to section 36 of the *CCAA*; (ii) compel the assignment of certain contracts to which DCC is a party pursuant to section 11.3 of the *CCAA* (the "**Proposed Assignment**"); and (iii) approve the HP2 Severance Transaction (as such term is defined in the Applicants' Motion Record).

2. There are four principal reasons for DCC's opposition:

   (a) The statutory requirements of section 36 of the *CCAA* have not been met. The Applicants assessed auction bids and governed the auction in a way that may have been suitable for the sale of more typical business assets, but was not fair or reasonable where the Purchased Assets are joint venture agreements, and where the outcome of the process is the imposition of a new business partner on DCC without its consent. In particular:

      (i) the financial and other implications of the bids to DCC, including the ability of a bidder to satisfy the statutory requirements in section 11.3, should have been considered in the assessment of the bids; and

      (ii) given that the assets in question are contracts, the financial viability of the proposed assignee and its willingness to assume liabilities under the contracts are critical elements in properly evaluating bids. These two factors were expressly contemplated by the Bidding Procedures but were overlooked or fundamentally misapprehended by the Applicants in the

way it managed the process, to the direct detriment of the interests of DCC.

Because due consideration was not given to the unique position of DCC, as the counterparty to contracts which comprised the vast majority of the Purchased Assets, the process was not fair or reasonable in the circumstances.

(b) The statutory requirement of section 11.3(3)(b) has not been met by the Applicants since there is no evidence that QSI Partners Ltd. ("**QSI**") would be able to perform the obligations being assumed. In fact, the opposite is true. The evidence demonstrates that QSI does not have the financial ability to perform the obligations it seeks to have assigned.

(c) The statutory requirements of s. 11.3(3)(c) have not been met for the following reasons:

(i) the "agreement" contemplated in s. 11.3 refers to the entirety of the contractual arrangements between the parties, not the selection by QSI of certain rights and obligations. It would be inappropriate for the Court to permit QSI to use s.11.3 to "cherry pick" the rights but leave the obligations that together comprise the joint venture agreement; and

(ii) it would be inappropriate for the court to permit the Proposed Assignment given the lack of fairness in the manner in which the auction process was conducted.

(d) It would be inappropriate to approve the HP2 Severance Transaction, especially if the proposed assignee is not assuming obligations under the Framework

Agreement. This represents an attempt by the Applicants to obtain the benefits of the Framework Agreement while at the same time effectively disclaiming the Framework Agreement.

PART II—THE FACTS

3. DCC is a global corporation governed headquartered in Midland, Michigan, offering more than 7,000 silicone based products and services to its customers.[1] Through two subsidiaries,[2]DCC owns a 49% stake in a joint venture (the "**Joint Venture**") with the Applicants Bécancour Silicon Inc. ("**BSI**") and Timminco Limited ("**Timminco**"). BSI is the only other partner in the Joint Venture and owns the remaining 51% interest.

4. The Joint Venture was formed in accordance with a framework agreement entered among BSI, Timminco and DCC (the "**Framework Agreement**") in August, 2010 to own and operate a silicon metal production facility in Bécancour, Québec (the "**Facility**"). The Bécancour facility supplies silicon metal to the joint venture partners or their affiliates.

5. The business of the Joint Venture is conducted by a limited partnership, known as Quebec Silicon Limited Partnership (the "**Partnership**"). The Partnership was formed according to the laws of Quebec and is governed by an agreement (the "**Partnership Agreement**") between BSI, Dow Corning Canada and Quebec Silicon General Partner Inc. (the **"General Partner"**) and a shareholder agreement (the "**Shareholder Agreement**").

[1] Affidavit of Joe Rinaldi, Sworn May 14, 2012 ("Rinaldi Affidavit"), para. 4 (Responding Motion Record of DCC, p. 2).

[2] The two subsidiaries are indirectly wholly-owned Dow Corning Canada and DC Global Holdings S.a.r.l., formerly Dow Corning Netherlands, B.V. See Rinaldi Affidavit, paras. 4-6 (Responding Motion Record of DCC, p. 2).

A. The Bécancour Joint Venture Agreement

6. The Joint Venture was created and is governed by the Framework Agreement. The Framework Agreement sets out the fundamental terms of Joint Venture, the manner in which the Applicants and DCC agreed to own and operate the Facility, and contains the essential elements of the commercial relationship between the partners. The preamble of the Framework Agreement sets out its express purpose:

> …entering this Agreement in order to set forth certain key terms of such joint venture arrangement, including the relationship of the parties following the Closing.[3]

7. The Framework Agreement specifically refers to a series of ancillary documents which were necessary to implement the Framework Agreement and would jointly govern the operation of the Joint Venture. Collectively, the Framework Agreement and these ancillary documents constitute a single, integrated agreement (the **"Joint Venture Agreement"**) that reflects the bargain struck by the parties in the operation of the business and governs their relationship. In addition to the Framework Agreement, the Joint Venture Agreement includes the Partnership Agreement, the Shareholder Agreement, an output and supply agreement, (the "**Output and Supply Agreement**"), a business transfer agreement (the "**Business Transfer Agreement**"), a pension transfer agreement (the "**Pension Transfer Agreement**") and various intellectual property, support services, and lease agreements.[4]

8. The ancillary documents were necessary to accomplish the purpose of the Joint Venture and to secure its continued operation. It is the Framework Agreement which establishes the commercial relationship between two public companies, DCC and Timminco, and which permits

[3] Exhibit "D" to the Kalins Affidavit (Motion Record Vol. I, p. 191).

[4] Rinaldi Affidavit, para. 14 (Responding Motion Record of DCC, p. 3).

each of DCC and Timminco's affiliate, BSI, to benefit from a reliable source of silicon metal at an attractive price for use in its own businesses or, in the case of BSI, for re-sale.[5] If one were to identify the single document that embodied the agreement between the true partners of the Joint Venture, it would be the Framework Agreement. The ancillary documents implement the Joint Venture Agreement. Individually, they draw their meaning and purpose from the Framework Agreement. The operation of the Joint Venture on an ongoing basis, and the relationship between DCC and the Applicants, cannot be achieved through the performance of these ancillary documents individually but only through their performance jointly. In particular, the operation of the Joint Venture relies on critical elements from the Framework Agreement.

B. Ongoing Obligations Under the Joint Venture Agreement

9. The Applicants bring this motion to seek to force the assignment, without DCC's consent, of certain ancillary agreements without assigning the Framework Agreement, notwithstanding that (i) the formative phase of the Joint Venture Agreement has not been completed; and (ii) the Framework Agreement plays a fundamental role as the reference point for the important rights and obligations of the parties, including the continued commitment of the core partners, DCC and the Applicants, to support the Joint Venture and contribute their share of capital as it may be needed. In part, these features ensure that each partner has assurances about with whom they are dealing in relation to the operation of the Joint Venture.

10. Notably, the Framework Agreement provides both partners with reciprocal, irrevocable, absolute, and unconditional guarantees between the corporate parents of each of the partners.[6] These guarantees, set out in Section 6.13, expressly apply not only to the Framework Agreement

[5] Rinaldi Affidavit, para. 14 (Responding Motion Record of DCC, p. 3).

[6] The Framework Agreement is Exhibit "D" to the Kalins Affidavit. See Section 6.13 (Motion Record, Vol. 1 p. 246).

itself, but to the ancillary documents and obligations that jointly make up the Joint Venture Agreement.[7] In practice, the effect of these guarantees is to make the relevant parent companies the real parties to the Joint Venture, with an assumption of all related obligations thereunder. It is worth noting that BSI is responsible for purchasing, on an ongoing and indefinite basis, 51% of the total output of the Facility.

11. The parent guarantees are important and benefit not only the partners, but other stakeholders in the Facility, such as employees and creditors, who rely on the commitment and resources of the Joint Venture partners.[8] They are also important given the capital needs of the Facility. Section 15.1 of the Partnership Agreement includes mandatory capital calls to ensure that the Partnership is able to comply with legal obligations, maintain safety and production standards at the Facility, and satisfy pension funding obligations.[9]

12. The Framework Agreement also includes significant indemnities granted by the signatories, which are therefore also guaranteed by the parents of the Joint Venture partners. The purpose of the Joint Venture was to establish a stand-alone business for silicon metal production, with its own workforce and facilities, distinct from BSI's other businesses and free of any historical or other liabilities unrelated to the operation of the Joint Venture facility.[10]

13. For that reason, specific steps were taken by the parties to structure the Joint Venture Agreement to protect the Partnership from any obligations unrelated to its own activities.[11] BSI expressly assumed liability for any BSI employees who were not transferred to the Partnership

[7] Rinaldi Affidavit, para. 17 (Responding Motion Record of DCC, p. 6).

[8] Rinaldi Affidavit, para. 18 (Responding Motion Record of DCC, p. 6).

[9] Partnership Agreement is Exhibit "G" to the Kalins Affidavit (Motion Record, Vol 2, p. 298); see Rinaldi Affidavit, para. 18 (Responding Motion Record of DCC, p. 6).

[10] Rinaldi Affidavit, para. 22 (Responding Motion Record of DCC, p. 8).

[11] Rinaldi Affidavit, para. 23 (Responding Motion Record of DCC, p. 8).

and for any BSI retirees. Separate group insurance and pension plans were created in order to distinguish between the employees who would remain the responsibility of BSI and those that were assumed by the Partnership.[12] Mirrored pension plans were established and a pension splitting arrangement was entered into with the approval of the Régie des rentes du Quebec and the Canada Revenue Agency.[13]

14. DCC was specifically induced[14] to invest in the Joint Venture on the basis of key indemnities that were included in the Framework Agreement and served to protect DCC against any liabilities that the parties agreed were to remain with BSI. These indemnities, which were included in the Framework Agreement, represent an essential component of the overall bargain struck between DCC and BSI (and their parent corporations) in the Joint Venture Agreement.[15] They include specific indemnities at Section 9.1[16] of the Framework Agreement, in relation to pre-closing obligations of BSI, and Section 6.7(f)[17], in relation to post-retirement benefits for certain employees.

15. The indemnities are, by their nature, designed by the parties to represent an ongoing commitment on which DCC and the Partnership could rely. Other components of the Joint Venture Agreement made reference to these indemnities to clarify that other terms of the ancillary documents were not intended to modify those protections.[18] Removing them from the Joint Venture Agreement would unfairly prejudice DCC and fundamentally change the Joint

[12] Rinaldi Affidavit, para. 23 (Responding Motion Record of DCC, p. 8).

[13] Rinaldi Affidavit, para. 24 (Responding Motion Record of DCC, p. 8).

[14] Rinaldi Affidavit, para. 25 (Responding Motion Record of DCC, p. 9).

[15] Rinaldi Affidavit, para. 25 (Responding Motion Record of DCC, p. 9).

[16] Framework Agreement (Motion Record, Vol. 1, p. 252).

[17] Framework Agreement (Motion Record, Vol. 1, p. 241).

[18] For example, see Section 8(b) of the Business Transfer Agreement, Exhibit "E" to the Kalins Affidavit (Motion Record, Vol. 1, p. 282).

Venture Agreement by re-allocating risk from BSI to DCC, contrary to a central tenet of their agreement.

16. The Joint Venture Agreement also provided for various transactions in the Framework Agreement that were to be completed following closing. These largely address issues arising from the sharing of land and facilities in Bécancour, necessary because of BSI's previous operations on the site and the exclusion of its solar-grade silicon business from the Joint Venture Agreement.[19] These rights and obligations under the Framework Agreement remain, in part, outstanding. The HP2 Severance Transaction which the Applicants ask this Court to approve is in fact an attempt to enforce those provisions of the Framework Agreement that principally benefit the Applicants (and ultimately the proposed purchaser). Without the completion of the HP2 Severance Transaction pursuant to the Framework Agreement, the Applicants (and any proposed purchaser) would have beneficial ownership of a property to which they had no legal right of access to and the Partnership would have no ownership, or legal right of access to, a dust collector used in the operation of its business.[20]

C. Consent and the Identity of the Partner in the Joint Venture

17. The Joint Venture partners, in addition to requiring the full commitment of corporate parents in relation to the various obligations of the Joint Venture Agreement, also took steps to ensure that DCC would not be forced into a commercial relationship with a party that it did not wish to have as a partner. DCC would not have accepted a 49% share in a Joint Venture without such protections.[21] Various terms of the Joint Venture Agreement reflect the importance of the identity of the counterparty in the Joint Venture and the parties' agreement that consent would be

[19] Rinaldi Affidavit, para. 20 (Responding Motion Record of DCC, p. 7).
[20] Rinaldi Affidavit, para. 20-21 (Responding Motion Record of DCC, p. 7).
[21] Rinaldi Affidvit, para. 29 (Responding Motion Record of DCC, p. 10).

needed for any meaningful assignment of rights. Given its 49% stake, DCC was also concerned to ensure that any future successor to BSI in the Joint Venture would be required to step into the shoes of BSI for all purposes, and the various consent and transfer provisions also reflect this aspect of the agreement.[22] Specifically, the Joint Venture Agreement includes the following terms:

(a) a complete prohibition (set out in the Partnership Agreement), on the transfer of all or part of a partner's Partnership units for a period of 5 years without prior written consent of the partner.[23] Partners are given complete and absolute discretion in this respect as prior written consent may be withheld "for any or no reason." Equivalent provisions are included in the Shareholder Agreement[24] and the Articles of Incorporation of the General Partner.[25] Transfers of partnership units or shares other than according to these terms is deemed null and void;

(b) a complete prohibition on any transfers by a partner of less than all of its partnership units[26] or less than all of its shares in the General Partner[27];

(c) a requirement that all transfers of partnership units include a corresponding transfer of all shares in the General Partner and all of the transferring partner's rights and obligations under the Output and Supply Agreement;[28]

(d) a requirement that partnership unit transfers to take place following the 5-year complete moratorium on transfers be subject to a right of first refusal and tag-along rights in

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[22] Rinaldi Affidavit, para. 31 (Responding Motion Record of DCC, p. 12).
[23] Section 10.1, Partnership Agreement (Motion Record, Vol. 2. p. 327).
[24] Section 6.1, Shareholder Agreement (Motion Record, Vol. 2, p. 379).
[25] Section 7.1., Articles, (Responding Motion Record of DCC, pp. 31-32).
[26] Section 10.1, Partnership Agreement (Motion Record, Vol. 2, p. 327).
[27] Section 6.1, Shareholder Agreement (Motion Record, Vol. 2, p. 379); Section 7.1., Articles, (Responding Motion Record of DCC, pp. 31-32).
[28] Section 10.2, Partnership Agreement (Motion Record, Vol. 2, p. 327).

respect of such sale[29] Equivalent provisions are included in respect of shares of the General Partner;[30]

(e) restrictions on the creation of a security interest on any interest in the Partnership or on shares of the General Partner,[31] including the inclusion of foregoing rights of the other party in the limited circumstances where security interests can be created.

18. By these terms, the parties made a long-term commitment to each other and to the Joint Venture. That commitment was backed by guarantees. The Joint Venture Agreement was carefully constructed to give the parties control both over the identity of their partners and their conduct. No single document from among those that make up the Joint Venture Agreement can be said to reflect the allocation of risk between the parties.

D. The Auction and the Basis for the Evaluation of Competing Bids

19. In March, the Applicants proceeded to establish the timeline and procedures for a "stalking horse" marketing process, with an auction set to take place on April 24, 2012 (the "**Auction**") pursuant to certain procedures[32] (the "**Bidding Procedures**"). The Auction ultimately resulted in the selection of a leading bid involving QSI, a corporation registered in the Cayman Islands (the "**QSI Bid**") and indirectly owned by Globe Specialty Metals Inc. ("**Globe**") and a back-up bid (the "**Wacker Bid**") made by Wacker Chemie AG ("**Wacker**").

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[29] Sections 10.4 and 10.5, Partnership Agreement (Motion Record, Vol. 2, pp. 328-330).

[30] Section 6.4, Shareholder Agreement (Motion Record, Vol. 2, p. 379), Sections 8 and 9, Articles, (Responding Motion Record of DCC, pp. 32-34).

[31] Section 5.1 ,Shareholder Agreement (Motion Record, Vol. 2, p. 379).

[32] Bidding Procedures, Exhibit "A" to Kalins Affidavit (Motion Record, Vol. 1, p. 42).

20. QSI is a "NewCo" with no material assets.[33] In the QSI Bid, Globe has joined as a guarantor of certain obligations of QSI – mostly related to the performance of QSI's obligation to pay the cash portion of the purchase price. The QSI Bid includes, as part of the consideration to BSI, that it will assume the obligations of BSI under the Assigned Contracts including the Partnership Agreement and other agreements with DCC.

21. Of critical importance to this motion, Globe has not agreed to guarantee the obligation of QSI to assume and perform the obligations of BSI under the contracts it proposes to assume (the "**QSI Assigned Contracts**"). Contrary to the argument at para. 91 of the Applicants' factum, this makes the capacity of QSI itself an important factor from the point of view of the interests of DCC. Also, QSI seeks to "cherry pick" by assuming some of the rights and obligations related to the Joint Venture, but to exclude others – most notably, Framework Agreement and the Business Transfer Agreement or any of their terms. By seeking to exclude the Framework Agreement, QSI is seeking to avoid the indemnities described above and Globe is seeking to avoid taking financial responsibility for the performance of the Joint Venture Agreement.

22. Wacker is a qualified bidder under the terms of the Bid Procedures. By the requirements set out in the Bid Procedures, that means that Wacker has established to the satisfaction of the Monitor that it has the financial capacity not only to satisfy its obligation to pay the purchase price but also to perform its obligations under the contracts it proposes to assume (the "**Wacker Assigned Contracts**").[34]

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[33] Cross-Examination of Stephen Lebowitz, May 18, 2012 ("Lebowitz Cross"), Q 22-23 (Supplementary Motion Record, p. 159).

[34] Bidding Procedures, Exhibit "A" to Kalins Affidavit (Motion Record, Vol. 1, p. 44).

23. It is proposed that the Wacker Bid, as a back-up bid, be completed if the QSI Bid cannot be. The Wacker Bid is fundamentally different from the QSI Bid because it includes the Framework Agreement among the Wacker Assigned Contracts (subject to concessions to be made by DCC). Also, Wacker agreed to be financially responsible for the purchase price and the assumption of various liabilities to DCC (the "**Wacker Assumed Obligations**") and/or the Partnership under the Wacker Assigned Contracts. In the event that Wacker assigns its rights and obligations under the Wacker Bid to an affiliate, it has agreed to guarantee the performance of obligations of such affiliate under the terms of the Wacker Bid.[35]

24. The Applicants, with the assistance of the Monitor, estimated that the value to BSI of the assumption of the Wacker Assumed Obligations was approximately $18 million.[36] In valuing the Wacker Bid against the QSI Bid in the same round, the Applicants, relying on the advice of the Monitor, only gave Wacker a credit of $240,000 for the assumption of this $18 million of liability. This valuation ignored the value to DCC of the assumption of the Wacker Assumed Obligations and focused only on the very marginal increase in the amount of any potential distribution to unsecured creditors in the event that the pool of claims against the estate was reduced by $18 million.[37]

25. This calculation was first performed at Round 36 of the Auction and fundamentally corrupted the outcome of the auction.[38]

[35] See s. 7.1(a), Wacker APA, Exhibit "B" to Kalins Affidavit (Motion Record, Vol. 1, p. 92).

[36] Eighth Report of the Monitor, Appendix A, Schedule A.

[37] Cross-Examination of Peter Kalins, May 17, 2012 ("Kalins Cross"), Q 222-228 (Supplementary Motion Record, pp. 75-78).

[38] Eighth Report of the Monitor, Appendix A, p. 4.

26. Since the Auction, the Monitor's reports provide insight into the factors that the Applicants considered at each stage of the Auction in comparing the bids by QSI and Wacker. In its Seventh Report, it advises:

> In exercising its business judgement in determining, in consultation with the Monitor, the then highest and/or best Overbid at each stage of the auction, the Timminco Entities considered a variety of factors, including the amount of cash consideration (net of the Expense Reimbursement payable to the Stalking Horse Bidder in the event that it was not the Successful Bidder), the non-cash consideration, the conditions of the Overbid and any terms that may impact on closing risk.[39]

27. In its Eighth Report, the Monitor specifically answered a question by DCC about what analysis or rationale was used to evaluate competing bids. It answered that:

> In evaluating the Portion Bids of QSI and Wacker relative to each other, the Timminco Entities, in consultation with the Monitor, considered the differences between bids in cash consideration, non-cash consideration, terms and conditions potentially impacting closing risk, time to complete and, once cash consideration potentially exceeded secured debt and prior ranking claims, factors impacting potential claims against the estate.[40]

28. The Eighth Report notes that the Applicants and the Monitor considered the question of whether DCC was more likely to consent to one bid than the other, and this factor was considered only in relation to closing risk and "potential litigation costs associated with obtaining the Assignment Order for a bid where the DCC Consent was not forthcoming."[41] Although the higher likelihood of consent was factored in favour of one bidder over the other,

[39] Seventh Report of the Monitor, p. 11.

[40] Eighth Report of the Monitor, Appendix A, p. 1.

[41] Eighth Report of the Monitor, Appendix A, p. 3.

this was done in relation to whether DCC's agreement would be obtained "on a consensual basis" or otherwise.[42]

29. Neither the Monitor's Seventh nor the Eighth Report contains any evidence that the relative prejudice to DCC of competing bids was ever considered as a factor in assessing the value of the bids. The value of DCC's consent to the assignment of the Joint Venture was seen only as the avoidance of a nuisance and the legal costs of forcing an assignment of the Joint Venture to QSI by an order under s. 11.3 of the *CCAA*.

30. In the Applicants' evidence, it set out the factors considered in weighing the bids as follows:

> In order to determine the Successful Bid and the Back-up Bid, the Timminco Entities, with the assistance of their advisors and in consultation with the Monitor, carefully reviewed and weighed each final Overbid and considered the Bid Assessment Criteria (as defined in the Bidding Procedures), including the amount of the purchase price and any purchase price adjustment, the liabilities to be assumed by the Bidder, the ability of the Bidder to close the transaction and related closing conditions, and the likelihood, extent and impact of any potential delays in closing.[43]

31. On cross-examination, Timminco admitted that the only relevance of the consent or non-consent of DCC on its assessment of the competing bids was its effect on closing risk, and that the focus of the auction was on resulting claims against the estate:

> Q. Were there any negatives about the QSI bid?
>
> A. Well, as I've indicated previously, when comparing the two, we believed that the QSI bid is, I would say, **less favourable to Dow Corning and, therefore, being less favourable to Dow Corning**

[42] Eighth Report of the Monitor, Appendix A, p. 3.

[43] Kalins Affidavit, para. 23 (Motion Record, Vol. 1, p. 14).

> **would make it more challenging to receive the DCC consent, and therefore create potentially more closing risk.**
>
> Q. But don't you have to a duty to try and get a good deal for Dow Corning?
>
> A. I believe we've looked at Dow Corning in the context of its position as a stakeholder in the estate of BSI.
>
> Q. Isn't it different from everybody else?
>
> A. **Our focus was on what was for the most benefit of the estate of BSI, and looking at the claims that companies may have against the estate of BSI, and so we were focusing on that.**[44] *[Emphasis Added]*

32. The evidence on the motion is that no consideration was given during the Auction to the interests of DCC as counterparty or the relative prejudice to DCC of various configurations of transactions that were proposed by bidders. Indeed, when asked what monetary value was given to the assumption by Wacker of the Framework Agreement, the Business Transfer Agreement, and certain indemnities in its bid, the Monitor replied that these features were considered only in relation to closing risk of the sale and any impact on the distribution to unsecured creditors.[45] The Monitor also observed that, in relation to the reduction in closing risks associated with DCC consent being obtained; a "factor" was also "the ability to assign contracts under s. 11.3 of the *CCAA*".[46] Not only was prejudice to DCC not considered, but the ability to impose that prejudice on DCC against its opposition was also used to undervalue Wacker's bid.

33. Not only did the Applicants fail to consider the interests of DCC in terms of the relative prejudice it may suffer under the different bids, but they failed to undertake any assessment of the capacity of the bidders to perform the obligations under the contracts whose assignment was being proposed. They failed to do so notwithstanding that s. 11.3(3)(b) requires the Court to

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[44] Kalins Cross, Q 284-286 (Supplementary Motion Record, pp. 100-101).
[45] Eighth Report of the Monitor, Appendix A, p. 6.
[46] Eighth Report of the Monitor, Appendix A, p. 6.

make an assessment of the capacity of bidders to perform and that the Bidding Procedures, approved by the Court, also required the following as part of bidder qualification:

> Proof of Financial Ability to Perform. Written evidence upon which the Debtors may reasonable conclude that the Phase I Bidder has the necessary financial ability to close the transaction **and provide adequate assurance of future performance of all obligations to be assumed in such contemplated transaction.**[47]

34. On cross-examination, Timminco's evidence was that any concern about the financial ability of bidders at the Auction related to closing risk of the transaction *per se*, not to any risks associated with whether or not the successful bidder would in fact be able to undertake "future performance of all obligations to be assumed" under the assignment:

> Q. Do I understand, though, just looking at the question, it is a statement that's in the bid procedures. It relates not just to performance of the contemplated transaction, but it goes on to say "Provide adequate assurance of future performance of all the obligations to be assumed in such contemplated transaction." [As read.]
>
> Now, what were you thinking about when you were preparing this?
>
> A. **We were certainly thinking about the closing risk and the risk that the bidder that we were dealing with would have adequate financial resources to complete the transaction from the time that they entered into the commitment for the transaction to the closing.** We were certainly concerned about making sure, minimizing any risks that a bidder did not have the financial ability to close a transaction in circumstances where they were obligated to do so.
>
> Q. It is interesting that you answered that way because that's not what I asked you about. I asked you about assuming obligations, the obligation to be assumed in the contemplated transaction.
>
> A. Uh-hmm.

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[47] Bidding Procedures, Exhibit "A" to Kalins Affidavit (Motion Record, Vol. 1, p. 44).

> Q. What are the obligations to be assumed?
>
> 18 A. I imagine those would be the **obligations that are set out in the purchase agreement**, the obligations of that counterparty to complete that particular transaction.[48] *[Emphasis Added]*

35. This is consistent with the Monitor's report on the Auction, which confirmed that:

> The relative financial strengths of the two bids were not specifically assessed. The Timminco Entitites did consider the risks of closing each bid, including the likelihood of being able to satisfy the requirements to obtain the Assignment Order in the event that the DCC Consent was not forthcoming.[49]

36. There is no evidence about what was considered in relation to the likelihood of the statutory criteria in s. 11.3 being met.

E. DCC Excluded from the Auction

37. DCC met with several bidders in advance of the Auction. Its position was that bidders desiring consent should assume the Framework Agreement, but also that it was available for further discussion and would consider suggestions from bidders for alternative ways to address the question of indemnities in favour of DCC.[50] DCC also offered to attend the auction, but was not given this opportunity. The Monitor suggested that DCC be available by telephone, which it was. No requests were received by DCC to participate in any discussions.

38. The next day, DCC was asked through its counsel whether it might be available for a discussion with a bidder. When advised of the timing of the availability of both DCC representatives (one of whom was available before 1:30 p.m.; one of whom was only available at 1:30 p.m.), the Monitor indicated that those discussions would not be pursued following a discussion with the Applicants, who had by then already denied the request by the bidder for an

[48] Kalins Cross, Q 31-33 (Supplementary Motion Record, pp. 15-16).
[49] Eighth Report of the Monitor, Appendix A, p. 8.
[50] Rinaldi Affidavit, para. 39 (Responding Motion Record of DCC, p. 14).

opportunity to engage in discussions with DCC.[51] The Monitor advises that it did not object to the adjournment request, but that the Applicants made the ultimate decision to deny it.[52]

39. Timminco's evidence is that it considered an adjournment request on the second day "so that Wacker could seek or try to obtain the consent of Dow Corning, in connection with Wacker's proposed new terms, with respect to the -- these -- the cross-indemnities."[53] It concluded, however, that several factors made an adjournment to permit those discussions to be inappropriate, including that it might involve several hours and that "we did not believe that an adjournment at that time would result in a resolution of the DCC consent issue."[54] This conclusion was reached without approaching DCC about whether circumstances would likely permit consent to be obtained[55] and notwithstanding DCC's previous request to be included in the Auction process and the fact that, to the knowledge of the Applicants and the Monitor, it was standing by all through the first day and evening of the auction and was available within hours on the second day.

PART III—ISSUES AND THE LAW

40. The Applicants' motion should be dismissed for four reasons.

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[51] Rinaldi Affidavit, paras. 40-41 (Responding Motion Record of DCC, pp. 14-15); Seventh Report of the Monitor, pp. 60-65.

[52] Eighth Report of the Monitor, Appendix A, p. 9.

[53] Kalins Cross, Q 200 (Supplementary Motion Record, p. 66).

[54] Kalins Cross, Q 208 (Supplementary Motion Record, p. 70).

[55] Kalins Cross, Q 213-214 (Supplementary Motion Record, p. 72).

A. The Proposed Transaction Does Not Meet the Requirements of Section 36: the Bidding Procedures Were Misapprehended or Overlooked

41. First, the Proposed Transaction does not meet the requirements of section 36. Although there was an approved sales process, the Applicants conducted the Auction in a manner that was not fair or reasonable in light of the nature of the assets. While the approach taken by the Applicants might have been suitable for the sale of more typical business assets, it was not fair or reasonable in this case because the Purchased Assets constituted an agreement governing a joint venture, in which the purchaser would be required to assume ongoing obligations that were owed to the joint venture partner. This was particularly so in this case because of the clear agreement that BSI could not assign its interest in the Joint Venture without the consent of DCC and that DCC could withhold its consent for any reason during the first 5 years of the partnership.

42. Although the Bidding Procedures expressly contemplated two key factors that would take into account the interests of DCC (and satisfy the criteria of s. 11.3 of the *CCAA*), the Applicants failed to conduct the Auction in a manner that considered these factors and, in fact, improperly assessed bids as a result. Given that the assets in question are contracts, the financial viability of the proposed assignee and its willingness to assume liabilities under the contracts are critical elements in properly evaluating bids. Because these factors were overlooked, or misunderstood, the Auction was conducted in an unfair and unreasonable manner.

43. The sale of assets in these circumstances is governed in part by subsection 36(3) of the *CCAA*, which expressly requires an assessment of the reasonableness of the sales process and the effect of the proposed transaction on creditors as well as "other interested parties". It reads:

> (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.

44. Clearly, the section requires an assessment of the proposed sale not only from the point of view of the creditors, but with due regard to the interests of other stakeholders who would be particularly affected by the transaction. In the case of an assignment of contracts, it is clear that the interests of the most directly affected party – the counterparty to the agreement – must be given consideration and that the Applicants must assess competing bids by assessing their relative impact on the counterparty, as well as any differences in their impact on the estate.

45. This was reflected in the Bidding Procedures, which contained two key requirements that are set out under the next following subheadings. If these factors had been given appropriate consideration, the result of the Auction would have been different.

i. The Assumption of Liabilities and How they were Valued

46. First, pursuant to the Bidding Procedures, the "Bid Assessment Criteria" include various factors which the Applicants "shall take into account."[56] Among these is the "proposed

[56] Bidding Procedures, Exhibit "A" to Kalins Affidavit (Motion Record, Vol. 1, p. 47).

assumption of any liabilities, if any" in any of the bids put forward.[57] The Applicants, however, did not provide any material value to the assumption by bidders of particular liabilities, as is clear by their valuation of the Wacker Bid, which assumed $18 million of liabilities that the QSI bid did not.

47. As these liabilities relate to actual or potential obligations of the Partnership, DCC will or potentially could be liable for approximately half this amount as 49% partner in the Joint Venture.[58] Rather than give due weight to Wacker's proposed assumption of $18 million of liabilities, however, the Applicants used a methodology that placed nominal value on the assumption of their liabilities by considering the impact of the $18 million only in respect of the ultimate potential recovery to unsecured creditors of the Applicants. Applying that methodology, the $18 million potential benefit was given a $240,000 value, being the amount of additional cash available for distributions to unsecured creditors if this liability were removed from the Applicants' claims pool.[59]

48. This approach to the proposed assumption of liabilities was inappropriate for several reasons. First, it gave no credit for the value to DCC of the assumption of the obligation and the corresponding prejudice to DCC of its Joint Venture Agreement being assigned without this important obligation being assumed. Second, it completely ignores and assigns no value to any potential benefit to retirees of BSI who would benefit from Wacker's commitment, as a company of substance, to stand behind the actual and potential obligations of the Partnership in addition to DCC.

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[57] Bidding Procedures, Exhibit "A" to Kalins Affidavit (Motion Record, Vol. 1, p. 48).

[58] Rinaldi Affidavit, para. 18 (Responding Motion Record of DCC, p. 6).

[59] Eighth Report of the Monitor, Appendix A, Schedule A; Kalins Cross, Q 222-228.

49. The Applicants took this inappropriate approach to the proposed assumption of liabilities because, by their own admission, they did not believe that they were under any obligation to assess the bids from the perspective of DCC, upon whom it seeks to impose the Proposed Assignment:

> Q. Were there any negatives about the QSI bid?
>
> A. Well, as I've indicated previously, when comparing the two, we believed that the QSI bid is, I would say, **less favourable to Dow Corning and, therefore, being less favourable to Dow Corning would make it more challenging to receive the DCC consent, and therefore create potentially more closing risk.**
>
> Q. But don't you have to a duty to try and get a good deal for Dow Corning?
>
> A. I believe we've looked at Dow Corning in the context of its position as a stakeholder in the estate of BSI.
>
> Q. Isn't it different from everybody else?
>
> A. Our focus was on what was for the most benefit of the estate of BSI, and looking at the claims that companies may have against the estate of BSI, **and so we were focusing on that.**[60] *[Emphasis Added]*

50. Even if the Applicants had been considering the question of assumed liabilities in an appropriate manner, the methodology was based on certain assumptions that were open to question but were accepted without question in the assessment of the bids. The Monitor assumed an unsecured claims pool of approximately $145 million, the vast majority of which ($123 million) is described as an "Estimated Intercompany Claim". There is no evidence that any independent assessment was made by the Monitor as to whether this "intercompany claim" is valid or whether it properly belongs in the unsecured claims pool. It could in fact be an equity claim. In this event, the relevant claims pool would be reduced to $22 million and the "value"

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[60] Kalins Cross, Q 284-286 (Supplementary Motion Record, pp. 100-101).

assigned to the assumption of the $18 million liabilities would increase significantly pursuant to the Monitor's methodology.

ii. The Capacity to Perform the Underlying Contracts

51. In addition to the assumption of liabilities, the Bidding Procedures required that qualified bidders be those that can provide written evidence that would "provide adequate assurance of future performance of all obligations to be assumed in such contemplated transaction."[61] This mirrors the s. 11.3 requirement (discussed below) that the purchaser to whom the assignment of contracts is being proposed be one that would be able to perform the obligations assumed.

52. It was clear on cross-examination that the Applicants at the Auction disregarded or misapprehended this requirement as only being relevant to the ability of the bidder to close the transaction itself, and not the ability of the bidder to perform the obligations in the underlying contracts after closing (the express requirement of s.11.3(3)(b)). Timminco was "certainly thinking about the closing risk" in relation to this requirement of the Bidding Procedures and the evidence makes clear that this was their sole focus.[62] Had the Applicants properly considered this requirement, it would have been clear that the bid ultimately chosen as the leading bidder did not meet the financial capacity requirements to bid and therefore, could not meet the requirements of s. 11.3 and could not expect to receive the consent of DCC.

[61] Bidding Procedures, Exhibit "A" to Kalins Affidavit (Motion Record, Vol. 1, p. 44).
[62] Kalins Cross, Q 31-33 (Supplementary Motion Record, pp. 100-101).

B. The Proposed Assignment Does Not Meet the Requirements of s. 11.3(3)(b): QSI Does Not Have the Ability to Perform the Obligations it Proposes to Assume

53. The statutory requirement of section 11.3(3)(b) has not been met by the Applicants since there is no evidence that QSI would be able to perform the obligations being assumed. In fact, the opposite is true. The evidence demonstrates that QSI does not have the financial ability to perform the obligations it must assume.

54. Paragraph 11.3(3)(b) of *CCAA* expressly requires the Court to make its own assessment of "whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations." This reflects the potentially profound impact of an assignment order under s. 11.3 on a third party. In the case of a joint venture agreement in which the assignment would impose a new business partner on the counterparty, the impact (and therefore the risk of prejudice) is particularly acute. The "rights and obligations" that the proposed purchaser must be "able to perform" are those rights and obligations under the agreement to be assigned, yet the Applicants during the Auction process failed to engage in any assessment of the capacity of any bidder to undertake those obligations. Instead, they focused only on the capacity to close the asset sale itself. The Court must now make its own assessment on the basis of the evidence before it on the motion.

55. The Monitor's Eighth Report set out the factors considered by the Applicants in assessing the competing bids as follows:

> In evaluating the Portion Bids of QSI and Wacker relative to each other, the Timminco Entities, in consultation with the Monitor, considered the differences between bids in cash consideration, non-cash consideration, terms and conditions potentially impacting closing risk, time to complete and, once cash consideration

> potentially exceeded secured debt and prior ranking claims, factors impacting potential claims against the estate.[63]

56. None of these factors relate to the capacity of either bidder to perform the actual obligations the Applicants ask the Court to assign to them. In that same report, the Monitor also specifically advised that the "[t]he relative financial strengths of the two bids were not specifically assessed."[64] Instead, the Applicants considered closing risks (and the availability of a motion for Court approval, if needed) instead.[65]

57. On cross-examination, Timminco admitted that the focus of the assessment of financial capacity related only to the ability of a bidder to complete the transaction with the Applicants and not on the ability of a bidder to perform any obligations to DCC under the assigned agreement. The evidence was that a distinct assessment of financial capacity would in any event have been unnecessary because the Applicants knew that (a) the purchaser would be buying "a very valuable business" and that (b) "any such purchaser would have much better financial ability than Bécancour Silicon."[66]

58. This amounts to no assessment whatsoever of whether the bidders were or were not likely to be able to fulfill the obligations owed to DCC and possible to other stakeholders of the Joint Venture. The reasoning of the Applicants in this respect was entirely circular. Pursuant to their logic, any bidder capable of paying the purchase price of the assets would necessarily be found to have the capacity to meet its ongoing obligations, since the vendor defined "capacity" as equivalent to possessing an ownership interest in the partnership. Naturally, any bidder able to satisfy the purchase price would also appear to "have much better financial ability" than a

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[63] Eighth Report of the Monitor, Appendix A, p. 1.
[64] Eighth Report of the Monitor, Appendix A, p. 8.
[65] Eighth Report of the Monitor, Appendix A, p. 8.
[66] Kalins Cross, Q 39 (Supplementary Motion Record, p. 18).

company under *CCAA* protection. As a result of the Applicants' failure to undertake this assessment, there is no evidence before the Court that QSI "would be able to perform the obligations" on a going-forward basis. Indeed, there is compelling evidence is that QSI cannot do so.

59. QSI is a corporation registered in the Cayman Islands.[67] It is a "NewCo" for which financial statements have never been prepared.[68] No financial information was provided to the vendor or the Monitor about its assets, and no such information is before the Court.[69] It has no employees.[70] Its relationship to Globe Specialty Metals Inc. is that of an indirect subsidiary.[71] There is no third party financing available to QSI itself, but only to its parent.[72] QSI has no legally binding commitments from any affiliated companies or from any third parties.[73] The only asset it possesses is the asset purchase agreement that is presently before the Court.[74] It is also the DIP lender but the DIP loan would be deemed satisfied (without QSI receiving any cash) on the completion of the sale.

60. The importance of an actual assessment of QSI's capabilities is particularly essential to DCC in these circumstances because the proposed assignee would hold a 51% interest in the Joint Venture. DCC only agreed to assume a 49% interest in the Joint Venture due to the inclusion of various protections, including the parent guarantees.[75]

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[67] Lebowitz Affidavit, para. 6 (Motion Record, Vol. 2, p. 519).
[68] Lebowitz Cross, Question 4 (Supplementary Motion Record, p. 150).
[69] Lebowtiz Cross, Question 7 (Supplementary Motion Record, p. 152).
[70] Lebowitz Cross, Question 3 (Supplementary Motion Record, p. 150).
[71] Lebowitz Cross, Question 15 (Supplementary Motion Record, p. 156).
[72] Lebowitz Cross, Question 19 (Supplementary Motion Record, p. 158).
[73] Lebowtiz Cross, Questions 20 (Supplementary Motion Record, p. 158).
[74] Lebowitz Cross, Questions 22-23 (Supplementary Motion Record, p. 159).
[75] Rinaldi Affidavit, para. 29 (Responding Motion Record of DCC, p. 10).

61. Importantly, while Globe is a guarantor of the purchase price under the asset purchase agreement, it expressly **does not act** as guarantor in relation to the underlying obligations of the contracts themselves that are to be assigned to QSI.[76] Furthermore, among the components of the Joint Venture Agreement that are not included in the Proposed Transaction are the reciprocal guarantees by parent companies provided in Section 6.13 of the Framework Agreement.[77] While QSI's evidence on this motion refers to the financial position of Globe, this evidence is irrelevant to the statutory test that applies. It is the proposed assignee that the Court must assess, not its parent.

62. QSI's evidence and the submissions of its counsel about the financial strength and capability of QSI's affiliates are without substance because none of those affiliates or any third party is committed to provide support to QSI.[78] There is no legally binding obligation on Globe to make any contributions to the Joint Venture or to fulfill any of QSI's obligations thereunder. DCC would have no contractually binding rights against Globe to enforce obligations unless these are included in the assignment. Indeed, if Globe's intention was to guarantee QSI's obligations, there is no evidence to explain why it did not provide its guarantee as a term of its bid in the Auction when it had an opportunity to do so. Instead, it carved out those commitments from its guarantee with the result that DCC would have no covenant of substance.

63. Notably, the Applicants and Monitor did not accept QSI's bid without a guarantee by its parent to mitigate closing risk, but this motion seeks to impose QSI as a partner on DCC without

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[76] The extent of the Guarantee is set out in Section 8 of the Asset Purchase Agreement, Exhibit "C" to the Kalins Affidavit (Motion Record, Vol. 1, p. 153) The "Guaranteed Obligations" excludes performance of the "Assumed Obligations" under the contracts.

[77] Framework Agreement (Motion Record, Vol. 1, p. 246).

[78] For example, see QSI Factum, para. 63. See also Factum of the Applicants, para. 89.

any such guarantee. As admitted on cross-examination, the competing bid – Wacker – did not give rise to any such concerns:

> Q. Therefore the covenant that you are relying on in the Wacker agreement is a covenant of Wacker itself?
>
> A. Yes.
>
> Q. And so you were satisfied with Wacker's covenant without a guarantee; correct?
>
> A. Yes.
>
> Q. Because it's a company of substance?
>
> A. Yes.
>
> Q. Whereas QSI is not a company of substance; correct?
>
> A. No, I wouldn't say that QSI has no substance.
>
> Q. Well, why did you insist on a guarantee from Globe for your part of the deal?
>
> A. We needed to have a **level of comfort that there would be a purchaser that would have the necessary funds** in order to complete the closing….
>
> (…)
>
> Q. So, you were concerned that they wouldn't be able to pay the purchase price?
>
> A. **We were concerned that we would have a counterparty that we could turn to at closing if the particular purchaser we were dealing with, for whatever reason, chose not to perform its obligations notwithstanding its obligation to do so.**[79]

64. Notwithstanding this material difference between the two bids, neither the Applicants nor the Monitor requested that Globe provide a guarantee in relation to QSI's obligations under the

[79] Kalins Cross, Q 65-71 (Supplementary Motion Record, pp. 25-27).

underlying agreements.[80] Although the Applicants have insisted on agreement terms to mitigate their own closing risk, they nevertheless propose to deprive DCC of similar guarantees in relation to the ongoing obligations of the Joint Venture operation itself, even though parent guarantees were an integral component of the Joint Venture Agreement.

65. QSI notes in its factum[81] that DCC and Globe are already partners in a joint venture and the joint venture partner of DCC is a subsidiary of Globe. However, QSI's factum does not acknowledge that Globe has guaranteed the obligations of its subsidiary in that other venture. In any event, the record contains no evidence in relation to these arrangements.

66. The Applicants have the burden of persuading the Court that "the person" to whom the contracts would be assigned has the capacity to perform the obligations under that contract. In this case "the person" is QSI and not its parent or any affiliated companies given the express exclusion of any parent guarantees in relation to the underlying contractual obligations.

C. The Proposed Assignment is Inappropriate and Does Not Meet the Requirements of s. 11.3(3)(c)

67. Paragraph 11.3(3)(c) requires the Court to consider "whether it would be appropriate to assign the rights and obligations" to the person proposed by the Applicants on the assignment motion.

68. What constitutes an "appropriate" exercise of the Court's extraordinary jurisdiction under s. 11.3 – and the attendant impact on the counterparty to the relevant agreement – is informed by jurisprudence that pre-dates the amendments that codified the Court's power to assign contracts.

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[80] Eighth Report of the Monitor, May 20, 2012, p. 8.
[81] QSI Factum, para. 68.

Prior to the 2009 amendments, courts were concerned with ensuring that the exceptional jurisdiction to assign contracts was only exercised in appropriate circumstances given the profound impact on third parties. The cases reveal an important focus on (a) the nature and extent of the prejudice that may be caused to the third party; and (b) the need for a connection between the proposed exercise of the assignment power and the aims of the *CCAA*.

69. In *Playdium*, Spence J. had considered whether or not the proposed contractual assignment would subject the counterparty to "an inappropriate imposition or to an inappropriate loss of claims, having regard to the purpose and spirit of the regime created by *CCAA*…"[82] This is consistent with jurisprudence emphasizing the need for courts to act "cautiously"[83] and exercise powers "sparingly"[84]when faced with third parties who would be affected by the use of discretionary *CCAA* powers.

70. In *Nexient Learning Inc.*, Wilton-Siegel J. adopted the reasoning of Spence J. in *Playdium* that the "governing test" for whether or not to exercise discretion to assign contracts is whether that exercise of discretion was "important to the reorganization process."[85] The Court in *Nexient* also noted that the determination of whether the proposed relief was consistent with the spirit of the *CCAA* required consideration of several factors that had also animated the reasoning in *Playdium*, including:

> whether sufficient efforts had been made to obtain the best price such that the debtor was not acting improvidently; whether the proposal takes into consideration the interests of the parties; the efficacy and integrity of the process by which the offers were

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[82] *Re. Playdium Entertainment Corp.,*[2001] O.J. No. 4459 (S.C.J.) at para. 43 (DCC Brief of Authorities, Tab 1).
[83] *Re. Woodward's Ltd.*, [1993] B.C.J. No. 42 (S.C.) at para 32 (DCC Brief of Authorities, Tab 2).
[84] *Re. Nexient Learning Inc.*, [2009] O.J. No. 5507 (S.C.J.) at para. 59 [*Nexient*] (DCC Brief of Authorities, Tab 4).
[85] *Nexient Learning* at para. 56 (DCC Brief of Authorities, Tab 4).

> obtained; and whether there had been unfairness in the working out of the process.[86]

71. Wilton-Siegel J. also emphasized the importance of directly considering the impact on the third party and asking whether there is any unnecessary detrimental effect that might have been avoided:

> Before exercising the Court's jurisdiction in this manner, the Court should be satisfied that the purpose and spirit of the *CCAA* proceedings will be furthered by the proposed assignment by analyzing the factors identified by Spence J. [in *Playdium*] and any other factors that address the equity of the proposed assignment. **The Court must also be satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party**.[87]

72. The emphasis on the need to demonstrate a connection to the reorganization process was emphasized by the Supreme Court of Canada in its discussion of "appropriateness" in the *CCAA* context in *Century Services Inc. v. Canada (Attorney General)*, in which it was required to consider the Court's jurisdiction to lift a stay in particular circumstances. Deschamps J., writing for seven members of the Court, noted:

> However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring **whether the order sought advances the policy objectives underlying the *CCAA***. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social

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[86] *Nexient Learning* at para. 58 (DCC Brief of Authorities, Tab 4).
[87] *Nexient Learning* at para. 59. (DCC Brief of Authorities, Tab 4)

> and economic losses resulting from liquidation of an insolvent company.[88]

73. The Court went on to discuss that "appropriateness" involves not only a consideration of the objective of the proposed order (or presumably its ultimate outcome), but also the appropriateness of its means. This requires an assessment of fairness and advantage in relation to each stakeholder who would be affected by the proposed order:

> I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. **Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.**[89]

74. This is consistent with Wilton-Siegel J.'s adoption of a test in *Nexient Learning Inc.* that considers whether the assignment of contracts is "important to the reorganization process"[90] at issue in the relevant circumstances. In *Nexient*, the Court also adopted the *Playdium* factors, including "whether the proposal takes into consideration the interests of the parties", the "efficacy and integrity of the process" and "whether there had been unfairness in the working out of the process.[91] This approach is also consistent with the question of whether unnecessary detrimental effects on stakeholders have been avoided. In *Nexient*, Wilton-Siegel J. noted that there must be no "adverse effect" on the contractual rights of the counterparty "beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party."[92]

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[88] *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 SCR 379 ("*Century Services*") at para. 70 (DCC Brief of Authorities, Tab 3).

[89] *Century Services* at para. 70 (DCC Brief of Authorities, Tab 3).

[90] *Nexient Learning* at para. 56. (DCC Brief of Authorities, Tab 4)

[91] *Nexient Learning* at para. 58 (DCC Brief of Authorities, Tab 4).

[92] *Nexient Learning* at para. 59 (DCC Brief of Authorities, Tab 4).

75. On this motion, the Court therefore must consider whether the Proposed Assignment is "appropriate" in two ways. It must have reference to the fairness of the outcome on DCC and any prejudice to it. It must also consider whether the Applicants and the Monitor adequately took DCC's interests into account in the manner in which the Auction was conducted. In light of the fact that the Applicants ultimately had more than one bidder to choose from in the Auction, the Court must now consider whether the basis of the differentiation between the leading and the alternative bid was fair and gave due weight to the legitimate interests of DCC.

76. Both because of the nature of the "agreement" before the Court and the question of fairness of the Auction, the Court should find that the Proposed Assignment would be inappropriate under paragraph 11.3(3)(c).

i. The Appropriate "Agreement" is Not Before the Court and "Cherry-Picking" Within an Agreement is Inappropriate

77. Although the underlying purpose of s. 11.3 is to ensure that creditors may be given the opportunity to benefit from an assignment of an agreement where appropriate, the presumption is that any such assignment also preserves the rights of the counterparty under that same agreement. As noted by the Alberta Court of Appeal in *Ford Motor*, which interpreted the similar provisions in s. 84.1 of the *Bankruptcy and Insolvency Act*:

> …s. 84.1 of the BIA allows a court to approve the assignment (sale) of any agreement to obtain maximum benefit for creditors upon payment of any monetary breaches **and upon concluding that the rights and remedies of the counterparty will be preserved.**[93] *[Emphasis Added]*

[93] *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2011 ABCA 158 at para. 41 ["*Ford*"] (DCC Brief of Authorities, Tab 5).

78. In that case, the Court emphasized that the proposed sale would not prejudice the counterparty – Ford Motor Company – because the contract at issue was not being altered:

> All other rights and obligations under the assigned dealership agreement were to remain unchanged but for the change in the identity of the dealer from Welcome Ford to the ultimate purchaser.[94]

79. The Court of Appeal concluded that in assessing the appropriateness of the assignment, the chambers judge had properly considered the question of Ford's consent, whether or not the proposed purchaser was "up to the job" and whether or not Ford's rights and remedies under the contracts would be preserved.[95] Clearly, these were relevant factors to the interests of the counterparty, not of the estate, but were nonetheless necessary as part of the evaluation of whether the assignment was appropriate. The question was, in part, whether the third party retained the contractual rights it had prior to the assignment.

80. The proposed assignment the Applicants ask the Court to make is not of the entirety of the Joint Venture Agreement. Instead, the Applicants propose to assign a selection of certain rights and obligations and not others, even though all such rights and obligations govern the relationship between the Applicants and DCC. The *CCAA* provisions that expressly permit appropriate assignments only permit assignments of entire agreements that reflect the bargain struck between the debtor and its counterparty. The statute does not permit or envision the exclusion from the assignment of key portions of the agreement between the debtor and the counterparty, nor would such exclusion be appropriate. The Applicants on this motion have not put "the agreement" before the Court, but rather a modified agreement that DCC never would have entered into. In practice, this amounts to an assignment of certain contractual rights and the

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[94] *Ford* at para. 47 (DCC Brief of Authorities, Tab 5)
[95] *Ford* at para. 69 (DCC Brief of Authorities, Tab 5).

effective disclaimer or resiliation of certain other related contractual obligations, without recourse to the provisions of s. 32 of the *CCAA*. The Applicants do not rely on s. 32 because under those provisions and the common law, it is clear that while a Court may approve a contractual disclaimer **by the debtor**, it has no authority or jurisdiction to effectively allow a **solvent purchaser** to obtain the benefits of contracts without also assuming their liabilities.

81. Given the complexity of the operation of the Joint Venture and the parties' intention to promote the stable operation of the Facility, the parties entered into the Framework Agreement and various ancillary documents, which jointly form a single agreement in the form of the Joint Venture Agreement. The "agreement" that the Applicants have put before the Court, however, is a collection of certain obligations from the Joint Venture Agreement and not others. The purchaser proposes to include the Shareholders Agreement, the Limited Partnership Agreement, the Supply Agreement and certain intellectual property agreements. It expressly excludes the Framework Agreement, notwithstanding that its transfer and assignment was originally included in the Stalking Horse Agreement[96] and notwithstanding that it is the critical agreement designed to, among other things, govern the operation of the Joint Venture and the relationship of the Joint Venture partners.

82. Where the proposed assignment relates to the continued operation of a business, it is inappropriate to selectively include certain contractual obligations while excluding others as part of an assignment. The starting point of any assignment of a business should be the continuation, where possible, of the bargain between the parties as had been defined by those parties. There is no evidence before the Court that there are elements of the pre-existing agreement that are unworkable or somehow inconsistent with the successful ongoing operation of the Joint Venture.

[96] Kalins Affidavit at para. 50 (Motion Record, Vol. 1, p. 25).

Indeed, the Applicants are seeking to effectively enforce outstanding obligations of DCC under the Framework Agreement by seeking approval of the HP2 Severance Transaction, while effectively disclaiming other aspects of the Framework Agreement by excluding them from the contracts to be assigned.

83. Section 11.3(1) permits the assignment of "an agreement" in appropriate circumstances. The purpose of the assignment powers under the *BIA* and the *CCAA* is to allow the estate to realize the potential value of its agreements in circumstances where the Court determines that the proposed assignee would be able to perform the obligations and it would be appropriate to order the assignment. Where there are various documents collectively governing the relationship between the Applicants and a counterparty in relation to the same business, the "agreement" in these circumstances must be interpreted to mean the entirety of the agreement between the parties as it relates to that business, not a selection of certain terms at the expense of others. This is particularly the case where the excluded terms are for the benefit of the counterparty.

84. Although courts recognize that it may be appropriate to allow some "cherry picking" by purchasers in relation to particular lines of business or contracts with various different parties, the mischief of allowing a purchaser to do so **within the confines of a particular debtor-third party relationship** has been clearly and correctly identified by the Court. In *Nexient Learning*, Wilton-Siegel J. found that it would be inappropriate and unfair to ask the Court to authorize an assignment where various agreements reflected "a continuing or multifaceted arrangement"[97] between the debtor and a third party or where various contracts are "interconnected" either formally or due to the "operational relationship"[98] between the subject-matter of various

[97] *Nexient Learning* at para. 62 (DCC Brief of Authorities, Tab 4).
[98] *Nexient Learning* at para. 62 (DCC Brief of Authorities, Tab 4).

contracts. He noted:

> However, the situation in which a purchaser seeks to assume less than all of the contracts between a debtor and a particular third party with whom the debtor has a **continuing or multifaceted arrangement is more problematic**. In many instances in which a purchaser wishes to discriminate among contracts with the same third party, the Court will not exercise its authority under the *CCAA*, or its inherent jurisdiction, to authorize an assignment and/or permanently stay termination rights based on insolvency defaults. **In such circumstances, the purchaser must assume all contracts with the third party or none at all.**
>
> **There can be many reasons why it would be inappropriate or unfair to authorize the assignment of less than all of a debtor's contracts with a third party. In many instances, there is an interconnection between such contracts created by express terms of the contracts. Similarly, there may be an operational relationship between the subject-matter of such contracts even if there is no express contractual relationship.** Courts are also reluctant to authorize an assignment that would prevent a counterparty from exercising set-off rights in contracts that are not to be assigned. **In respect of financial contracts between the same parties, for example, it would be highly inequitable to permit a purchaser to take only "in the money" contracts leaving the counterparty with all of the "out of the money" contracts and only an unsecured claim against the debtor for its gross loss.** It would also be inappropriate in many circumstances to permit a selective assignment of a debtor's contracts if the competitive position of the third party relative to the assignee would be materially and adversely affected, at least to the extent the third party is unable to protect itself against such result.[99] *[Emphasis Added]*

85. There can be no real dispute that the Joint Venture Agreement in its entirety, including the Framework Agreement, reflects "a continuing or multifaceted arrangement" between DCC and the Applicants from which individual agreements cannot be properly abstracted. The various components of the Joint Venture Agreement work with each other as part of a comprehensive agreement on how the Joint Venture is to be run, by whom, and in what manner.

[99] *Nexient Learning* at paras. 62-63 (DCC Brief of Authorities, Tab 4).

The "operational relationship" between the various aspects of the Joint Venture Agreement is clear. To permit a purchaser to discriminate between certain rights and obligations that are to be included or excluded from a future relationship with the counterparty is neither fair, nor necessary for the *CCAA* process to succeed. Where the Proposed Transaction includes the possibility that there will be a possible effective disclaimer of certain agreements, the counterparty to those agreements must be given an opportunity to negotiate those terms.

86. In their facta, both the Applicants[100] and of QSI[101] adopt technical arguments about the documents that comprise the Joint Venture Agreement. In the context of a proposed assignment of an agreement under the *CCAA*, however, the Court must consider the true "agreement" that governs the relationship between the debtor and the relevant counterparty.

ii. The Manner in Which the Auction was Conducted was Unfair and it would be Inappropriate to Approve the Resulting Proposed Assignment

87. The Applicants have failed to demonstrate why the prejudice to DCC that would be caused by the QSI Bid in this case is "absolutely required"[102] to facilitate the reorganization process and advance the ends of the *CCAA*. Notably, they have not even attempted to do so. On the face of the evidence, it is clear that the nature and scope of the prejudice to DCC under the Proposed Transaction is not a necessary harm to permit a re-organization, since an alternative bid with essentially the same benefit to the estate includes markedly less prejudice to the interests of DCC. The Auction, however, was conducted in such a fashion that the difference in prejudice to

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[100] Factum of the Applicants, para. 99-100.

[101] QSI Factum, para. 77-78.

[102] *Nexient Learning* at para. 59 (DCC Brief of Authorities, Tab 4).

DCC was assigned no value whatsoever in the evaluation of bids.[103] This is a fatal misapprehension of the requirements of an assignment under s. 11.3.

88. In this case, the evidence is clear that the Applicants failed to consider or adequately value the impact of the Proposed Assignment on the interests of DCC. This failure to consider DCC in the comparison of bids makes the Proposed Assignment inappropriate in the circumstances. To the extent the Applicants did compare the existing bids, it used flawed methodology both in terms of assessing the impact of the Proposed Transaction on the estate and its impact on DCC. The valuation methodology used by the Applicants and the Monitor presupposed that this Court would (i) treat the Framework Agreement as being disclaimed without a hearing under s. 32 and (ii) rubber stamp the Applicants' motion under s. 11.3 such that DCC's possible opposition was valued at nothing more than a nuisance.

89. As is set out above, the Applicants ignored or misapprehended two key requirements of the Bidding Procedures that would have required them to turn their minds to the impact of the Proposed Assignment on DCC. Furthermore, having prohibited DCC from participating in the Auction, the Applicants began that process knowing that DCC's consent during the Auction was impossible and that a motion may be necessary. In those circumstances, they should have been particularly aware of the potential need for judicial intervention and have paid careful attention to the s. 11.3 criteria.

90. Having ignored key mandatory elements of the Bidding Procedures and ignored the requirements under s. 11.3 (such as ensuring the purchaser had the capacity to assume the agreements), the Applicants' exercise of judgment in the Auction is deserving of no deference by

[103] Kalins Cross, Q 222-228 and Q 284-286 (Supplementary Motion Record, pp. 75-79 and pp. 100-101).; Eighth Report of the Monitor, Appendix A, p. 6.

this Court. The Applicants acted unreasonably or without regard to the statutory criteria governing the extraordinary remedy of contract assignment under the *CCAA*. There is no evidence that any meaningful consideration of DCC's interests ever took place; in fact, the evidence is that the Applicants behaved as though their only duty was to their creditors.

91. The exclusion of DCC from the Auction process was particularly unreasonable in light of the fact that (a) any purchaser would need DCC's consent; (b) DCC had advised that it was available and had, in fact, asked to be present at the Auction;[104] and (c) Wacker requested to speak to DCC. In response, the Applicants decided that a successful negotiation between Wacker and DCC was likely that an agreement would be reached[105] even though both Wacker and DCC obviously believed the discussion could be fruitful (or else would not have suggested they wanted to engage in it). Notably, Wacker's evidence on this motion indicates that it believes that it is "commercially very close"[106] to reaching an agreement with DCC, which "could be finalized within a short time frame."[107] DCC has sent terms[108] on which it would consent to both parties and remains available for additional negotiations with both bidders.

92. The Applicants' approach to the Auction effectively precluded the possibility that consent could be reached during the Auction by refusing DCC's request that it participate in the process. Just as the Applicants interpreted the Bidding Procedures in a manner that failed to recognize any need to give particular consideration to the interests of DCC, they approached the Auction by refusing to give DCC any special status that might have permitted a consensual

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[104] Rinaldi, para. 39 (Responding Motion Record of DCC, p. 14); Kalins Cross, Q 316 (Supplementary Motion Record, p. 111).

[105] Kalins Cross, Q 217 (Supplementary Motion Record, p. 73).

[106] Affidavit of Ralf Widmer, sworn May 15, 2012 ("Widmer Affidavit"), para. 31 (Responding Motion Record of Wacker Chemie AG, p. 10).

[107] Widmer Affidavit, para. 31 (Responding Motion Record of Wacker Chemie AG, p. 10).

[108] Rinaldi Affidavit, para. 53 (Responding Motion Record of DCC, p. 18).

arrangement which would have materially altered the form of the successful bid and possibly the identity of the successful bidder. In those circumstances, it would not be appropriate under s. 11.3 to give effect to the result of the Auction.

D. The HP2 Severance Transaction Should Not be Approved

93. It would be inappropriate to approve the HP2 Severance Transaction. It represents an attempt by the Applicants to obtain the benefits of the Framework Agreement while at the same time effectively disclaiming the Framework Agreement.

94. The profound unfairness of what the Applicants are proposing to do in permitting QSI to select certain contractual obligations, but not others, is clearly illustrated in the relief they seek in relation to the proposed HP2 Severance Transaction. The obligation to complete that transaction – which would be to the benefit of QSI – is contained in the Framework Agreement. The Framework Agreement specifically provides that a deed of servitude contemplated as part of the Severance Transactions be reasonably satisfactory to DCC.[109]

95. The Transaction is not, as suggested by the Applicants in their factum, an "internal corporate reorganization" that remains outstanding, but rather a matter governed by the Framework Agreement in which each of the partners in the Joint Venture have certain responsibilities. By the Applicants' own admission, the transaction is essential to the operation of the Joint Venture. If not completed, the proposed assignee will have no rights of access to the HP2 Property[110] and the Partnership will have no access to a dust collector, which is a key piece of equipment used in its business but located on the HP2 property.[111] While claiming that the

[109] Rinaldi Affidavit, para. 21 (Responding Motion Record of DCC, p. 17-18).
[110] Kalins Affidavit, para. 85 (Motion Record, Vol. 1, p. 36).
[111] Kalins Affidavit, para. 86 (Motion Record, Vol. 1, p. 37).

transaction is an "internal" one, the Applicants also admit that the HP2 Severance Transaction is one aspect of the Framework Agreement that remains outstanding.[112]

96. The Applicants seek to exclude the Framework Agreement from the assignment so that the proposed purchaser need not assume any related obligations. It is only because of this exclusion – of what is clearly an integral agreement – that the Applicants have no choice but to ask the Court to intervene and do by way of its exceptional powers what would otherwise be done by way of the ordinary operation of the business relationship between the parties.

97. Not only do the Applicants seek to assign only certain parts of the Joint Venture Agreement and not others, but they are asking the Court to effectively grant the purchaser the benefits of part of a contract – the Framework Agreement – without any of the related obligations. Even under the Applicants' theory of what constitutes "an agreement" for the purposes of s. 11.3, this would be an impermissible assignment under that section, as it would effectively constitute the assumption by the proposed purchaser of rights under an agreement with an effective repudiation (by a solvent purchaser) of its related obligations.

PART IV—ORDER SOUGHT

98. For the foregoing reasons, DCC respectfully requests that this Court:

(a) dismiss the relief sought in 1(c) under s. 11.3 of the CCAA for an order assigning certain contractual rights and obligations;

(b) dismiss the relief sought in 1(d) and 1(e) relating to the HP2 Severance Transaction;

[112] Factum of the Applicants at para. 98.

(c) approve the proposed sale to either bidder, subject to such bidder first obtaining the consent of DCC;

(d) grant DCC its costs of the motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of May, 2012.

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SCHEDULE "A'

Re. Playdium Entertainment Corp., [2001] O.J. No. 4459 (SCJ)

Re. Woodward's Ltd., [1993] B.C.J. No. 42 (SC)

Century Services Inc. v. Canada (Attorney General), [2010] 3 SCR 379

Re. Nexient Learning Inc., [2009] O.J. No. 5507 (SCJ)

Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd., [2011] A.J. No. 592 (CA)

SCHEDULE "B"

Companies' Creditors Arrangement Act

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(*a*) an agreement entered into on or after the day on which proceedings commence under this Act;

(*b*) an eligible financial contract; or

(*c*) a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

(*a*) whether the monitor approved the proposed assignment;

(*b*) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(*c*) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

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

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(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.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(*a*) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(*b*) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(*a*) a director or officer of the company;

(*b*) a person who has or has had, directly or indirectly, control in fact of the company; and

(*c*) a person who is related to a person described in paragraph (*a*) or (*b*).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

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 TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

Proceeding Commenced at Toronto

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