IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION
In Bankruptcy and Insolvency

Citation: *Rambler Metals and Mining Limited, Re CCAA*, 2023 NLSC 134
Date: October 11, 2023
Docket: 202301G0841

IN THE MATTER OF an application of Rambler Metals and Mining Canada Limited and 1948565 Ontario Inc.

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

Before: Justice Alexander MacDonald
Edited Transcript of Oral Reasons for Judgment

Place of Hearing:	St. John's, Newfoundland and Labrador
Date of Hearing:	September 11, 2023
Date of Oral Judgment:	September 11, 2023

Appearances:

Joseph J. Thorne	Appearing on behalf of the Applicants
Alex MacFarlane	Appearing on behalf of the Monitor
Phil Clarke, Liam Murphy, and Jason Kanji	Representatives of the Monitor

Kathryn Esaw and Allison Philpott	Appearing on behalf of the Purchaser, AuTECO Minerals Ltd.
Meghan King	Appearing for Elemental Royalties Corp.
Maeve Baird and Deanna Frappier KC	Appearing on behalf of CRA
Monique Sassi	Appearing on behalf of DIP Lenders
Peter Fraser	Representative of DIP Lenders
Sean Pittman	Appearing for Krinor Resources
Michael Collins and Sean Collins	Appearing for International Royalty Corporation / Royal Gold
Brendan O'Neill	Appearing for Rambler Group Directors & Officers

Authorities Cited:

CASES CONSIDERED: *Harte Gold Corp. (Re)*, 2022 ONSC 653; *PricewaterhouseCoopers Inc. v. Canada Fluorspar (NL) Inc.*, 2023 NLSC 88; *Plasco Energy (Re)* (2015), 2015WL13889310, CV-15-10869-00C (Ont. S.C.J. [C.L.]); *Arrangement Nemaska Lithium Inc.*, 2020 QCCS 3218, leave to appeal refused, 2020 QCCA 1488, leave to appeal refused, 2021 CarswellQue 4589 (SCC); *Southern Star Developments Ltd. v. Quest University Canada,* 2020 BCCA 364, refusing leave to appeal, *Quest University Canada (Re)*, 2020 BCSC 1883; *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.*, 2022 ONSC 6354; *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (C.A.); *Lydian International Limited (Re),* 2020 ONSC 4006; *Re Toys "R" Us (Canada) Ltd.*, 2018 ONSC 609; *Cline Mining Corporation, Re,* 2014 ONSC 6998; *Sports Villas Resort, Inc. (Re)*, 2020 NLSC 109; *Nortel Networks Corp., Re*, 2017 ONSC 673; *Belyea*

v. Federal Business Development Bank (1983), 44 N.B.R. (2d) 248, 116 A.P.R. 248 (C.A.)

STATUTES CONSIDERED: *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36; *Wage Earner Protection Program Act*, S.C. 2005, c 47

REASONS FOR JUDGMENT

MACDONALD J.

INTRODUCTION

[1] Rambler Metals and Mining Canada Limited (Rambler Canada), Rambler Metals and Mining PLC (Rambler UK), Rambler Mines Limited (Rambler Mines), and 1948565 Ontario Inc. (1948), applied for creditor protection and other relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*).

[2] On February 27, 2023, I granted the Initial Order in favour of Rambler Canada and 1948 (Rambler Group) now filed in this Court. I appointed Grant Thornton Limited (GTL) to be the Monitor. I set the comeback hearing for March 6, 2023, and on that date, I granted an Amended and Restated Initial Order (ARIO) in which I provided for enhanced Monitor's powers. I approved the Sales and Investment Solicitation Process (SISP), and extended the stay until May 19, 2023.

[3] On April 6, 2022, I granted an order pursuant to s. 5(5) of the *Wage Earner* Protection *Program Act*, S.C. 2005, c 47.

[4] On May 16, 2023, I granted an amended ARIO and extended the stay until September 11, 2023. I also increased the maximum amount of the Debtor in Place financing (DIP) to US $8.3 million.

[5] On June 29, 2023, I granted a vesting order in which I approved a settlement of a dispute between Rambler Canada and Transamine SA.

[6] This is a motion by the Rambler Group for an approval of the sale of the shares of Rambler Group to the prospective purchaser and approval of:

(a) a Reverse Vesting Order (RVO) to allow for the sale of the Rambler Group's mining enterprise;

(b) an order extending the stay until December 31, 2023;

(c) an order expanding the Monitor's powers to include new entities to be created for the purposes of implementing the Rambler Group's proposed restructuring;

(d) an order releasing certain persons as I describe later in this decision (Releases);

(e) a claim identification order;

(f) an order passing accounts from February 20, 2023 through July 31, 2023, of the:

i. Monitor's fees and disbursements of $1,002,370; and

ii. Monitors Counsel (Borden Ladner Gervais LLP) fees and disbursements of $178,390.

(g) an order sealing the confidential supplement to the Monitor's Sixth Report.

[7] The Rambler Group served the Monitor and all known creditors and shareholders with its application materials. Monitor's counsel provided notice to

stakeholders previously registered for prior court applications. It also published its report accompanying this Application on GTL's website.

[8] Except for objections filed by International Royalty Corporation and Krinor Resources, Inc., no one opposes the relief sought. Both objectors withdrew their objections after discussions in court.

[9] At the end of the hearing, I granted the RVO and made other ancillary orders including:

(a) the second amendment of the ARIO;

(b) an order enhancing the Monitor's power;

(c) the Releases to directors, officers and others persons of the Rambler Group, the DIP lenders, the Purchaser, and the Monitor;

(d) the order sealing the confidential supplement to the Monitor's Sixth Report;

(e) the claims identification procedure; and

(f) passing of the Monitor and its counsel's accounts.

[10] This is an edited version of my oral reasons.

FACTS

[11] I explained the background of this *CCAA* proceeding and the circumstances that gave rise to it in my February 27 oral decision, filed on March 3, 2023. I will not repeat all of that background today. I have filed an edited written version of that decision.

[12] Rambler Canada owns and operates the copper and gold Ming Mine, ancillary facilities, mineral leases, and other property near Baie Verte, Newfoundland and Labrador (Mine). It owns 50% of the Little Deer and Whaleback mines exploration project. 1948 owns the remaining 50% of the exploration project. I will refer to Rambler Canada and 1948 as the Rambler Group.

[13] Ming Mine opened in 2012 in its current form, operating as a small-scale operation targeting high-grade mineral zones. While the Mine initially generated a positive cash flow, it became apparent that Rambler Canada needed more ore production to reduce unit production costs.

[14] The Rambler Group say, and the Monitor agrees, that a weak balance sheet and lack of capital caused Rambler Canada to make cash-constrained decisions that resulted in poor long-term profitability after 2016.

[15] In 2019, to address the high unit production costs, Rambler Canada increased production but then exhausted the available underground reserves. This caused cash-flow deficiencies as it shifted from production of copper and gold to development of additional underground reserves.

[16] The Rambler Group started to make improvements to mining efficiencies in 2020. However, the COVID-19 pandemic and declining copper prices negatively affected business operations.

[17] COVID-19 required Mine employees to social distance. Employees were more likely to remain on site because of the impacts of COVID-19. Employee social distancing contributed to insufficient ore production to feed processing operations. This in turn caused lower revenue because of reduced copper recovery. All of these factors caused yet higher unit production costs.

[18] Thus, the Rambler Group experienced financial challenges for some time because of chronic undercapitalization exacerbated by the impacts of the COVID-19 pandemic.

[19] As of March 4, 2022, the Rambler Group owed about US $36 million in secured debt.

[20] Rambler Canada owed about US $1.7 million to Canada Revenue Agency (CRA) for source deductions. I refer to the other creditors in my earlier decision.

[21] The Monitor has completed the SISP. The Monitor seeks approval of sale to a new purchaser. It seeks to implement the transaction through a proposed RVO.

[22] A RVO generally involves a series of steps whereby:

(a) the purchaser becomes the sole shareholder of the debtor company;

(b) the debtor company retains its assets, including key contracts and permits; and

(c) the excluded liabilities and assets not assumed by the purchaser are transferred into a newly incorporated entity or entities (referred to in RVOs as "ResidualCo"). The Monitor then addresses these assets and liabilities through a bankruptcy or similar process. In this case, the Monitor will eventually substitute Newco, the ResidualCo, for the Rambler Group as the Applicant under this *CCAA* proceeding.

[23] The RVO differs from a traditional assets vesting order (AVO) in which the assets of a debtor company are vested in the purchaser free and clear of any encumbrances or claims, other than those assumed by the purchaser, as contemplated by s. 36(4) of the *CCAA*. The purchase price stands in place of the assets and is available to satisfy creditor claims in accordance with their pre-existing priority.

[24] Here, the RVO will cancel all the existing Rambler Group shares and the Purchaser will pay the purchase price in exchange for new common shares in Rambler Group. The RVO provides that Rambler Group will transfer the purchase price, and Excluded Assets, Excluded Contracts, and Excluded Liabilities as defined in the Subscription Agreement to Newco, the ResidualCo, in this RVO. All claims attached to the Excluded Assets will continue to attach and are transferred to Newco.

[25] The RVO also provides for Excluded Registrations that become registration of Newco and Retained Registrations that Rambler Group retains as Registrations.

[26] Immediately thereafter, the Purchaser will then own 100% of the issued capital of the Rambler Group free and clear of any encumbrances, except for Retained Liabilities, Permitted Encumbrances and the Retained Registrations, as defined in the Subscription Agreement.

[27] The Subscription Agreement allows the Purchaser to assign its rights to an affiliate, subject to the requirements set out in the Subscription Agreement. The Monitor expects the Purchaser will do so prior to closing.

[28] The parties intend to close the transaction by September 30, 2023, or failing that, before October 25, 2023. Conditions precedent to the closing include the Purchaser:

(a) raising capital to finance the transaction; and

(b) obtaining shareholder approval of the transaction.

[29] The Rambler Group will then own all of the Rambler Group's assets and liabilities except those excluded. Rambler Group retains its environmental obligations.

[30] The share purchase agreement contemplates that the Rambler Group and the Purchaser will take certain implementation steps to allow the sale to proceed in a tax-efficient manner. The Monitor, after discussions with its counsel, the Company, and the Purchaser, understands the reasons for the steps. It believes the implementation steps are reasonable in the circumstances.

[31] The Excluded Liabilities and Excluded Assets vest in Newco. Newco's liabilities will exceed $5 million and it will be insolvent.

[32] The Purchaser will pay the purchase price in two tranches. The Purchaser also agrees to assume liability for "Specified Arrears" (as defined in the Subscription Agreement) and the Rambler Group's operation expenses from the date of the RVO to the closing. The Monitor applied to keep other bidders' proposals confidential until the transaction closes.

[33] The transaction provides that Newco will retain the purchase price and will immediately pay the DIP loan. All other payments will be subject to Court approval.

[34] The purchase price is insufficient to pay out all secured creditors. The unsecured creditors will receive nothing.

[35] While the Monitor does not expect that it will make a distribution to unsecured creditors, it will undertake a claims process to allow parties who believe that they may have a priority claim to other secured creditors to assert such a claim.

[36] This, together with the Monitor's concurrent review of the secured creditors' security, will allow the Monitor to determine the appropriate distribution to creditors. After this determination, the Monitor will apply for a distribution order. The claims process is set out in the Claims Indemnification Order.

ISSUES

[37] The issues are, should I approve the:

(a) RVO;

(b) order extending the stay until December 31, 2023;

(c) order expanding the Monitor's powers over new entities created for the purposes of implementing Rambler Group's proposed restructuring;

(d) the Releases provided for in the RVO;

(e) claim identification order;

(f) order sealing the confidential supplement to the Monitor's Sixth Report and certain information on the other bids received under the SISP until the closing of the purchase as outlined in the share purchase agreement?; and

(g) passing of the Monitor and its counsel's accounts.

[38] I will first deal with whether I should approve the RVO.

ANALYSIS

Should I approve the RVO?

[39] I hereby approve the RVO. A successful *CCAA* process typically results the plan of arrangement that creditors approve. However, s. 36(1) of the *CCAA* says, "[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."

[40] Section 36 provides that shareholder approval is not necessary. Furthermore, it does not require creditor approval. Section 11 of the *CCAA* also gives me general authority. It provides, "[T]he court, on the application of any person interested in the matter, may … make any order that it considers appropriate in the circumstances."

[41] Thus, creditors need not approve a sale of assets outside the ordinary course of business. A RVO is such a transaction.

[42] I will first consider whether I have the statutory authority to approve a RVO. Justice Penny in *Harte Gold Corp. (Re)*, 2022 ONSC 653, conducted an extensive review of the history of RVOs in *CCAA* applications. I dealt with these principles in *PricewaterhouseCoopers Inc. v. Canada Fluorspar (NL) Inc.*, 2023 NLSC 88. I will repeat them now.

[43] Justice Penny says that the Ontario court first appears to have approved an RVO in *Plasco Energy (Re)* (2015), 2015WL13889310, CV-15-10869-00C (Ont. S.C.J. [C.L.]) in the handwritten endorsement of Justice Wilton-Siegel (*Harte* at para. 24).

[44] Justice Wilton-Siegel said, "[T]he Court has authority under section 11 of the *CCAA* to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the *CCAA* insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise" (*Harte* at para. 24).

[45] Justice Penny observed in that, "A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of

applications based on court approval of an RVO structure has increased significantly in the past few years" (at para. 25).

[46] Two appeal courts have dealt with RVOs.

[47] The first is *Arrangement Nemaska Lithium Inc.*, 2020 QCCS 3218, leave to appeal refused, 2020 QCCA 1488, leave to appeal refused, 2021 CarswellQue 4589 (SCC), at paras. 52 and 71. Applications Justice Gouin approved a RVO in the face of opposition by a creditor.

[48] Justice Gouin (quoted in *Harte*, at para. 27) found that the approval of a RVO should be considered under s. 36 of the *CCAA,* subject to determining, among other things:

(a) Whether sufficient efforts to get the best price have been made and whether the parties acted providently;

(b) The efficacy and integrity of the process followed;

(c) The interests of the parties; and

(d) Whether any unfairness resulted from the process.

[49] Justice Gouin found the applicant met these criteria. He approved the RVO. He concluded it would serve to maximize creditor recoveries. It maintained the debtor company as a going concern. It allowed for an efficient transfer of the necessary permits, licences and authorizations to the purchaser (*Harte*, para. 27).

[50] In *Arrangement Nemaska Lithium*, the Quebec Court of Appeal denied leave to appeal. In paragraph 19 it said, "The *CCAA* judge dismissed Cantore's argument regarding the Court's limited authority to grant a vesting order." It found that courts should broadly interpret, "sell or otherwise dispose of assets outside the ordinary

course of business under s. 36(1) *CCAA* " to "allow a *CCAA* judge to grant innovative solutions such as RVOs," consistent with the "wide discretionary powers afforded the supervising judge pursuant to section 11 *CCAA*" (see also *Harte* at para. 28).

[51] The second is Southern Star Developments Ltd. v. Quest University Canada, 2020 BCCA 364, refusing leave to appeal, Quest University Canada (Re), 2020 BCSC 1883.

[52] The British Columbia Court of Appeal refused leave to appeal. It said at paragraph 32 that the RVO granted by the application judge, Justice Fitzpatrick, "reflects precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising *CCAA* proceedings."

[53] *In Harte,* Justice Penny said, "[T]he jurisprudence … clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the *CCAA*" (at para. 37).

[54] Justice Penny, (at para. 38) provides a list of questions I should consider. These are:

(a) Why is the RVO necessary?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO than they would have been under any other viable alternative?

(d) Does the price paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) preserved under the RVO?

[55] Justice Fitzpatrick in *Quest University Canada (Re)* found that the *CCAA* provided sufficient authority to grant the RVO and was consistent with the remedial purposes of the *CCAA* (at para. 170).

[56] In paragraph 155 she said, "I find further support for Quest's position in the recent comments of the Court in *Callidus* [*9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10]. The Court was there addressing a different issue — whether a *CCAA* judge has jurisdiction under s. 11 to bar a creditor from voting where the creditor is 'acting for an improper purpose' — but the Court's comments on the exercise of jurisdiction under the *CCAA* ring true in relation to the RVO structure."

[57] Justice Fitzpatrick quoted the Supreme Court of Canada in *Callidus* where it said, "The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*. … Additionally, the court must keep in mind three 'baseline considerations' ... which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence" (*Quest* at para. 155; and *Callidus* at para. 49).

[58] The Justice continued and said, "Many of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable 'assets' that could be not be [*sic*] transferred" (at para. 160).

[59] Justice McEwen in *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.*, 2022 ONSC 6354, said "Reverse vesting orders are relatively new structures. I agree that reverse vesting orders should not be the 'norm' and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances ... That said, reverse vesting orders have been deemed appropriate in a number of cases" (at para. 33).

[60] Justice McEwen continued in paragraph 34 and said cases approved reverse vesting orders in circumstances where:

(a) the debtor operated in a highly regulated environment in which its existing permits, licences, or other rights were difficult or impossible to reassign to a purchaser;

(b) the debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser; and

(c) maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.

[61] I agree. I will consider the factors in section 36(3) of the *CCAA*, the principles articulated in these cases, the court's guidance in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (C.A.) for the approval of the sale of assets in an insolvency, and the additional factors referred to in paragraph 38 of *Harte*.

[62] Thus when I combine these factors, I will consider as I did in my decision in Canada *Fluorspar (NL) Inc.*:

(a) is the RVO necessary?

(b) does the RVO produce an economic result at least as favourable as any other viable alternative?

(c) is any stakeholder worse off under the RVO than they would have been under any other viable alternative?

(d) does the price for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO?

(e) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(f) whether the Monitor approved the process leading to the proposed sale or disposition;

(g) does the Monitor say that the proposed sale would be more beneficial to the creditors than disposition under a bankruptcy?

(h) the extent to which the creditors were consulted;

(i) the effects of the proposed sale on the creditors and other interested parties;

(j) whether the price is reasonable and fair, taking into account their market value;

(k) whether sufficient effort has been made to obtain the best price, and whether the debtor has acted improvidently;

(l) the interests of all parties;

(m) the efficacy and integrity of the SISP; and

(n) whether there has been unfairness in operation of the SISP.

[63] I need not consider all of these factors. Each need not support the issuing of the RVO. I use them to assist me in exercising the broad discretion I have under the *CCAA*.

Is the RVO necessary?

[64] I find that the RVO is necessary. Rambler Group has dozens of permits and licences that it must retain if it is to operate the Mine. The Monitor says that:

(a) under an AVO most of these may be difficult to transfer. Even if it is possible to do so, the transfers will likely result in significant delays and costs;

(b) the permits, licences and leases are critical to the ability of the Purchaser to restart operations. The uncertainty around timing of acceptance would materially affect the restart operations and therefore the economics of the transaction;

(c) the tax attributes of a RVO are important to the Purchaser and support its valuation of Rambler Group. It can only preserve these tax attributes through a RVO (Monitor's Ninth Report at para. 49); and

(d) the RVO has significant benefits that are reasonable, justified and appropriate in the circumstances. Accordingly, it supports the transaction and the RVO.

Reasonableness of the Process Leading to the Proposed Sale

[65] I find that the process leading to the proposed sale is reasonable in the circumstances. I find that the Monitor approved the process leading to the proposed sale or disposition.

[66] The Monitor sought court approval of the SISP. Creditors received notice of these applications. The Court process allowed secured creditors the opportunity to provide input to the Court on these processes. The SISP is not innovative or unique. Many courts have approved similar sales processes.

Are stakeholders worse off under the RVO structure than they would have been under any other viable alternative? Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

[67] I find that the RVO produces an economic result at least as favourable as any other viable alternative. The Monitor says, and I agree that:

(a) the additional cost to implement and approve the transaction would affect the Purchaser's proposed timelines to restart operations;

(b) the economic result of the transactions provides a better result than any other form of transaction under bankruptcy. It allows the Rambler Group to continue as a going concern. The transaction provides for repayment of DIP financing as well as some payment to the senior secured creditors;

(c) even under the RVO, secured creditors will realize a loss. Subject to the Monitor's further review and any Distribution Order, there are no funds available for unsecured creditors. Thus, the RVO does not disadvantage the unsecured as they would not receive any distribution in an AVO; and

(d) approval of a plan of arrangement based on an AVO is not an option. It would further reduce recovery to the secured creditors who were already suffering losses. It would unnecessarily add additional cost and risk to the sale as it would take time and money that the Monitor does not have.

[68] I also find that:

(a) a bankruptcy would jeopardize the possibility of future operations. It could jeopardize the permits and licences necessary to maintain such operations. These risks could destroy the sale or reduce the purchase price;

(b) a bankruptcy sale would delay, and perhaps jeopardize, the sale. Before an AVO can be approved under a bankruptcy, Rambler Group must be

bankrupt, a meeting of creditors must be held, inspectors must be appointed, and they must approve the sale;

(c) DIP lenders would need to advance additional money to finance ongoing operations during this time. There is no evidence they would be willing to do so. This process might fundamentally change the Rambler Group's value to the Purchaser; and

(d) every non-liquidation bid in the SISP assumes a RVO. There is no other more traditional AVO Proposal.

Consultation with Creditors

[69] I discussed the efforts the Monitor took to inform creditors of this sale earlier in this decision. The Monitor did consult with CRA and other secured creditors. I have no evidence if it consulted with unsecured creditors.

The Effect of the Proposed Sale on Creditors and Other Interested Parties

[70] The proposed transaction has the prospect of renewed employment for some of the Rambler Group employees. It has the prospect of providing ongoing business opportunities for suppliers of goods and services to the Mine.

[71] The Monitor says that the RVO will provide an expedient and efficient transfer of Rambler Group's intangible assets to the Purchaser. This would support a timely restart of operations that will provide an opportunity for employees, stakeholders, and the unsecured creditors to engage with the new business. He says, and I agree that this will benefit the local community.

[72] Thus, the evidence is that no creditor is in a worse position because of the use of a RVO than they would have been under an AVO (or, for that matter, under any plausible plan of compromise).

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[73] Furthermore, the transaction contemplates issuing new shares to the Purchaser. The RVO cancels the existing interests in the Rambler Group. Thus, the Rambler Group's current shareholders will receive no recovery of their investment.

Fairness of Consideration

[74] Rambler Group's business and assets have been extensively marketed both prior to and during the *CCAA* proceedings. At the conclusion of the SISP, this bid is the most acceptable. As I described earlier, this transaction will provide a superior recovery for creditors than would a liquidation of the Companies' assets in bankruptcy.

[75] Furthermore, the Monitor said that the purchase price is fair and reasonable taking into account the assets including the mineral leases and licences. Therefore, I find the price is fair and reasonable.

Other Considerations Re. Appropriateness of a RVO vs. AVO

[76] The principal objective and benefit of employing the RVO in this case is the preservation of Rambler Group's many permits and licences necessary to conduct operations at the Mine.

[77] Under an AVO, the purchaser would have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This process would necessarily involve risk, delay and cost. Furthermore, there is no way of knowing whether a new environmental indemnity is available from the GNL.

[78] Thus, the RVO would achieve the timely and efficient preservation of the licences and permits necessary for the operations of the Mine.

[79] Finally and importantly, the Monitor supports the use of the RVO.

[80] For all these reasons, I find that the proposed RVO is necessary to achieve the clear benefits of the purchase and that it is appropriate to approve this transaction in the circumstances.

[81] The RVO will:

(a) provide for timely, efficient and impartial resolution of the Companies' insolvency;

(b) preserve and maximize the value of the Companies' assets;

(c) ensure a fair and equitable treatment of the claims against the Companies;

(d) protect the public interest and preserve employment and third-party suppliers and service providers; and

(e) balance the costs and benefits of Rambler Group's restructuring or liquidation.

[82] I now turn to whether I should extend the stay.

Should I approve an Order Extending the Stay until December 31, 2023?

[83] I extend the stay until December 31, 2023.

[84] The current stay period expires September 12, 2023. Under s. 11.02 of the *CCAA*, I may grant an extension of a stay of proceedings where: (a) circumstances

exist that make the order appropriate; and (b) the Rambler Group satisfies me that it has acted and *is* acting in good faith and with due diligence.

[85] The Rambler Group seeks to extend the stay to October 31, 2023, to allow it to proceed with the closing of the transaction, and resolve the issues associated with the RVO claims I referred to earlier.

[86] I find that creditors will not suffer material prejudice because of the extension of the stay. Rambler Group's cash flow forecast shows sufficient liquidity to allow the Monitor to deal with the remaining tasks contemplated by the RVO. The Monitor has confirmed, and I find that the Rambler Group continues to act in good faith and due diligence. I now turn to whether I should grant an order expanding the Monitor's powers.

Should I approve an Order Expanding the Monitor's Powers for the Purposes of Implementing the Rambler Group's Proposed Restructuring?

[87] The *CCAA* provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the *CCAA* provides that the Monitor can, "carry out any other functions in relation to the [debtor] company that the court may direct." Section 11 authorizes me to make any order that is necessary and appropriate in the circumstances.

[88] I grant the Monitor's enhanced powers provided in the draft Order. I do so because:

(a) the Monitor's expanded powers will allow it to administer the affairs of Newco, to wind down these *CCAA* proceedings, and deal with Newco through bankruptcy or otherwise following the close of the transaction; and

(b) The Monitor needs such powers to achieve the benefits of the transaction to stakeholders. No creditor suffers prejudice because of the Monitor's enhanced powers.

[89] I now turn to whether I should approve a RVO providing for the releases.

Should I approve a RVO providing for the Releases?

[90] I so order. The Monitor asked that I grant a court order releasing[1]:

(a) the present and former directors, officers, employees, legal counsel and advisors of the Rambler Group and Newco;

(b) the Monitor and its legal counsel and advisors, and their respective present and former directors, officers, partners, employees and advisors;

(c) the Purchaser, it's directors, officers, employees, legal counsel, and advisors; and

(d) the DIP Lenders, its counsel, and their respective present and former directors, officers, partners, employees, and advisors.

[91] The Releases will cover any present and future claims against the Released Parties based on any fact, or matter, or occurrence in respect of the purchase transaction. It does not release any claim for fraud or willful misconduct. It does not release any claim that I may not release pursuant to s. 5.1(2) of the *CCAA*. It does not release any environmental liability to GNL.

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[1] ((a), (b), (c), and (d) being collectively, the "Released Parties.")

[92] I find that the Releases are reasonable and appropriate in the circumstances. I base my decision on an assessment of s. 5.1 of the *CCAA* and the factors taken from *Lydian International Limited (Re)*, 2020 ONSC 4006 (at para. 54), and from my decision in *Canadian Fluorspar (NL) Inc.*

[93] Section 5.1 of the *CCAA* says, "A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations."

[94] Subsection 2 says, "A provision for the compromise of claims against directors may not include claims that relate to contractual rights of one or more creditors; or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors."

[95] Finally, subsection 3 says, "The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances."

[96] Chief Justice Morawetz said in *Lydian* (at para. 54) that I should consider the following factors:

(a) Whether the Released Parties from claims were necessary and essential to the restructuring of the debtor;

(b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

(c) Whether the plan could succeed without the Releases;

(d) Whether the Released Parties were contributing to the plan; and

(e) Whether the Releases will benefit the debtors as well as the creditors, generally.

[97] Again, I need not consider all of these factors. Each need not support the issuing of the Releases. I use the factors to assist me in exercising the broad discretion I have under the *CCAA*.

[98] I find the that:

(a) the Releases are fair and reasonable in the circumstances;

(b) the released claims rationally connect to the restructuring;

(c) the Released Parties are necessary and essential to the restructuring of the Rambler Group; and

(d) the Released Parties contributed to the restructuring.

[99] The Released Parties' efforts directly lead to the RVO and the sale of the enterprise. The share purchase agreement provides that the Purchaser must be satisfied with the form of the RVO. Counsel tells me that the various internal versions of the RVO always contained the release in favour of the Purchaser.

[100] Because of this sale and the efforts of the parties, there is cash available to satisfy some creditor claims. If I do not grant the Releases, there is a risk that the Purchaser might not proceed. If the Purchaser does proceed, it might reduce the purchase price.

[101] The Mine will likely reopen. It will provide employment. It will provide benefits to suppliers, and to Baie Verte and the larger community. The Releases help achieve the purposes of a *CCAA* proceeding, which includes maximizing creditor

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recovery and preserving continued employment in a restructured enterprise. Therefore, I find that the Releases connect rationally to the restructuring.

[102] Rambler Group was also a critical player in the processes leading to the *CCAA* filing.

[103] Thus, I find that the Released Parties made significant contributions to the Rambler Group's restructuring, both prior to and throughout these *CCAA* proceedings.

[104] The Monitor, the Purchaser, Rambler Group, and the DIP Lenders are unaware of any claims against them or their advisors related to these *CCAA* proceedings. Therefore, the Releases should not materially prejudice any stakeholders.

[105] Furthermore, the Releases are sufficiently narrow. Any environmental liabilities to the GNL are unaffected. The Releases do not affect claims referred to in s. 5.1(2) of the *CCAA* or claims arising from fraud or willful misconduct.

[106] The scope of the Releases is sufficiently balanced. It allows the Released Parties to move forward with the transaction and to conclude these *CCAA* proceedings. The Monitor, Rambler Group, and the Purchaser all take the position that the Releases are an essential component to the transactions.

[107] The Monitor and its counsel served creditors with materials relating to this Motion in accordance with the process set out in the AIROs.

[108] The Monitor included the form of the Releases in the draft RVO. This provided stakeholders with ample notice and time to raise concerns with Rambler

Group or the Monitor. No creditor (or any other stakeholder) has objected to the Releases.

[109] Thus, I find that the Releases are fair and reasonable. I now turn to whether I should grant the claims identification order.

Should I grant the claims identification order?

[110] I hereby grant the order. The Monitor seeks a claims identification order setting out a process to resolve creditor claims. Detailed discussion of this process is set out in the Monitor's Sixth Report.

[111] Courts commonly grant claims identification procedures under the authority of ss. 11 and 12 of the *CCAA*. I have done so in the Collins Contracting file 202001G1964. The Ontario Superior Court of Justice confirmed this authority in *Re Toys "R" Us (Canada) Ltd.*, 2018 ONSC 609 when it said, "Claims procedure orders are routinely granted under the courts general powers under ss. 11 and 12 of the *CCAA*" (at para. 8 and 14).

[112] In addition to my decision in *Collins Contracting*, claims procedure orders have been made in *Re Toys "R" Us* and *Cline Mining Corporation, Re,* 2014 *ONSC* 6998. Courts can make such orders even when there is insufficient proceeds from the sale to pay the claims of unsecured creditors.

[113] I find the claims procedure proposed by the Monitor is fair, reasonable, and appropriate in the circumstances. I find it will enable the Monitor to identify all potential claims, including all priority and secure claims against the Rambler Group and the directors and officers. I now turn to whether I should approve an order sealing the confidential supplement to the Monitor's Sixth Report and certain information on the other bids received under the SISP until the closing of the purchase as outlined in the share purchase agreement.

Should I approve an order sealing the confidential supplement to the Monitor's Sixth Report and certain information on the other bids received under the SISP until the closing of the purchase as outlined in the share purchase agreement?

[114] The Monitor also requests that I seal its confidential supplement to the Monitor's Sixth Report and certain information on the other bids received under the SISP until the closing of the purchase as outlined in the share purchase agreement.

[115] It is concerned that publication of this information would pose serious risk to the commercial interests of the stakeholders. It would then irreparably harm the Rambler Group's efforts to maximize the sale price.

[116] I hereby grant that order. The Supreme Court of Newfoundland and Labrador gave guidance on the principles applicable to these requests in *Sports Villas Resort, Inc. (Re)*, 2020 NLSC 109 (at para. 7), when it said, "I also granted an order sealing the Receiver's First Report until the transaction contemplated in the application is completed."

[117] It continued, "[T]his Court has authority to seal part or all of the court record. The receiver submits that this is an appropriate case for me to exercise my discretion in accordance with generally accepted insolvency practice to grant a sealing order over the Receiver's First Report… until the completion of the sale contemplated by this application."

[118] The court continued (at para. 9) and said, "Because the proposed sale of the Subject Property has not been approved, the receiver is rightly concerned that the sensitive information contained in the Receiver's First Report could adversely affect the sale of these assets to another party."

[119] I agree. I also find that the extent of the sealing order required is the minimum that will preserve the confidentiality of the purchase price until the transaction is

closed. No less onerous sealing order is suitable in the circumstances. I now turn to whether I should approve the Monitor and its counsel's fees and disbursements.

Should I approve the Monitor and its counsel's fees and disbursements incurred from February 20, 2023 to July 31, 2023?

[120] I will not do so now, but I will give directions for further approvals.

[121] In *Nortel Networks Corp., Re*, 2017 ONSC 673, the Ontario Superior Court of Justice [Commercial List], provided guidance on this issue in paragraphs 13 to 15. The Monitor bears the onus of making out its case. A bald assertion by the Monitor that the fee is reasonable does not necessarily make it so. The Monitor must provide the Court with cogent evidence on which the Court can base its assessment of whether the fee is fair and reasonable in all of the circumstances.

[122] The so-called *Belyea* factors described in *Belyea v. Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248, 116 A.P.R. 248 (C.A.), are a useful but not exhaustive list. These are:

(a) the nature, extent and value of the assets;

(b) the complications and difficulties encountered;

(c) the degree of assistance provided by the debtor;

(d) the time spent;

(e) the Monitor's knowledge, experience and skill, and the diligence and thoroughness displayed;

(f) the responsibilities assumed by the Monitor;

(g) the results of the Monitor's efforts; and

(h) the cost of comparable services when performed in a prudent and economical manner.

[123] Thus, I must ensure that the compensation sought is indeed fair and reasonable. I should consider the *Belyea* factors and the time spent.

[124] However, the value provided by the Monitor is more important than the mathematical calculation of the hours incurred multiplied by the hourly rate. While the two should be synonymous, my focus is on what the Monitor accomplished, not on how much time it took.

[125] I direct that the Monitor will file with this Court and serve on the secured creditors and the Canada Revenue Agency:

(a) a report addressing the *Belyea* factors; and

(b) a summary of the Monitor and its counsel's fees and disbursements. The summary shall describe the category of the tasks undertaken and the amounts due for those tasks. The Monitor shall provide the invoices supporting these fees to the Court or any secured creditor who so requests.

ALEXANDER MACDONALD
Justice