Court of Appeal File No. CA040276

COURT OF APPEAL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, C. 57

AND

IN THE MATTER OF GREAT BASIN GOLD LTD.

BETWEEN:

GREAT BASIN GOLD LTD.

RESPONDENT
(PETITIONER)

AND:

THE AD HOC GROUP OF CONVERTIBLE DEBENTURE HOLDERS

APPELLANT
(RESPONDENT)

REPLY BOOK OF THE RESPONDENT, GREAT BASIN GOLD LTD. ON APPLICATION TO FOR LEAVE TO APPEAL AND STAY OF PROCEEDINGS

Appellant (Respondent):

The Ad Hoc Group of Convertible Debenture Holders

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INDEX

MEMORANDUM OF ARGUMENT

PART I: Statement of Facts

1. The Petitioner, Great Basin Gold Ltd. ("GBG") generally accepts the Statement of Facts contained in the Memorandum of Argument of the Ad Hoc Group of Convertible Debenture Holders (the "Ad Hoc Group") commencing at paragraph 5. However, the Company does wish to clarify some facts and take issue with some of the other facts stated as noted below.

2. The Trust Indenture with the Convertible Debenture Holders pre-dates both of the existing Credit Suisse loan facilities. Both of the existing Credit Suisse facilities required new guarantees and security to be provided by GBG and various GBG subsidiaries at the time.

3. The trust indenture under which the debentures held by members of the Ad Hoc Group were issued does not contain any negative pledge. It does not restrict GBG or any of GBG's subsidiaries from granting guarantees and security.

4. Significant efforts were made by the Board of Directors of GBG to obtain debt financing. Justice Fitzpatrick found that the evidence sets out the Board's detailed consideration of the more negative aspects of the Credit Suisse proposal, including the GBG Inc. Guarantee.

5. The Board exercised its business judgment in concluding that the Credit Suisse DIP Loan would enhance the likelihood of survival of each of the corporations in the GBG Group. The only proposal that the Board of Directors considered to be truly viable was the DIP financing proposal of Credit Suisse AG.

1st Affidavit of Lourens Abraham Van Vuuren sworn September 19, 2012 ("Van Vuuren #1"), paras 11, 36, 39, 43, 44, 71, 87, 91 and 93

6. The Ad Hoc Group claims that GBG "repeatedly declined to pursue" discussions of further credit to the Company. The evidence of the Ad Hoc Group relates to several telephone conversations with Michael Kerlock, Manager of Customer Relations and Corporate Development for GBG and emails to Mr. Kerlock in August and September of 2012. The email exchanges attached as Exhibit "D" to the Affidavit of the representative of the Ad Hoc Group

invited Mr. Stutter, on behalf of the Ad Hoc Group, to contact Lou Van Vuuren, the CEO of GBG. There is no evidence that he did so.

1st Affidavit of Steven Duenkler sworn September 24, 2012, paras 3-9 and Exhibit "D"

7. Madam Justice Fitzpatrick found there were risk, uncertainty and timing issues associated with the Ad Hoc Group's proposal. It is the "significant closing risk and delay" associated with the Ad Hoc Group's proposal that are determining factors in favouring the Credit Suisse proposal.

Reasons for Judgment, September 27, 2012, paras 115, 198, 199

8. The CCAA Judge found that the Ad Hoc Group's proposal was the more uncertain of the two proposals even if it could be implemented and that the urgent cash needs of GBG were not met by the Ad Hoc Group's proposal.

Reasons for Judgment, September 27, 2012, paras 198 and 200

9. Madam Justice Fitzpatrick concluded that, based on the evidence before her, none of the US Subsidiaries which the Ad Hoc Group sought to add as parties had assets in Canada and were therefore not "debtor companies" as defined in the CCAA.

Reasons for Judgment, September 27, 2012, para 104

PART II: Point in Issue

10. Whether leave to appeal from the Orders of the Honourable Madam Justice Fitzpatrick made September 19, 2012 and September 27, 2012.

11. Whether a stay of proceedings should be ordered until the appeal has been determined.

PART III: Argument

Leave to Appeal

12. The factors to be considered in determining if leave to appeal should be granted are well settled. There are four factors: (a) whether the point in appeal is of significance to the practice; (b) whether the point raised is of significance to the action itself; (c) whether the appeal is *prima*

facie, meritorious or, on the other hand, whether it is frivolous; and (d) whether the appeal will unduly hinder the progress of the action.

***Edgewater Casino Inc. (Re)*, 2009 BCCA 40, para 17**

13. It must also be kept in mind that a reviewing court on an application to review an order of a chambers Judge must determine whether the chambers Judge was wrong in law or principle or misconceived the facts.

***Edgewater*, supra, para 12**

14. Mr. Justice MacFarlane stated in *Pacific National Lease* in regards to applications for leave to appeal from an order made by a CCAA Judge:

> "Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context, appellate proceedings may well upset the balance, and delay or frustrate the process under the CCAA. I do not say that leave will never be granted in a CCAA proceeding. But the effect on all parties concerned will be an important consideration in deciding whether leave ought to be granted".

***Re Pacific National Lease Holding Corp.* (1992), 72 B.C.L.R. 2nd 368 at para 32**

15. Justice Tysoe in *Edgewater* cites numerous cases in which Mr. Justice MacFarlane's comments were adopted. Justice Tysoe stated in *Edgewater* that he agrees with Justice MacFarlane's comments in *Pacific National Lease*. While the same four part test is to be applied to applications for leave to appeal from a CCAA order, it must be recognized that the supervising Judge in CCAA proceedings has a special position and, particularly in relation to the third and fourth factors noted above, leave to appeal from typical CCAA orders will be given sparingly.

***Edgewater*, supra, paras 13 and 18**

16. Justice Chiasson in *Pine Valley Mining* stated that the test for granting leave in CCAA proceedings is more stringent than in regular circumstances and leave should be granted sparingly.

***Pine Valley Mining Corp. v. Marubeni*, 2008 BCCA 263 at para 16**

17. This Court has also held that a higher threshold must be met before leave to appeal is granted in the CCAA proceeding "in order to justify the delay and other prejudicial effects on the proposed arrangements that would result from the commencement of an appeal".

***Houweling Nurseries Ltd. v. Amethyst Greenhouses Ltd.*, 2003 BCCA 347**

18. Mr. Justice Tysoe also stated in *Edgewater* that the application of the normal standard for granting leave to appeal in the CCAA context will almost always lead to a denial of leave from a discretionary order made in ongoing CCAA proceedings.

***Edgewater*, supra, para 24**

19. The Order made by the CCAA Judge approving the DIP Loan was a discretionary order. This Court's discretion should not be exercised in place of the discretion of the CCAA Judge unless that discretion had been exercised wrongfully or no weight or insufficient weight had been given to relevant evidence.

***New Skeena Forest Products Inc.*, 2005 CarswellBC 705, at para 20**

Analysis

20. In general terms, the Orders of Madam Justice Fitzpatrick made September 19, 2012 and September 27, 2012 regarding approval of the DIP loan were an exercise of the discretion given by Section 11.2 of the CCAA. Madam Justice Fitzpatrick carefully analysed the factors set out in Section 11.2.

Reasons for Judgment, September 19, 2012, para 27
Reasons for Judgment, September 27, 2012, paras 188-196.

(a) Significance to the Practice

21. The portions of the Orders of the CCAA Judge appealed from are Orders approving the DIP Loan proposed by the existing lender, Credit Suisse AG. Consideration of DIP loans is a normal occurrence in CCAA proceedings and is provided for in the CCAA at Section 11.2. Guidance from this Court is not required.

22. The CCAA Judge must consider each application to approve a DIP loan on its merits while considering the provisions of Section 11.2 of the CCAA. Only after considering those factors can the CCAA Judge exercise his or her discretion as did Madam Justice Fitzpatrick.

23. There is no need for a "clear bright line test" as suggested by the Ad Hoc Group.

(b) Significance to the Action Itself

24. The Ad Hoc Group did not challenge the granting of the Initial Order nor that DIP financing is required by the Petitioner. Rather, they sought to have their proposal for DIP financing accepted in place of the Credit Suisse AG proposal. While it is critical to the Company that it obtain DIP financing, which proposal is approved is not of significance to the action itself.

25. As determined by Madam Justice Fitzpatrick, there is the possibility that neither the Burnstone Advisory Fee nor the GBGI Guarantee will be triggered. If this were the case, no payments would be made under either of the portions of the Credit Suisse DIP Loan found to be offensive by the Ad Hoc Group. The issue of the amount, if any, of payment to be made, can be determined at a later time.

Reasons for Judgment, September 27, 2012, paras 174-175

26. Consequently, the amount that may be available for a Plan proposed by GBG to its creditors will be determined at a future date. That is not an unusual situation in a CCAA proceeding.

(c) Whether the Appeal is *prima facie* Meritorious

Are the US Subsidiaries "debtor companies"?

27. It is a condition precedent to the Ad Hoc Group's DIP proposal that three of the US Subsidiaries of the Petitioner be added to the CCAA proceeding so that a Chapter 15 application can be made to the US Bankruptcy Court recognizing the CCAA Order. Madam Justice Fitzpatrick refused to order that those subsidiaries be added as parties. She determined that there was no jurisdiction under the CCAA to do so.

Reasons for Judgment, October 1, 2012, paras 90-104

28. The Ad Hoc Group submits that the Chambers Judge was wrong in determining that the US Subsidiaries did not carry on business in Canada. That issue was not argued before Her Ladyship. The only question was whether or not the US Subsidiaries had assets in Canada.

Reasons for Judgment, September 27, 2012, para 100

29. The Ad Hoc Group submit that, "at all times", the US Subsidiaries had cash in the Company's bank accounts in Vancouver, BC and therefore had assets in Canada. Her Ladyship found on the evidence before her that the US Subsidiaries had no funds in Canada. Funds that were transferred into GBG's accounts in Canada that originated from the sale of gold were applied against the large inter-company loans owed by virtually all of the subsidiaries, including the US Subsidiaries, to GBG.

Reasons for Judgment, September 27, 2012, paras 102-104

30. There is no evidence that any of the US Subsidiaries have assets in Canada and, therefore, no basis upon which to overturn Madam Justice Fitzpatrick's decision in that regard.

31. The Ad Hoc Group point to the evidence of Mr. Van Vuuren in his 1st Affidavit at paragraphs 93-102. In paragraph 102 he states "inter-company accounts are reconciled monthly." However, in his 2nd Affidavit, Mr. Van Vuuren states that whenever funds are transferred to the accounts of GBG in Canada through the cash management system, the amounts transferred are credited to the amounts owing to the Petitioner by the subsidiary.

2nd Affidavit of Lourens Van Vuuren sworn September 26, 2012, para 7

32. The fact that the accounts are "reconciled" on a monthly basis does not change the legal relationship of GBG as creditor to the subsidiaries as debtor which would allow for the application of the funds transferred in against the inter-company loans.

33. The proposed appeal on this point has no merit.

Section 11.2 is Discretionary

34. Despite having found that the application of the Ad Hoc Group must fail because the US Subsidiaries are not "debtor companies", Her Ladyship went on to consider the Credit Suisse DIP loan and the Ad Hoc Group DIP loan.

35. As mentioned above, the approval of DIP financing by the CCAA Judge is an exercise of discretion. This Court will interfere with that exercise of discretion only "sparingly".

36. The Ad Hoc Group submits that the granting of the GBGI Guarantee of the existing Burnstone indebtedness is contrary to Section 11.2 of the CCAA which prohibits the security or

charge granted under that section from securing "an obligation that exists before the order is made".

37. Section 11.2 allows for a charge on the **company's property** in favour of a lender. The proposed charge securing the GBGI Guarantee is not on property of the Company, but is on property of GBGI, a subsidiary of the Company.

38. Madam Justice Fitzpatrick found that the granting of the GBGI Guarantee and security is not prohibited by Section 11.2 of the CCAA. That finding was confirmed in the September 27, 2012 Reasons for Judgment.

Reasons for Judgment, September 19, 2012, para 20
Reasons for Judgment, September 27, 2012, para 86

39. As alleged by the Ad Hoc Group, the GBGI Guarantee does provide additional security for the existing Burnstone lenders but not on property of the Company.

40. The Ad Hoc Group submits that the Monitor has found that the GBGI Guarantee is "materially objectionable" in the Monitor's Pre-Filing Report. However, the Monitor also stated that the timing issues, completion risk and other operational issues and costs associated with the Ad Hoc Group DIP Proposal "appear to be significant".

First Report of the Monitor, para 7.12(d)

41. Madam Justice Fitzpatrick accepted the Monitor's statement in Court that "the risk and uncertainty surrounding the proposal of the Ad Hoc Group in the face of these urgent financing needs does not trump the more onerous provisions of the Credit Suisse proposal, including the Advisory Fee and the GBGI Guarantee".

Reasons for Judgment, September 27, 2012, para 118

42. It is clearly the view of Madam Justice Fitzpatrick that the DIP Loan Proposal of Credit Suisse "enhances the prospects that a plan of compromise or arrangement will lead to continuation of the Company...".

43. In addition, the CCAA Judge considered the factors enumerated in Section 11.2(4).

Reasons for Judgment, September 27, 2012, paras 188-200

44. Having considered all the relevant factors, Her Ladyship exercised her statutory discretion and approved the Credit Suisse DIP Proposal rather than the Ad Hoc Group Proposal. This Court should not interfere with that exercise of discretion.

Criminal Rate of Interest

45. Having considered the submissions of the Ad Hoc Group that the Credit Suisse DIP Proposal should not be approved because it **might** result in interest at a criminal rate contrary to Section 347 of the *Criminal Code*, Her Ladyship found that that was a mere possibility and may not trigger the criminal interest provisions.

Reasons for Judgment, September 27, 2012, para 143

46. Her Ladyship went on to find that the issues relating to a criminal interest rate can be and should be decided another day and that the determination of those issues is premature.

Reasons for Judgment, September 27, 2012, paras 154-155

47. However, Her Ladyship did not leave the Ad Hoc Group without a remedy. She directed that the Company take steps not to allow for payment of either the Burnstone Advisory Fee or under the GBGI Guarantee until further Order of the Court. The criminal rate issue can be decided prior to funds being paid to Credit Suisse.

Reasons for Judgment, September 27, 2012, para 204

48. Therefore, Her Ladyship's decision reserves the right of the Ad Hoc Group to make the arguments at a later date that Credit Suisse is not entitled to payment of the Burnstone Advisory Fee or amounts under the GBGI Guarantee.

49. The Ad Hoc Group complains that Madam Justice Fitzpatrick refused to declare that the terms of the Credit Suisse DIP Loan were contrary to Section 247 of the *Criminal Code*. The CCAA Judge did not determine that the provisions complained of did not give rise to a criminal rate of interest. Rather, she held that is was premature to make that determination at this time.

Reasons for Judgment, October 1, 2012, paras 154-155

(d) Whether the Appeal will Unduly Hinder the Progress of the Action

50. The evidence accepted by Madam Justice Fitzpatrick was that Credit Suisse would not advance the $35 million under the DIP Loan without the GBGI Guarantee. In rejecting the submissions of the Ad Hoc Group, Her Ladyship determined that the financial matters had not stabilized and that the Company remained in a severe liquidity crisis and in desperate need of advances under the DIP Loan.

Reasons for Judgment, September 27, 2012, paras 178, 197-200
2nd Affidavit of Lourens Van Vuuren sworn September 26, 2012, paras 3-6

51. The restructuring efforts of GBG are necessarily inhibited by this appeal. The Company remains in desperate need of advances under the DIP Loan. The proceeding necessarily stalls while an appeal from the approval of the DIP Loan continues.

Stay of Proceedings

52. The harm alleged by the Ad Hoc Group that will result from the Burnstone Advisory Fee and the GBGI Guarantee is that funds will be payable to Credit Suisse that might otherwise go, on a *pari passu* basis, to the other creditors, including the bondholders. The direction of Madam Justice Fitzpatrick that no monies be paid out under the Burnstone Advisory Fee or in relation to the GBGI Guarantee sufficiently deals with that concern. The Ad Hoc Group can make their submissions regarding the criminal interest rate prior to payment of funds pursuant to the Burnstone Advisory Fee or the GBGI Guarantee. A stay is not required.

PART IV: Nature of the Order Requested

53. That the application of the Ad Hoc Group for leave to appeal and a stay of a portion of the Order of Madam Justice Fitzpatrick made September 19, 2012 be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED: October 2, 2012

Peter J. Reardon,
Counsel for the Respondent,
Great Basin Gold Ltd.

PART V: TABLE OF AUTHORITIES

CASES

1. *Edgewater Casino Inc., (Re)*, 2009 BCCA 40
2. *Houweling Nurseries Ltd. v. Amethyst Greenhouses Ltd.*, 2003 BCCA 347
3. *New Skeena Forest Products Inc., (Re)*, 2005 CarswellBC 705
4. *Pacific National Lease Holding Corp., (Re)*, (1992), 72 B.C.L.R. 2nd 368
5. *Pine Valley Mining Corporation v. Marubeni*, 2008 BCCA 263

LEGISLATION

6. *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 11.2