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

2022 NLSC 149 (CanLII)

Citation: *Edward Collins Contracting Limited (Re)*, 2022 NLSC 149
Date: October 14, 2022
Docket: 202201G1964

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

AND IN THE MATTER OF an application of Edward Collins Contracting Limited, Classic Security Ltd., FGC Holdings Ltd., 51037 Newfoundland and Labrador Inc. and H & E Designs Ltd. (collectively, the "Companies ")

- AND -

Docket: 202201G1853

IN THE MATTER OF the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended (the "*BIA*");

AND IN THE MATTER OF the Receivership of Edward Collins Contracting Limited, H & E Designs Ltd., Classic Security Ltd., FGC Holdings Ltd. and 51037 Newfoundland and Labrador Inc.

BETWEEN:

ROYAL BANK OF CANADA

APPLICANT

AND:

EDWARD COLLINS CONTRACTING LIMITED, H & E DESIGNS LTD., CLASSIC SECURITY LTD., FGC HOLDINGS LTD. and 51037 NEWFOUNDLAND AND LABRADOR INC.

RESPONDENTS

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Before: Justice Alexander MacDonald

Edited Transcript of Oral Reasons for Judgment

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: September 16, 2022 and September 28-29, 2022

Date of Oral Judgment: October 5, 2022

Appearances:

Darren D. O'Keefe	Appearing on behalf of the Companies
Neil L. Jacobs, K.C. and Joseph J. Thorne	Appearing on behalf of Royal Bank of Canada
Maeve A. Baird	Appearing on behalf of the Minister of National Revenue

David L. Hearn	Appearing on behalf of the Government of Newfoundland and Labrador
Andrew Punzo and Mark A. Borgo	Appearing on behalf of Western Surety Company
Tim Hill, K.C. and Joshua J. Santimaw	Appearing on behalf of Daimler Truck Financial Services Canada Corporation
Andrew A. Fitzgerald, K.C.	Appearing on behalf of S.R. Stack & Company Ltd.
Phil Clarke	Appearing on behalf of Grant Thornton Limited, the Proposed Monitor
Steven McLaughlin	Appearing on behalf of Ernst & Young Inc.

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Authorities Cited:

CASES CONSIDERED: *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10; *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60; *Norcon Marine Services Ltd., (Re)*, 2019 NLSC 238; *Hester Creek Estate Winery Ltd., Re*, 2004 BCSC 345; *United Used Auto & Truck Parts Ltd., Re*, (1999), 12 C.B.R. (4th) 144, 93 A.C.W.S. (3d) 411 (B.C.S.C.); *Montréal (Ville) c. Restructuration Deloitte Inc.*, 2021 SCC 53; *Industrial Properties Regina Limited v. Copper Sands Land Corp.,* 2018 SKCA 36

STATUTES CONSIDERED: *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36; *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

REASONS FOR JUDGMENT

MACDONALD J.:

INTRODUCTION

[1] On July 8, 2022, the Royal Bank of Canada ("RBC") applied to appoint Ernst and Young Inc. as a court-appointed receiver over all or substantially all of the assets

of Edward Collins Contracting Limited, Classic Security Ltd., FGC Holdings Ltd., 51037 Newfoundland and Labrador Inc. and H & E Designs Ltd ("Companies"). The Companies oppose the application.

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[2] On July 18, 2022, the Companies applied for creditor protection and other relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*"). They asked me to grant an initial order called for under section 11.02(1)(a) of the *CCAA* ("Initial Order"). If I deny the Initial Order, they ask that I dismiss the receivership application.

[3] On July 19 and 20, 2022, the Court heard the parties on both applications. The Court informed the parties that it could not hear these matters until September 16, 2022.

[4] On July 20, 2022, the Court granted a consent order ("Consent Order"). The Court ordered that any person having a contractual arrangement or a statutory mandate for the supply of goods or services, were restrained until further order from the Court from discontinuing, altering or terminating the supply of such goods or services ("Consent Stay") until September 16, 2022 ("Consent Stay Period").

[5] I heard both applications on September 16, 28 and 29, 2022. On September 16, 2022, I continued the Consent Order until now.

[6] The parties agree that I will deal with the *CCAA* application first. If I dismiss the *CCAA* application, I will then deal with the receivership application. I now turn to the *CCAA* application.

CCAA APPLICATION

[7] RBC, the principal secured creditor of the Companies, and Daimler Truck Financial Services Canada Corporation, a secured lender of certain equipment, oppose the *CCAA* application.

[8] The Western Surety Company ("Surety"), Edward Collins Contracting Limited's ("Collins Contracting") construction surety provider, the Canada Revenue Agency ("CRA"), and the other parties at the hearing neither supported nor opposed the *CCAA* application.

[9] I hereby grant the Companies the Initial Order which I attach as Schedule A. I will now explain why I made this decision.

[10] I have considered:

(a) Do the Companies have standing under the *CCAA*?

(b) Have the Companies satisfied the test to allow me to grant an Initial Order?

(c) If so, should the Companies' conduct during the Consent Stay cause me to refuse the Initial Order? and

(d) Did the Companies act in bad faith?

[11] I will then deal with:

(a) Should the Court exercise its discretion to grant the administration charge? and

(b) What conditions should I impose in the Initial Order?

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[12] I will first deal with whether the Companies have standing under the *CCAA*.

Do the Companies have standing under the *CCAA*?

[13] I find the Companies have standing under the *CCAA*. The *CCAA* applies to a debtor company or affiliated debtor Companies, if they are insolvent or have committed an act of bankruptcy and owe more than $5 million.

[14] The Companies owe RBC in excess of $5 million and CRA about $4.9 million. I am satisfied that the Companies are insolvent.

[15] Thus, I find that the Companies qualify as debtor companies under the *CCAA*. I now turn to whether the Companies met the test to allow me to issue an Initial Order.

Have the Companies satisfied the test to allow me to issue an Initial Order

[16] I find that the Companies have satisfied the test. I will now explain why I made that decision.

[17] Under section 11.02(1)(a) of the *CCAA*, I may pursuant to an initial order stay all proceedings against the Companies for not more than 10 days.

[18] The Supreme Court of Canada in *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 ("*Callidus*"), gives me guidance on the purpose and objectives of the *CCAA* in paragraphs 39 to 42. I will now summarize that guidance.

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[19] The *CCAA* is one of three principal insolvency statutes in Canada. Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have.

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[20] These objectives include:

(a) providing for timely, efficient and impartial resolution of a debtor's insolvency;

(b) preserving and maximizing the value of a debtor's assets;

(c) ensuring fair and equitable treatment of the claims against a debtor;

(d) protecting the public interest; and

(e) balancing the costs and benefits of restructuring or liquidating the company.

[21] Among these objectives, the *CCAA* generally prioritizes avoiding the social and economic losses resulting from liquidation of an insolvent company.

[22] The typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state – that is, as a going concern.

[23] However, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally". (*Callidus* at para. 42).

[24] *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the *CCAA* itself. Such scenarios are referred to as “liquidating *CCAA*s”, and they are now commonplace in *CCAA* applications.

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[25] Liquidating *CCAA*s take diverse forms and may involve:

(a) the sale of the debtor company as a going concern;

(b) an "en bloc" sale of assets that are capable of being operationalized by a buyer;

(c) a partial liquidation or downsizing of business operations; or

(d) a piecemeal sale of assets (*Callidus* at para. 43).

[26] In this case, the Companies seek the reorganization and survival of the Companies as a going concern. That is not to say the Companies’ plans may change when it formulates its final restructuring plan.

[27] Under Section 11.02(1) of the *CCAA*, I may, in an initial order, make any orders I see fit. I may:

(a) Stay proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA”*); and

(b) restrain proceedings in any existing action against the Companies and prohibit any new action against them.

[28] I cannot make the Initial Order effective for more than 10 days.

[29] Under subsection 11.02(2) of the *CCAA,* I can amend the Initial Order and extend the stay at a so-called comeback hearing. I must hold the hearing before the expiry of the stay in the Initial Order. I may amend these Orders. I will call these amendments the Amended Orders.

[30] Under section 11.02(3) of the *CCAA*, I cannot grant an Amended Order unless the Companies satisfy me that:

(a) circumstances exist that make the extension appropriate; and

(b) they are acting in good faith and with due diligence.

[31] Section 11.02(3)(b) of the *CCAA* says, "in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence". Subsection 2 deals with orders after the initial order.

[32] Despite the wording of section 11.02(3)(b) indicating "good faith and due diligence" applies only to orders under subsection (2), that being orders "other than initial applications", the Supreme Court of Canada in *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 69, determined good faith and due diligence applies to initial orders as well.

[33] It said at paragraph 70 that "the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority".

[34] Under section 11.7(1) of the *CCAA*, when I make an Initial Order, I must appoint a person to monitor the business and financial affairs of the Companies. The monitor must be a trustee, defined in section 2 of the *BIA*. The Companies ask that I appoint Grant Thornton Limited, represented by Phil Clarke, Senior Vice-President and Bankruptcy Trustee ("Proposed Monitor").

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[35] During the currency of the Initial Order and comeback Amended Orders, the Companies attempt to complete a plan of compromise and arrangement with its creditors. The Proposed Monitor assists them. The Proposed Monitor, as an officer of the Court, periodically reports to the Court on the progress of the plan.

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[36] I will now turn to the circumstances the Companies must show me to allow me to grant the Initial Order.

Legal Test – Contents of Plan

[37] Justice Orsborn in *Norcon Marine Services Ltd., (Re)*, 2019 NLSC 238, said at paragraph 15, that I should consider whether the Companies have some chance, by engaging the *CCAA* process, of furthering the purposes of the legislation.

[38] Justice Orsborn observed the Companies must overcome a low bar to trigger the *CCAA* process. However, the Companies must do more than simply ask for time.

[39] The Companies must put forth "a germ of a plan" that suggests "a reasonable possibility of restructuring" (*Norcon* at para. 16). However, they need not present a fully developed plan at the initial hearing, nor are they required to have the support of all of their creditors.

[40] To put this test in context, I will now describe the financial difficulties the Companies find themselves in and how these difficulties arose.

Companies' Financial Woes

[41] Collins Contracting is a general contractor specializing in roadworks. As described in the affidavit of David Savoie, Business Specialist with RBC, in the 2019

fiscal year, its revenue was $12.1 million and its net income was $393,000. In the 2020 FY, its revenue was $11.4 million and its profit was $310,000.[1] Significantly, Collins Contracting's obligation to CRA increased from about $60,000 to about $451,000.[2]

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[42] He says that in the 2021 FY, the Companies' revenue decreased to $8.5 million. Its 2020 FY profit became a $3.4 million loss in 2021. This loss was incurred despite Collins Contracting's $1.2 million emergency wage subsidy from Canada.[3]

[43] He further says the information in the 2021 financial statements caused Collins Contracting to be in default of the RBC loan facility because it no longer had minimum debt service coverage ratio of 1.25X called for in the loan facility.[4]

[44] Because of the Companies' financial difficulties and default, on December 31, 2021, RBC, Collins Contracting, H & E Designs Ltd., Frank Collins and Josh Collins executed the forbearance agreement.

[45] In the agreement, Collins Contracting acknowledges it is in default of its obligations to RBC. It agreed to provide interim financial statements and CRA balance reporting.

[46] It also agreed, at paragraph 1(e), to "confirm the rights and remedies available to the Bank under the Security are fully and immediately enforceable by [RBC] and hereby waive all notice periods of application thereto, including notice period of application under Section 244 of the [*BIA*]".

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[1] Affidavit of David Savoie, filed August 5, 2022, [Savoie Affidavit], at para. 15.
[2] *Ibid.* at para. 16.
[3] *Ibid.* at para. 34.
[4] *Ibid.*

[47] In the second recital of the agreement, RBC agreed not to call it loans until February 28, 2022.

[48] Collins Contracting provided RBC monthly interim year-to-date financial statements from October, 2021 to March, 2022. All showed a continued deterioration of Collins Contracting's financial position.[5]

[49] The March 2022 interim statement, provided to RBC on June 9, 2022, shows revenue of $5.3 million, compared to forecasted revenue of $15.2 million, and a net loss of $2.1 million compared to forecasted net income of $3 million. The amount owing to CRA was then about $3.2 million.[6]

[50] Thus, over the 2021 FY and up to March 2022 FY, the Companies incurred a cumulative loss of about $5.5 million. Its CRA obligation increased from $451,000 in 2020 to $3.2 million.

[51] RBC demanded its loans on July 17, 2022. RBC was owed, as of June 15, 2022, more than $5 million, together with interest, expenses and fees.[7]

[52] CRA filed an affidavit on September 12, 2022, of Mark Lohnes, Resource Officer/Complex Case Officer with CRA. He said that the Companies owe CRA about $4.9 million. He said that over $3.3 million is for deemed trust unremitted employee payroll source deductions and HST.[8] This, excluding interest and penalties, is the so-called deemed trust debt.

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[5] *Ibid.* at paras. 39-51.
[6] *Ibid.* at para. 51.
[7] Receivership Originating Application, filed July 8, 2022 at para 11.
[8] Affidavit of Mark Lohnes, filed September 12, 2022, [Lohnes Affidavit] at para. 38.

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[53] CRA says Collins Contracting owes almost $4 million of this amount. It says about $2 million (excluding penalties and interest) is for deemed trust for unremitted employee payroll source deductions ("Payroll deemed trust debt") and about $756,000 for HST deemed trust debt.[9]

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[54] In paragraph 38, CRA says the remainder of the Companies owe CRA about $939,000. About $348,000 (excluding penalties and interest) is for Payroll deemed trust debt and about $205,500 is for HST deemed trust debt.[10]

[55] CRA says that Collins Contracting last remitted amounts in March 2022, and it was the last of the Companies to do so. The Proposed Monitor said, and I accept, that he made remittances over the summer of Collins Contracting's monies owed to CRA for that period, but he did not remit any of the arrears.

[56] CRA is in the process of reviewing the Companies' accounts, and it will determine the final arrears after that review. The timing of this review is currently within the control of CRA, and its counsel could not provide me any guidance on when this review might begin or end.

[57] The Companies provided little explanation for their financial difficulties in its application or in Francis Collins' July 18, 2022 affidavit. They did not explain how it incurred the CRA debt.

[58] On July 18, 2022, Francis Collins, director of the Companies, filed an affidavit supporting the initial application. He provided me with the Companies' 2021 FY financial statements, but provided no cash flow statements or any other historical financial data.

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[9] *Ibid.* at para. 19.
[10] *Ibid.* at para. 38.

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[59] Francis Collins, addressed the CRA balances by saying, "As appears from the Company's books and records, there is currently a significant amount outstanding to the Canada Revenue Agency ("CRA"). The Company is actively working with CRA to determine the full outstanding balances and to work on a payment plan to relieve this liability. The Company is hopeful that the CCAA proceedings will bring CRA to the table to discuss options, as to date CRA has not been forthcoming with information or responsive to requests from the Company to discuss the Company's CRA's position of potential discrepancies in CRA's accounting."[11]

[60] This statement shows, at best, a disturbing lack of awareness of how the Companies incurred almost $5 million in CRA obligations, including almost $3.3 million in deemed trust amounts for both income tax and HST.

[61] On September 23, 2022, Josh Collins filed an affidavit to provide me with further information. He answers the question, "How did [Edward Collins Contracting Limited] get itself into financial trouble and accumulate such a high amount of CRA Debt?"[12] He says two primary events caused both.

[62] The first event is the purchase of a defective asphalt plant. Collins Contracting underestimated the risk of purchasing a defective plant and the cost and time necessary to rectify the plant deficiencies and to bring its software up-to-date.[13]

[63] The second event is the collapse of Collins Contracting's revenue during COVID-19.[14]

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[11] Affidavit of Francis Collins, filed July 18, 2022 at para. 12.
[12] Affidavit of Josh Collins, filed September 23, 2022 [Collins' Second Affidavit], at heading A.
[13] *Ibid.* at paras. 3-12.
[14] *Ibid.* at paras. 14-25.

[64] He says that both events contributed to a loss of almost $3 million in 2021.[15] RBC said the loss was $3.4 million and I can only assume this was because Mr. Savoie relied on interim rather than final statements.

[65] Josh Collins admits that Collins Contracting maintained its liquidity despite these losses by not paying their CRA obligations,[16] and in May 2020 by borrowing $1 million from RBC by way of a $1 million loan under the so-called "Highly Affected Sectors Credit Availability Program" ("HASCAP"). The Government of Canada guaranteed this HASCAP loan. This program is designed to support companies that suffered financially during the COVID-19 epidemic.

[66] The Proposed Monitor confirms in his first pre-filing report that the unpaid CRA funds "were used to offset the acquisition and operating losses incurred" for capital acquisitions, losses for underutilized equipment and other operational losses.[17] In paragraph 21(b), the Proposed Monitor also identifies that Collins contracting lost more than $1 million dollars on an unfavourable bridge construction contract.

[67] Thus, I find the triggering causes of the Companies' financial crisis are an improvident capital purchase, an unfavourable construction contract, and the general collapse of the Companies' revenue and its resulting operating losses. This in turn caused the Companies not to pay the deemed trust debt to CRA to fund these losses.

[68] This, together with the collapse in the Companies' retained earnings[18] and profits and the increase in CRA's deemed trust debt, caused RBC to take action to protect its security from further erosion.

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[15] *Ibid.* at para. 17.
[16] *Ibid.* at para. 18.
[17] Pre-filing Report of Grant Thornton Limited, September 15, 2022 [Proposed Monitor's First Pre-filing Report], at para. 21(c).
[18] *Supra* note 12 at para. 20 (from about $2.9 million to almost nothing in 2021).

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[69] Having discussed the cause of the Companies' financial problems, I now turn to whether the Companies put forth "a germ of a plan" that suggests "a reasonable possibility of restructuring". (*Norcon* at para. 16)

Companies' "Germ of a Plan"

[70] I find that they have. I now will explain why I made that decision.

[71] The Companies' plan is contained in the Proposed Monitor's first and second pre-filing reports and in affidavits from Josh Collins.

[72] The plan is based on two pillars. The first pillar is the prospect of Travelers Capital refinancing the Companies' debt obligations. The Companies provided me with an executed "summary of terms and conditions" dated September 22, 2022. Joshua Collins is named as a guarantor. I will call this the Term Sheet.

[73] The Term Sheet indicates that Travelers will lend the Companies 90% of the appraised forced liquidation value of the Companies' equipment value and 50% of the appraised value of certain real property. Travelers estimates this value is $6,796,490.

[74] The Companies provided me with the forced liquidation value appraisal on September 23, 2022. The Proposed Monitor tells me the valuation supports the valuation of the equipment in the Term Sheet.

[75] Travelers also requires that the Companies provide it with:

(a) completed environmental reports on specified property;

(b) real estate appraisals;

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(c) forward-looking income and cash flow statements; and

(d) Year-to-date statements and historical three-year prior financial statements.

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[76] On September 22, 2022, the Companies filed copies of:

(a) an appraisal of a residence on Lakeview Dr. in Deer Lake;

(b) A real estate agent's assessment of a property at 30 Reid's Lane in Deer Lake;

(c) an appraisal of Collins Contracting's office building in Placentia;

(d) an appraisal of a real estate development;

(e) a purchase and sale agreement for property on Charter Avenue in Placentia; and

(f) an offer to purchase property at 28-30 Reid's Lane in Deer Lake.

[77] The total value of real estate described in these filings is about $2.75 million.

[78] The Term Sheet also provides that Travelers must be satisfied that the Companies have paid all CRA priority payments. As the CRA priority payments are not current, I presume they mean that the CRA priority debt must be retired from the proceeds of the loan.

[79] The Term Sheet lists all the Companies as borrowers. Thus, this condition would include deemed trust amounts due to CRA, or at least that portion that could rank ahead of Travelers' security if they remain unpaid on closing.

[80] However, the Proposed Monitor testified at the hearing that Travelers has agreed that the HST deemed trust debt need not be paid on closing. He also said he "understands" that CRA is open to compromising the HST deemed trust debt.

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[81] Thus, it seems that Travelers will expect that the HST liability will be resolved by agreement with CRA or pursuant to a *CCAA* order before it advances funds under the Term Sheet.

[82] Travelers says in the Term Sheet that the total outstanding amounts to secured creditors and the CRA total is $7,058,337. It says this must be paid on closing.

[83] Josh Collins in his affidavit filed September 13, 2022, said there is a shortfall of about $250,000 between the amount of the Travelers' loan and the debt the Companies must repay on closing. I will call this the Loan Gap. He said the Companies can finance the Loan Gap through a variety of sources being from:

(a) $253,000 owed to the Companies by Olympic Construction Ltd. He did not provide me with any evidence of this amount or an acknowledgement from Olympic that this amount is due;

(b) a potential sale of real property in Deer Lake based on an expression of interest with an asking price of $500,000. He said, "If this offer materializes, we will net approximately $250,000".[19] On September 22, 2022, he provided me with an offer of purchase and sale for a piece of property in Deer Lake for less than that amount; and

(c) sale of equipment by the Companies for about $250,000 once they "further review our operational needs".[20] This is highly contingent. It is subject to a review of operational needs. I have no evidence of the value of this equipment. I do not know if Travelers intends to take security over this equipment.

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[19] Affidavit of Josh Collins, filed September 13, 2022 [Collins' First Affidavit], at para. 67(b).
[20] *Ibid.* at para. 67(c).

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[84] Even if the Companies can access this money, I do not accept that the Loan Gap is only $250,000.

[85] The Proposed Monitor provided an analysis of the amount Collins Contracting owes to CRA. He largely agrees with CRA's position but states that interest and penalties are not deemed trust amounts.

[86] He concludes that Collins Contracting and 51037 Newfoundland and Labrador Inc., after excluding interest and penalties, owes about $2.2 million in Payroll deemed trust debt. He acknowledges that CRA claims Collins Contracting owes it about $756,000 in HST deemed trust debt. However, he did not do an analysis in which he breaks out interest and penalties.

[87] He did not do a similar analysis for the remaining Companies. I only have CRA's evidence. It said that Classic Security Ltd. owes about $348,000 in payroll deemed trust amounts and about $151,000 in HST deemed trust debt, while H & E Designs Ltd. and FGC Holdings Ltd. owe about $28,000.[21] I do not know what portion of these is interest and penalties.

[88] In his second report filed on September 26, 2022, the Proposed Monitor disagrees with Josh Collins' Loan Gap. He said it is $473,362.[22]

[89] He said that the Companies now intend to close the Loan Gap by selling instead of financing one of the Reid Lane properties, thereby achieving a contribution of 100% of the sale price rather than 50% of its appraised value. This would net $199,000.[23]

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[21] Affidavit of Mark Lohnes, filed September 12, 2022 at paras. 27, 34 and 37.
[22] Pre-filing Report of Grant Thornton Limited, filed September 26, 2022 [Proposed Monitor's Second Pre-Filing Report] at 5.
[23] *Ibid.* at para. 17(a).

[90] Both he and Josh Collins say Collins Contracting is a beneficiary under a $500,000 insurance policy now, as the insureds died.[24] The Collinses say they discovered the existence of this policy at the end of August 2022.

[91] The Proposed Monitor said that only half of this amount, or $250,000, is available to offset the Loan Gap. The other half will be used to bolster Collins Contracting's cash flow.[25] I will discuss Collins Contracting's cash flow statements later in this decision.

[92] The Proposed Monitor described how Collins Contracting intends to sell equipment to realize more cash than Travelers 90% forced liquidation financing would generate.[26]

[93] However, the Loan Gap is likely larger unless RBC continues to hold some of its debts, notably the HASCAP.

[94] Furthermore, the Proposed Monitor says the Companies' estimated value of real estate is about $3.3 million.[27]

[95] However, the Companies' submitted appraisals, drive-by estimates and agreements of purchase and sale totaling about $2.7 million. Furthermore, the Proposed Monitor says the real estate value is $65,000 less than Travelers' estimate.[28] Although the difference is not material to my decision, I ask the Proposed Monitor to explain the discrepancy at or before the comeback hearing.

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[24] *Ibid.* at para. 17(b).
[25] *Ibid.* at paras. 17(c) and 17(d).
[26] *Ibid.* at para. 18.
[27] *Ibid.* at para. 14(a).
[28] *Ibid.* at para.16(a).

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[96] Travelers provides in the Term Sheet that the Companies are to repay the loan principal in 24 monthly blended installments of principal and interest, with interest at the rate of 12.75%. The loan amounts are amortized up to 120 months for real estate, and 60 for equipment. The loan balance is payable at the end of the 24 months.[29]

[97] This would seem to require the Companies to repay large sums of monies over two years. Presumably, the Companies will need to satisfy Travelers that they can meet this obligation when it submits is forward-looking pro-forma income statement.

[98] Finally, the Term Sheet is subject to a condition that said, “Final approval of the subject Loan transaction and the Loan Agreement, in form and in substance, by [Travelers’] credit committee.”[30] Thus, Travelers is not yet bound to the Term Sheet.

[99] I will now turn to the second pillar of the Companies’ restructuring plan - positive cash flow from existing contracts.

The Cash Flow Statements

[100] The *CCAA* requires the Companies to provide weekly projected cash flow statements. The Companies should make disclosure of all material facts known to them (see *Hester Creek Estate Winery Ltd., Re*, 2004 BCSC 345 at para. 5). The standard of disclosure expected of the Companies in these cash flow statements must be realistic (see *United Used Auto & Truck Parts Ltd., Re*, (1999), 12 C.B.R. (4th) 144, 93 A.C.W.S. (3d) 411 at para. 14 (B.C.S.C.).

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[29] *Supra* note 19, Tab L, Travelers Term Sheet [Travelers Term Sheet].
[30] Travelers Loan Sheet, Conditions Precedent to Closing, clause 1.

[101] I find that these cash flow statements are adequate to support an Initial Order. In the absence of other evidence, the disclosure is realistic and there is no evidence that the Companies have not disclosed all material facts known to them.

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[102] If this is not so, the Companies risk an application to set aside the Initial Order. In such an application, the test is whether the undisclosed facts may well have affected the outcome had they been known at the time of the application.

[103] In his first pre-filing report, the Proposed Monitor submitted cash flow statements for a 19-week period from September 17, 2022 to January 27, 2023. He said he prepared cash flow statements for 19 weeks because this gives the Companies time to complete the Travelers refinancing.

[104] In the cash flow statements, found at Tab M of his first pre-filing report, the Proposed Monitor said:

(a) the project cash receipts, mostly from 18 existing construction contracts, is $2.84 million. Its costs associated with this revenue is about $1.19 million;

(b) the Companies' cash flow before operating expenses will be about $1.65 million. Operating expenses will be about $770,000. Thus, the Companies will have a net cumulative cash position of $883,000; and

(c) the cash flow statement includes a speculative "Potential New Projects" column. The Proposed Monitor said these might contribute net cash of $1.2 million. But he does not include this amount as part of his calculated cumulative cash position.

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[105] I have limited information on the status of Collins Contracting's contracts. The Proposed Monitor makes a general statement that the Collins Contracting's trade accounts receivables are about $1.39 million. He said that Collins Contracting' counterparties owe them holdbacks, liquidated damages and force accounts (presumably, he means change orders under existing contracts) of about $1 million.[31]

[106] I do not know if Collins Contracting's counterparties contest these amounts. There is no evidence that the Proposed Monitor did a risk assessment on the potential recovery of these amounts. However, I will not require this information for the purposes of the Initial Order.

[107] The Proposed Monitor said that another counterparty terminated a contract that he did include in his original cash flow. He then submitted revised cash flow statements to address the $225,000 deficiency arising out of the termination. This project is for the Placentia Wellness Centre.[32]

[108] He said Collins Contracting will replace this revenue by allocating $250,000 from the life insurance proceeds.[33]

[109] In his second report, the Proposed Monitor said, "The operational assumptions required to be met to successfully achieve the refinancing include (a) [the Companies] achieve or exceed their cash flow forecast".[34]

[110] Josh Collins responded to my request I made on the first day of the hearing. He said, "Of the four projects where we currently have claims, we are in discussions on two of these projects [the same ones referred to by the Government of Newfoundland and Labrador that I refer to later in this decision] regarding [Collins

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[31] *Supra* note 17 at para. 22(a).
[32] *Supra* note 22 at para. 20(a).
[33] *Ibid.* at para. 20(b).
[34] *Ibid.* at paras. 19 and 19(a).

Contracting] potentially returning to the projects to complete the work. As of the date of this affidavit we have been asked to present a plan to Western Surety on how we intend to complete the work, for their approval. That work is ongoing."[35]

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[111] I get some comfort from the Proposed Monitor's comments in paragraph 38 of his first pre-filing report. He says that he "has also reviewed the support provided by the Company for the Probable and Hypothetical Assumptions and the preparation and presentation of the Cash Flow Projection".[36]

[112] He goes on and says, "Based on [my] review, nothing has come to [my] attention that causes [me] to believe that, in all material respects:

(a) the Probable and Hypothetical Assumptions are not inconsistent with the purpose of the Cash Flow Projection; and

(b) … the Probable and Hypothetical Assumption, developed by management are not suitably supported and consistent with the Company's plans or do not provide a reasonable basis for the Cash Flow Projection, given the Probable and Hypothetical Assumptions".[37]

[113] However, this comfort goes only so far as he says, "The Cash Flow Forecast has been prepared by management using probable and hypothetical assumptions set out"[38] in the Cash Flow Projections. Thus, Collins Contracting prepared the Cash Flow Projections and the Probable and Hypothetical Assumptions.

[114] The Proposed Monitor did not include two contracts (Numbers 46–21PHP and 12–21PHC) with the Minister of the Department of Transportation and Infrastructure

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[35] *Supra* note 12 at p. 35.
[36] *Supra* note 17 at para. 38.
[37] *Ibid.* at para. 38.
[38] *Ibid.* at para. 37.

("Province") in his cash flow projections. On September 23, 2022, the Province took a motion with respect to these contracts.

[115] It said that on April 8, 2022, the Province declared them in default. The Province called on the Surety's performance bond. The Province has not terminated the two contracts. It said that the Surety accepted responsibility under the bonds.

[116] As the Proposed Monitor did not include these contracts in his cash flow statements, they are not relevant to this application, except to the extent they may give rise to concerns about the other contracts' status.

[117] Under section 21 of the *CCAA,* the owner of the projects can claim set-off. If the Surety responds to these defaults, it may step into the shoes of the owner and then claim set-off.

[118] However, the Supreme Court of Canada in *Montréal (Ville) c. Restructuration Deloitte Inc.*, 2021 SCC 53, at para. 63 said, "Although s. 21 of the *CCAA* indicates that there is a right to effect compensation in proceedings under that statute, we are of the opinion that it applies only to compensation [set-off] between debts that arise *before an initial order is made* (in other words, 'pre-pre compensation')". [Emphasis in original.]

[119] It also said at paragraph 63, "s. 21 of the *CCAA* does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the *CCAA*."

[120] At paragraph 62 it said "it is our view that in the vast majority of cases an initial order will, and should, stay a creditor's right to set up pre-post compensation against the debtor. Finally, where an initial order has stayed the right of creditors to pre-post compensation, the court retains the discretion to lift the stay having regard to the circumstances."

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[121] It explained the policy reason for this decision by saying at paragraph 75, "allowing pre-post compensation would undermine the effectiveness of the status quo period, would jeopardize the survival of the debtor company or the business it operates and could derail the restructuring process".

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[122] If Collins Contracting's counterparts had declared any of the contracts in default, this could undermine the prospect of Collins Contracting's cash flow from these contracts to the extent they seek so-called "pre-pre compensation".

[123] I do not know whether the Surety will continue to provide construction bonding in light of these two defaults. Lack of bonding might compromise Collins Contracting's prospects for new work.

[124] Counsel for the Surety told me that owners have declared other Collins Contracting's contracts in default, but he had no instructions on this point. He said it was unlikely the Surety will continue to offer bonding to Collins Contracting.

[125] Counsel for the Companies advised that I should not accept this evidence as it was hearsay statements from counsel for the Surety. I agree. Surety's counsel said he had no instructions on these points. The Surety did not submit any evidence.

[126] In his September 23, 2022 affidavit, Josh Collins provided me with information about Collins Contracting's bonding facility with Western Surety. Such a bonding facility is essential if Collins Contracting is to bid on any significant provincial contracts. The Surety's counsel told the Court that while a Surety facility is in place, the Surety reserves the right to issue bonds in its sole discretion.

[127] The Surety's support is a critical part of Collins Contracting continuing to work its way out of its financial problems. Josh Collins said in paragraph 26 of his affidavit that in the last 30 days, it has bid $1 million in new construction work. He did not tell me that these contracts required construction bonds.

[128] Again this is not determinative of whether I will grant the Initial Order, but it represents a significant contingency that Collins Contracting must resolve if it successfully restructures as a going-concern entity.

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[129] Thus, the Companies' plan depends on a number of contingencies. The critical ones are:

(a) satisfaction of the Term Sheet conditions precedent, including real estate appraisals supporting Travelers' loan valuation of $6,796,490;

(b) successful efforts to close the Loan Gap;

(c) the consent of RBC to remain as the HASCAP lender subordinate to Travelers and if not, assignment of this debt to another;

(d) resolution of the CRA deemed HST debt and interest and penalties in all of the debt; and

(e) the accuracy of the 17-week cash flow statements provided by the Proposed Monitor.

[130] The Companies' restructuring contingency list is daunting. However, any insolvent debtor who seeks protection under the *CCAA* likely has a similar list.

[131] The Companies seek an Initial Order. That order will expire in 10 days. The Companies have provided more than a "germ of a plan". They presented a plan that, if successful, could present a reasonable possibility of restructuring.

[132] Therefore, the Companies have established that circumstances exist which would allow me to grant the Initial Order. I now turn to whether the Companies' conduct during the Consent Stay cause me to refuse the Initial Order?

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Should the Companies' conduct during the Consent Stay cause me to refuse the Initial Order?

[133] I find that the Companies' conduct during the Consent Stay does not cause me to refuse the Initial Order. I will now explain why I made that decision.

[134] RBC says the Companies' conduct during the Consent Stay is relevant for three reasons:

(a) The first reason is the Companies' late filings show they did not act with due diligence;

(b) The second reason is the Companies' inaction to address its financial problems show they did not act with due diligence; and

(c) The third reason is that the Companies should meet a more onerous standard of whether they have "a germ of a plan" because they had advantage of the Consent Stay Period.

[135] I will first deal with the Companies' late filings.

Did the Companies' late filings show they did not act with due diligence?

[136] I find that the Companies have acted with due diligence to the extent they need to in their application for the Initial Order. I will now explain why I made this decision.

[137] The Saskatchewan Court of Appeal in *Industrial Properties Regina Limited v. Copper Sands Land Corp.,* 2018 SKCA 36 at para. 23 said, "Although it is a consideration for granting an initial order, courts generally defer the in-depth analysis of good faith and due diligence to subsequent applications." It continued

and said, "If, however, the court determines the debtor corporation is not seeking *CCAA* protection in good faith or there is c*onvincing* evidence of a lack of due diligence, the court may deny an initial order ...". [Emphasis added.]

[138] Applicants often operate under severe financial pressure when they apply for an Initial Order. They have limited time to prepare their application and information by necessity is usually preliminary. As *CCAA* applications are usually urgent, the court may receive information shortly before the hearing. The timelines are necessarily compressed.

[139] This issue might not have arisen if the Companies had taken its application in September instead of July and made filing shortly before the hearing dates. However, the Court could not schedule the hearing until September 16, 2022, two months after the initial filing.

[140] The parties agreed on the Consent Order. The order included the Consent Stay. Both RBC and the Companies agreed to this in their interest. The Consent Stay likely benefits both the Companies and RBC as it preserves the status quo for both for more than two months. Critically, this is not a stay under the *CCAA*, or under the *BIA*.

[141] In a perfect world, the Companies would have taken advantage of the Consent Stay to improve their plan. However, this likely proved to be impossible because on August 5, 2022, the Companies replaced the Proposed Monitor with Grant Thornton.

[142] This replacement was within their rights. The Proposed Monitor is a critical part of the *CCAA* process. An applicant must have confidence in their monitor. It is not unreasonable for a new monitor to need some time to file a preliminary pre-filing report.

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[143] There is no doubt the Companies filed information at the last minute. The Companies did not file their cash flow statements until the Proposed Monitor did so in his first pre-filing report, one day before the hearing. He filed a revision in his second pre-filing report, after the hearing started. Section 10(2) of the *CCAA* requires that these must accompany the application.

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[144] The receivership and *CCAA* applications were heard together. RBC's evidence was all filed in the receivership application. A summary of the key filings is set out in this table:

Documents	**Filing Date**
RBC Receivership Application (*BIA*) and supporting Affidavit	July 8, 2022
Companies' initial Application filed and supporting Affidavit	July 18, 2022
Consent Order	July 20, 2022
Companies' termination of S.R. Stack & Company Ltd. as Proposed Monitor	August 5, 2022
Affidavit of David Savoie, RBC (*BIA* proceeding)	August 5, 2022
Companies' Application to replace Proposed Monitor in the Consent Order	August 18, 2022
Affidavit of David Savoie, RBC (*BIA* proceeding)	August 24, 2022
CRA Affidavit	September 12, 2022
Affidavit of Josh Collins	September 13, 2022
Affidavit of Josh Collins	September 15, 2022
Affidavit of David Savoie, RBC (*BIA* proceeding)	September 15, 2022
Proposed Monitor's first pre-filing report	September 15, 2022
Affidavit of Josh Collins	September 23, 2022
Crown's Application	September 23, 2022
Proposed Monitor's second pre-filing report	September 26, 2022

[145] The parties all took advantage of the extra time afforded to them because of the Consent Stay Period, some more than others.

[146] CRA, a principal creditor of the Companies, filed its documents late in the process. The Province also filed its documents *after* the hearing began.

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[147] The Companies filed some information I asked for after the start of the hearing. I asked for further details on the construction contracts and Collins Contracting's construction bonding. Both RBC and I asked for the equipment appraisal. RBC asked for a signed copy of the Term Sheet.

[148] Furthermore, I asked the Proposed Monitor at the end of the first day of the hearing to report to me if he became aware that there was any material change in the circumstances of the Companies' financial situation.

[149] In his second pre-filling report, he altered the cash flow statements because of a termination of a contract. He reported on the proposed use of a newly discovered $500,000 insurance policy payout benefiting Collins Contracting. He was right to do so.

[150] Furthermore, this matter was urgent. No one asked for a postponement. No one said how they might be prejudiced by the delay. Had anyone asked me for one, I would have been reluctant to grant it. Both RBC and the Companies, without a hearing on the merits, obtained the Consent Stay that affected other creditors' rights.

[151] By its nature, *CCAAs* are conducted in, as the Supreme Court of Canada in *Ted Leroy Trucking* at para. 58 states, "the hothouse of real-time litigation". Late filings in these circumstances, although are not condoned, are sometimes inevitable.

[152] The Companies, in particular though, should not assume that I am satisfied with the timing of some of their last-minute filings. The Proposed Monitor and the Companies should not expect similar latitude throughout this process.

[153] I will now deal whether the Companies' inaction to address their financial problems show they did not act with due diligence.

Did the Companies' inaction to address their financial problems show they did not act with due diligence?

[154] I find it does not. I will now explain why I made this decision.

[155] RBC suggested that I should consider not only the Companies' inaction during the Consent Stay, but before.

[156] This position is inconsistent with the Supreme Court of Canada's guidance in *Callidus.* It suggests at paragraph 51, that the parties must act with due diligence in the *CCAA proceeding*, when it said, "A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine … the effective functioning of the *CCAA* regime …."

[157] RBC says it asked the Companies to restructure as early as July 2021. RBC says the Companies hired two other consultants to help them with the restructure. They fired them both and hired Grant Thornton about a month and a half ago. RBC says they wasted months before they hired the Proposed Monitor.

[158] The *CCAA* focuses on the go-forward restructuring, not on the past. Someone might speculate that had the Companies taken a series of different actions, they might have avoided their financial difficulty. Perhaps they might have restructured earlier.

[159] I find that speculation about the Companies' actions which led up to its financial difficulties is irrelevant. I will not consider the Companies' failure to take action to restructure before they came to the Court seeking the Initial Order.

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[160] If I were to do so, this would have the effect of denying creditor protection to debtors who are the author of their own misfortune. The *CCAA,* at least for the Initial Order, offers a no-fault remedy, provided that the applicants act in good faith and act with due diligence in the *CCAA* application.

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[161] I will now deal with whether the Companies should meet a more onerous standard of whether they have “a germ of a plan” because they had advantage of the Consent Stay.

Should the Companies meet a more onerous standard of whether they have “a germ of a plan” because they had advantage of the Consent Stay?

[162] I find they should not. I will now explain why I made that decision. However, even if they should have done so, I find that they have.

[163] Justice Orsborn in *Norcon* said at paragraph 17, “The present case is a little different than the usual CCAA initial application. Norcon’s Notice of Intention to make a BIA proposal was filed on November 25, 2019, just over two weeks ago.”

[164] He continues and said, “In my view, this suggests that restructuring is not a possibility that has just appeared. Although not a lot of time has passed, the fact that the Court is being asked to continue an existing restructuring proceeding suggests that the ‘germ’ of any plan should exhibit a slightly higher possibility of coming to life than might otherwise be the case.”

[165] This may be so, but the Initial Order was not part of any formal restructuring process. There is no court-appointed receiver or monitor to assist the Companies as an intermediary to formulate a restructuring plan.

[166] I find the Consent Stay is not a stay under the *BIA* or the *CCAA*. It is a negotiated order to accommodate the Court schedule. RBC and the Companies negotiated this stay. Presumably, they did so because it was in their mutual advantage to do so.

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[167] On the other hand, even if I consider that the *CCAA* application and the request for the Initial Order is a continuation of the restructuring process discussed between RBC and the Companies for over a year, I find it difficult to assess whether the Companies' "plan" exhibits "a slightly higher possibility of coming to life than might otherwise be the case".

[168] I have outlined the challenging contingencies the Companies' face in completing a successful plan. I have no way of knowing if the Companies are more likely to overcome these contingencies than "might otherwise be the case". However, the Companies did more than present "a germ of a plan". I discussed the reason for this earlier in this decision. I now turn to whether the Companies acted in bad faith.

Did the Companies act in bad faith?

[169] Although the Companies referred to RBC's alleged bad faith in their pleadings, affidavits and brief, these allegations relate to RBC's actions leading up to it demanding repayment of the Companies' loans.

[170] While the allegations may be relevant to the receivership application, they have little bearing on the Companies' application for an Initial Order. Furthermore, its counsel said he would not argue that RBC acted in bad faith.

[171] I now turn to RBC's allegation of the Companies' bad faith.

[172] In argument, RBC's counsel said the Companies acted in bad faith when they failed to report the escalation of the CRA deemed trust debt to RBC and when they failed to comply with the forbearance agreement.

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[173] I find that RBC did not properly bring this issue before me. However, even if it had, there is insufficient evidence to establish that the Companies acted in bad faith. I will now explain why I made this decision.

[174] David Savoie says at paragraph 34 of his affidavit, filed August 5, 2022, that RBC did not discover the "substantial" increase in the CRA debt until November 1, 2021. He says that was the first time RBC received any FY 2021 financial statements.

[175] RBC's bad faith allegation perhaps relates to whether the Companies should have told RBC about the increased CRA debt before they revealed it in their financial statements. Perhaps the allegation relates to Collin's Contracting's failure to deliver to RBC the financial statements on time, or perhaps it relates to Collins Contracting's performance of the forbearance agreement.

[176] This imprecision on exactly what good faith obligation the Companies breached is why RBC should have expressly grounded its allegation in its pleadings, affidavits or briefs, and not merely raise the issue in their argument.

[177] The British Columbia Supreme Court dealt with a similar situation in *United Used Auto*. The court said at paragraph 15, "I am also not persuaded by the submissions of the secured lenders that the Petitioners are not acting in good faith. The facts that the Petitioners failed to abide by the terms of the forbearance agreements and that they obtained restructuring advice from Deloitte & Touche Inc. in February 1998 [the court issued its decision in November 1999] does not, in my view, demonstrate a lack of good faith in bringing these proceedings."

[178] I now turn to whether I should exercise my discretion and grant the administration fee in the Initial Order.

Should the Court exercise its Discretion to grant the administration charge?

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[179] I will not grant the administration charge in the Initial Order. I will now explain why I made that decision.

[180] The Companies seek, pursuant to section 11.52(1) of the *CCAA*, a charge on the Companies' property to a maximum amount of $50,000 to secure the Monitor's costs, and his and the Companies' costs for legal, financial and other experts.

[181] I must limit this administration charge to that which is reasonably necessary for the continued operation of the Companies during the initial 10-day stay.

[182] The Companies' cash flow statements show that administration costs and legal fees will be about $45,000 up to the issuance of the Initial Order, and about $20,000 for the two weeks beginning October 15, 2022.

[183] The cash flow statements show a positive cash position without the administration fee for the weeks ending September 30 to October 21, 2022.

[184] In the circumstances, I will not provide for an administration fee in the Initial Order. I will consider this request again at the comeback hearing.

[185] I now turn to what other provisions that were not in the draft order the Companies circulated, I should include in the Initial Order.

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FURTHER ORDERS

[186] Under section 11.02(1) of the *CCAA*, I can make an order on any terms that I may impose.

[187] I first note that the Companies are not asking me to authorize DIP financing in the Initial Order, so I will not do so.

[188] Given some of the information deficiencies I have identified in this decision, on or before the close of business on Thursday, October 13, 2022, the Companies will file:

(a) the FY 2022 financial statements, even if only in interim or draft form; and

(b) a breakdown of the Companies' current contracts, expected revenue, and other information to support the projections in the cash-flow statements provided to the Court in the initial filings. The Companies should disclose if any of the contracts have been declared to be in default.

[189] The Companies and the Monitor shall file an explanation if they cannot provide this information by the deadline. I now turn to the receivership application.

OTHER MATTERS – RECEIVERSHIP APPLICATION

[190] As I have granted the Initial Order, I hereby stay RBC's receivership application.

OTHER MATTERS - OUTSTANDING MOTION AND APPLICATION

[191] A motion and application remain outstanding.

[192] The first is that the Province asks that I order the Consent Order, or by extension the Initial Order, does not affect the Province's ability to engage the bond, remedy the defaults, and complete the contracts declared in default in the manner directed by the Surety.

[193] Second is that the Companies ask that I hold one of the Companies' contract counterparties in contempt of the Consent Order.

[194] The parties should, at the comeback hearing, be prepared to discuss a process to resolve both matters if I do not set the process before then.

DISPOSITION

[195] I hereby:

(a) grant the Initial Order described in Schedule "A" annexed; and
(b) appoint Grant Thornton Limited to monitor the business and financial affairs of the Companies.

[196] I hereby set the comeback hearing for October 17, 2022, at 10:00 a.m. I make no order as to costs.

ALEXANDER MACDONALD
Justice

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SCHEDULE "A"

2022 01G 1964
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

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

AND IN THE MATTER OF an application of Edward Collins Contracting Limited, Classic Security Ltd., FGC Holdings Ltd., 51037 Newfoundland and Labrador Inc. and H & E Designs Ltd. (collectively, "**ECC**" or the "**Company**");

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INITIAL ORDER

Before the Honourable Justice Alexander MacDonald on September 16, 2022, September 28-29, 2022 and October 5, 2022:

THIS APPLICATION made by Edward Collins Contracting Limited, Classic Security Ltd., FGC Holdings Ltd., 51037 Newfoundland and Labrador Inc. and H & E Designs Ltd. (collectively, "**ECC**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "***CCAA***") for an Order substantially in the form filed with the Application was heard on the 16th, 28th and 29th of September, 2022.

ON READING the affidavits of Francis Collins, Josh Collins, David Savoie, Mark Lohnes and the Exhibits attached thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of ECC (in such capacity, the "**Monitor**"), and the Pre-Filing Reports of GTL dated September 13th and September 23rd 2022;

ON HEARING the submissions of counsel for the Company, counsel for the Royal Bank of Canada, and counsel for the Canada Revenue Agency, and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 15th day of July, 2022, and on reading the consent of GTL to act as Monitor:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof. Further service of Court materials, including the Materials, may be facilitated by the Monitor as prescribed by paragraph 28 below.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Edward Collins Contracting Limited, Classic Security Ltd., FGC Holdings Ltd., 51037 Newfoundland and Labrador Inc. and H & E Designs Ltd. (collectively, "**ECC**" or the "**Company**") is a Company to which the *CCAA* applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in the within Application.

POSSESSION OF PROPERTY AND OPERATIONS

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

5. **THIS COURT ORDERS** that the Company, shall be entitled to continue to utilize its cash management system currently in place, or replace it with another substantially similar cash management system (the **"Cash Management System")** and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Company of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Company, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under any plan of compromise or arrangement with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

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

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

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

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

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

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

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

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

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

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

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

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the *CCAA* the Company shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be

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negotiated between the Company and the landlord from time to time (**"Rent"**), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

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

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NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY

11. THIS COURT ORDERS that until and including the 17th day of October, or such later date as this Court may order (the **"Stay Period"**), no proceeding or enforcement process in any court or tribunal (each, a **"Proceeding"**) shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

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

NO INTERFERENCE WITH RIGHTS

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

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CONTINUATION OF SERVICES

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

NON-DEROGATION OF RIGHTS

15. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the *CCAA*.

APPOINTMENT OF MONITOR

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

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

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

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

(c) assist the Company in its dissemination of reports and other information to the Secured Creditors (as defined herein) and their respective counsel;

(d) advise, in consultation with the Company, the preparation of the Company's cash flow statements and reporting;

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

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

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

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

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

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

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

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

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

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR

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

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

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

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

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Company, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information **("Records")** of which such party has knowledge of; and

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

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LIMITATION ON THE MONITOR'S LIABILITY

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

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

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

SERVICE AND NOTICE

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

GENERAL

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

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

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

32. **THIS COURT ORDERS** that a hearing for the balance of the relief sought by the Company in the Notice of Motion is hereby scheduled before this Court for the 17th day of October, 2022 at 10:00 a.m. or such other date as determined by this Court (the "**Comeback Hearing**").

33. **THIS COURT ORDERS** that on or before the close of business on Thursday, October 13, 2022, the Company shall provide the Court and each creditor referred to in paragraph 28 above, in the manner of service provided for in paragraph 28 above, with the following information: (the Company and the Monitor shall file an explanation if they cannot provide this information by the deadline):

(a) a detailed breakdown of the companies' current contracts, expected revenue, and other information to support the projections in the cash-flow statements provided to the Court on the initial filing. The Company should disclose if any of the contracts have been declared to be in default; and

(b) the FY 2022 financial statements, even if only in draft or interim form and any other information this Honourable Court may request.

ISSUED at St. John's, Newfoundland and Labrador this 5th day of October, 2022.

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