601924

ENTERED

JUDICIAL CENTRE OF CALGARY
CLERK'S STAMP:
FILED
Jun 10, 2021
by Email
CLERK OF THE COURT

COM
June 11, 2021
Justice Lema

COURT FILE NUMBERS	B201 731795 B201 731797 B201 731799
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTERS	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, OF INTERNATIONAL FITNESS HOLDINGS INC. INTERNATIONAL FITNESS HOLDINGS LP WORLD HEALTH NORTH LP
APPLICANTS	INTERNATIONAL FITNESS HOLDINGS INC., INTERNATIONAL FITNESS HOLDINGS LP and WORLD HEALTH NORTH LP
DOCUMENT	**BENCH BRIEF OF THE APPPLICANTS IN SUPPORT OF AN APPLICATION FOR AN ASSIGNMENT ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**STIKEMAN ELLIOTT LLP** 4300 Bankers Hall West 888 – 3rd Street S.W. T2P 5C5 Solicitor: Karen Fellowes, Q.C. / Elizabeth Pillon Phone Number: (403) 724-9469 / (416) 869-5623 Email: kfellowes@stikeman.com / lpillon@stikeman.com Fax Number: (403) 266-9034 File No.: 137923-1006 **Counsel for the Applicants, International Fitness Holdings Inc., International Fitness Holdings LP and World Health North LP**

601925

COURT FILE NUMBERS	B201 731795 B201 731797 B201 731799
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTERS	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, OF INTERNATIONAL FITNESS HOLDINGS INC. INTERNATIONAL FITNESS HOLDINGS LP WORLD HEALTH NORTH LP
APPLICANTS	INTERNATIONAL FITNESS HOLDINGS INC., INTERNATIONAL FITNESS HOLDINGS LP and WORLD HEALTH NORTH LP
DOCUMENT	**BENCH BRIEF OF THE APPPLICANTS IN SUPPORT OF AN APPLICATION FOR AN ASSIGNMENT ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**STIKEMAN ELLIOTT LLP** 4300 Bankers Hall West 888 – 3rd Street S.W. T2P 5C5 Solicitor: Karen Fellowes, Q.C. / Elizabeth Pillon Phone Number: (403) 724-9469 / (416) 869-5623 Email: kfellowes@stikeman.com / lpillon@stikeman.com Fax Number: (403) 266-9034 File No.: 137923-1006 **Counsel for the Applicants, International Fitness Holdings Inc., International Fitness Holdings LP and World Health North LP**

COM
June 11, 2021
Justice Lema

COM
June 11, 2021
Justice Lema

COURT FILE NUMBERS	B201 731795 B201 731797 B201 731799
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTERS	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, OF INTERNATIONAL FITNESS HOLDINGS INC. INTERNATIONAL FITNESS HOLDINGS LP WORLD HEALTH NORTH LP
APPLICANTS	INTERNATIONAL FITNESS HOLDINGS INC., INTERNATIONAL FITNESS HOLDINGS LP and WORLD HEALTH NORTH LP
DOCUMENT	**BENCH BRIEF OF THE APPPLICANTS IN SUPPORT OF AN APPLICATION FOR AN ASSIGNMENT ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**STIKEMAN ELLIOTT LLP** 4300 Bankers Hall West 888 – 3rd Street S.W. T2P 5C5 Solicitor: Karen Fellowes, Q.C. / Elizabeth Pillon Phone Number: (403) 724-9469 / (416) 869-5623 Email: kfellowes@stikeman.com / lpillon@stikeman.com Fax Number: (403) 266-9034 File No.: 137923-1006 **Counsel for the Applicants, International Fitness Holdings Inc., International Fitness Holdings LP and World Health North LP**

INDEX

I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the Applicants, International Fitness Holdings Inc., International Fitness Holdings LP and World Health North LP (collectively, the "**Applicants**") pursuant to section 84.1 of the *Bankruptcy and Insolvency Act* (the "**BIA**") in support of an application for an order (the "**Assignment Order**"), among other things, assigning to Ayrfit West Inc., Ayrfit Alberta Inc. and Ayrfit Edmonton Inc. (collectively, the "**Purchasers**") certain leases in the name of the Applicants.

2. The relief sought by the Applicants is contemplated by and required to close the sale transaction approved by this Court's Sale Approval and Vesting Order granted on May 27, 2021 (the "**Sale Approval and Vesting Order**"). The Sale Approval and Vesting Order approved, among other things:

   (a) the sale transaction (the "**Transaction**") contemplated by the Asset Purchase Agreement dated April 23, 2021, as amended by an Amending Agreement dated May 20 2021 (collectively, the "**APA**") between the Applicants, Spa Lady (West) Inc. and Purchasers (unless otherwise defined herein, all capitalized terms have the meaning ascribed to them in the APA); and

   (b) vesting in the Purchasers all of the Applicants' right, title and interest in and to the Acquired Assets (as defined in the Sale Approval and Vesting Order), free and clear of all Encumbrances other than certain Permitted Encumbrances specified in the Sale Approval and Vesting Order.

3. The Transaction contemplates, among other things, that the Purchaser will acquire certain of the Applicants' assets as a going concern, including the Assumed Leases.

4. Since the granting of the Sale Approval and Vesting Order, the Applicants have used, and continue to use, commercially reasonable efforts to obtain all consents and approvals required in respect of the Assumed Leases. However, despite such efforts, as of the date of this Application there remain two Assumed Leases for which required consents have not been obtained: the Canyon Meadows Lease and Glenora Lease (both defined below).

5. To ensure that the Transaction closes on the anticipated closing date of June 18, 2021 (the "**Closing Date**"), the Applicants are seeking an Assignment Order pursuant to section 84.1 of the BIA to order the assignment of the Canyon Meadows Lease and Glenora Lease to the Purchasers. The relief sought in this application is supported by the Applicants' court appointed proposal trustee, KPMG Inc. (the "**Proposal Trustee**"), subject to the legal issues pertaining to the Glenora Lease being determined by this Court.[1]

II. STATEMENT OF FACTS

6. The material terms of the Transaction, and events leading up to this Court's approval of the Transaction and APA on May 27, 2021 are more fully described in the Affidavit No. 3 of Peter Melynchuk, sworn May 21, 2021 (the "**Third Melynchuk Affidavit**").

7. On May 27, 2021, the Applicants and the Purchasers entered into a second amending agreement (the "**Second Amending Agreement**") to the APA in order to confirm certain changes to the schedules of the APA setting out the Assumed Leases, the IP Assets and the

[1] Proposal Trustee Report.

Excluded Assets.[2] The Court was made aware of the Second Amending Agreement before pronouncing the Sale Approval and Vesting Order.

8. The APA, as amended through the Second Amending Agreement, contemplates the assignment of Assumed Leases to the Purchasers.[3]

A. Background

9. Prior to the commencement of these proceedings, the Applicants operated twenty-one (21) fitness centres in Edmonton and Calgary (each, an "**IFH Location**" and collectively, the "**IFH Locations**"). It is a material term of the Transaction that, among other things, the Purchasers will be assigned and assume all of the Applicants' rights and liabilities under certain leases for the IFH Locations.[4]

10. As set out in the Third Melynchuk Affidavit, negotiations with respect to the leases have been ongoing between the Applicants, the Purchasers and landlords since late 2019. As of the date the Third Melnychuk Affidavit was sworn, the leases for eight (8) of the IFH Locations had been disclaimed, and the leases in respect of three (3) of the IFH Locations were anticipated to be assigned to the Purchasers by way of Court Order if terms of the assignment could not be negotiated with the landlords.[5]

11. Since the Third Melnychuk Affidavit was sworn, the lease for one additional IFH Location has been disclaimed, bringing the total number of disclaimed leases to nine (9). In addition, despite ongoing negotiations between the Applicants, the Purchasers and the landlords, no agreement has been reached with respect to the assignment of two (2) leases: the Canyon Meadows Lease and the Glenora Lease, each of which is described below.[6]

B. Assignment of the Canyon Meadows Lease

12. The Canyon Meadows location is leased to the Applicant IFH pursuant to a lease dated July 17, 1997, as assigned and amended on August 31st, 2006, assigned on November 25, 2009 and assigned and amended on January 1st, 2018, between IFH Inc. (as successor of Spa Lady Inc., the assignee of the original tenant 21st Century Health Spas (Western) Ltd.) and 1710818 Alberta Ltd. (as successor to the original landlord 690569 Alberta Ltd.) and granted possession of premises at the property situated at 13226 Macleod Trail in Calgary (the "**Canyon Meadows Lease**"). The current term of the Canyon Meadows Lease expires on December 31, 2023.[7]

13. The fitness centre at the Canyon Meadows location is a female-only fitness centre and has a successful track record as one of the best performing fitness centers of the IFH Group, with over 6,000 members at its peak. The fitness centre is located in a good caption area in the southeast quadrant of Calgary and is important to the IFH Group's fitness centre network, as the IFH Group has female-only fitness centers in each other quadrant of the city. Further, there is a co-ed GoodLife fitness center in the same building, which complements IFH's

[2] Affidavit No. 4 of Peter Melynchuk, sworn June 3, 2021 (the "**Fourth Melynchuk Affidavit**") at para 15, Exhibit "B".
[3] Fourth Melynchuk Affidavit at para 16.
[4] Affidavit No.3 of Peter Melynchuk, sworn May 21, 2021 (the "Third Melynchuk Affidavit") at para 9.
[5] Fourth Melynchuk Affidavit at para 17.
[6] *Ibid* at para 18.
[7] *Ibid* at para 20, Exhibit C.

female-only fitness centre well. The Assignment Order contemplates that the Canyon Meadows location will be assigned to Ayrfit Alberta Inc.[8]

14. In June 2020, in light of the business and operational disruptions caused by the onset of the COVID pandemic, IFH sent a letter to the Canyon Meadows landlord setting out a rent deferral proposal. On March 17, 2021, the landlord of the Canyon Meadows location issued a seizure notice with respect to equipment at the site in the amount of $200,404.44 (the "**Canyon Meadows Cure Cost**").[9]

15. The Purchasers have agreed to pay the Canyon Meadows Cure Cost as part of the assignment of the Canyon Meadows Lease to Ayrfit Alberta Inc. To the knowledge of the Applicants, the Canyon Meadows landlord is not disputing the relief sought in this application.

C. Assignment of the Glenora Lease

16. The Glenora location is leased pursuant to a lease dated August 1, 2012 between World Health Edmonton Inc. as tenant and Teslin Investments Joint Venture as landlord, which granted possession of premises at the property situated at 10720-142 Street in Edmonton (the "**Glenora Lease**" and with the Canyon Meadows Lease, the "**Assumed Leases**"). The current term of the lease expires in 2026.[10]

17. The fitness centre located at the Glenora location has historically performed very well. It is in a residential neighborhood which is home to a diversified demographic. The fitness centre occupies approximately 80% of the building at this location and has its own parking lot. As a result, the Glenora location is prominent and accessible.[11]

18. Following a 2018 acquisition of World Health Edmonton Inc. and certain related entities by World Health North LP (the "**World Health North Acquisition**") various leases naming World Health Edmonton Inc. as tenant were assigned to World Health North LP ("**WHN**"). Though most leases were assigned as part of the World Health North Acquisition, certain of the leases were intended to be assigned following the closing of the transaction, including the Glenora Lease. However, no written assignment agreement with respect to the Glenora Lease was ever entered into.[12]

19. Since the World Health North Acquisition in 2018, ongoing negotiations were occurring with the Glenora landlord regarding the assignment. On November 9, 2019, the landlord of the Glenora location signed a Lease Assignment, Amendment and Extension Agreement (the "**Glenora Lease Assignment**") which contemplated the assignment of the Glenora Lease to IFH as tenant effective January 1, 2020. The Glenora Lease Assignment also purported to extend the original lease to 2029 and set out new rental terms.[13]

20. As negotiations for the Glenora Lease Assignment were taking place, the IFH Group was undergoing a major transformation and rebranding process. Unfortunately, the onset of the COVID-19 pandemic in early 2020 occurred just as the IFH Group's transformation and rebranding efforts were concluding, and at the time the IFH Group shifted its focus to streamlining operations and responding to the various government-mandated closures of its

[8] *Ibid* at para 21.
[9] *Ibid* at para 20, Exhibit D.
[10] *Ibid* at para 24, Exhibit F.
[11] *Ibid* at para 34.
[12] *Ibid* at para 25, Exhibit G.
[13] *Ibid* at para 26, Exhibit H.

fitness facilities. As a result of these disruptions, the Glenora Lease Assignment was never countersigned.[14]

21. Despite no assignment agreement being finalized, the parties continued to govern themselves under the terms of the Glenora Lease. Since 2018, the landlord has continued to accept rent from WHN under the terms of the Glenora Lease. As noted above, in late 2019, the IFH Group underwent a major transformation and rebranding, pursuant to which the Glenora location changed its name from World Health to ClubFit. The landlord of the Glenora location consented to this re-branding, including the placement of new signage at the Glenora location.[15]

22. In June 2020, in light of the business and operational disruptions caused by the onset of the COVID pandemic, IFH sent a letter to the Glenora landlord setting out a rent deferral proposal. The proposal contemplated that (i) the landlord would apply for the Canada Emergency Commercial Rent Assistance ("**CECRA**") program, and (ii) the deferred rent would be amortized over the course of the Glenora Lease, on the assumption that the parties could agree to a long term extension for the Glenora Lease.[16]

23. In July 2020, the landlord of the Glenora location applied for the CECRA. As part of its application, the landlord was required to submit information about the Glenora Lease. In the CECRA application materials, the landlord affirms the existence of the Glenora Lease.[17]

24. The Glenora landlord was accepted into the CECRA program for the months of April 2020 through to September 2020. In accordance with the terms of the CECRA program, the Glenora landlord agreed to accept 25% rent from WHN for each of these months in full satisfaction of its obligations under the Glenora Lease, and received a government subsidy to cover 50% of the rent for these months.[18]

25. Consistent with the above actions, it was understood by the Applicants that that it was the party's intention to continue performing pursuant to the Glenora Lease until a lease amendment and assignment could be finalized.[19]

26. However, on or about May 4, 2021, the Applicants discovered that it was the landlord's position that there is no long-term lease in effect at the Glenora location, and that there is a month to month tenancy in place.[20] This was the first the Applicants' had heard of this position.

27. Taking into account rent deferral arrangements for this location, rent arrears for the Glenora Lease are in the amount of $148,101.88 inclusive of GST (the "**Glenora Cure Cost**" and with the Canyon Meadows Cure Cost, the "**Cure Costs**").[21] The Purchasers are prepared to pay the Glenora Cure Cost as part of the assignment of the Glenora Lease to Ayrfit Edmonton Inc.

III. ISSUES

[14] *Ibid* at para 27.
[15] *Ibid* at para 28.
[16] Fourth Melynchuk Affidavit at para 29, Exhibit I.
[17] *Ibid* at para 30, Exhibit J.
[18] *Ibid* at para 31.
[19] *Ibid* at para 32.
[20] *Ibid* at para 33.
[21] *Ibid* at para 31.

28. The sole issue before this Court is whether the proposed assignment of the Assumed Leases meets the requirements of section 84.1 of the BIA.

IV. ARGUMENT

A. The Glenora landlord is estopped from alleging the Glenora Lease is invalid

29. After the commencement of these proceedings and despite numerous representations to the contrary, the Glenora landlord has surprisingly taken the position that the Glenora Lease is a month to month tenancy. In response to this application, the Glenora landlord seeks (i) a declaration that the Glenora Lease is a month to month tenancy, and (ii) an order lifting the stay of these proceedings to permit the Glenora landlord to deliver a notice of termination of the Glenora Lease, so it may obtain vacant possession of the IFH Location.

30. For the reasons set out below, Applicants submit that this Court should decline to grant this relief on the basis of estoppel by representation or, alternatively, estoppel by convention. Additionally, the Applicants submit that the Glenora landlord is disentitled to its prayer for equitable relief on the basis that the Glenora landlord has failed to come to this Court with clean hands.

(i) Estoppel by Representation

31. The Applicants submit that the Glenora landlord, by its conduct, is estopped from disputing the existence of a long-term lease pursuant to the principles of promissory estoppel. In *Maracle v. Travelers Indemnity Co of Canada,* Justice Sopinka, writing for the Supreme Court, set out the requirements for promissory estoppel as follows:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, *by words or conduct*, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or is some way changed his position.[22]

32. Courts have also held that knowledge by the promisor that the promisee is likely to regard the promise as affecting their legal relations constitutes an appropriate basis from which the inference of the existence of a sufficient intent can be drawn. Promissory estoppel can arise where the conduct of the promisor indicates an intention to not to rely on contractual rights.[23]

33. It is submitted that the following actions taken by the Glenora landlord or its agents amount to words or conduct sufficient to indicate an intention to continue the Glenora Lease pending the assignment of the Glenora Lease to WHN as required by the doctrine of promissory estoppel:

(a) On November 9, 2019, the Glenora landlord signed the Glenora Lease Assignment;

(b) Since November 2018, the Glenora landlord has accepted rent from WHN as assignee;

(c) The Glenora landlord consented to the IFH Group's re-branding, which included the placement of new signage at the Glenora location. The Applicants invested

---

[22] *Maracle v. Travelers Indemnity Co of Canada*, [1991] 2 SCR 50 at para 13 **[TAB 1].**
[23] *Med-Chem Health Care Inc. (Re)*, 2000 CarswellOnt 3820, 2000 O.J. No. 4009 **[TAB 2].**

significant monies into carrying out that rebranding on the understanding that they had a long term interest in the Glenora location;

(d) WHN applied for government COVID-relief subsidies in respect of the Glenora Lease, which they would not have done if they did not have a long term interest in the Glenora location;

(e) The Glenora landlord applied for the CECRA program and acknowledged the existence of the Glenora Lease in the CECRA application materials[24];

(f) The Glenora landlord accepted 25% rent from WHN in accordance with the terms of the CECRA program for the months of April 2020 through to September 2020 and received a government subsidy to cover 50% of the rent for these months[25]**;**

(g) The Glenora landlord agreed to amortize deferred rent over a 6-month period;[26]

(h) Throughout the term that the Glenora landlord accepted the rent subsidy, or later, it was never disclosed to the Applicants that it was disputing the existence of a long-term leasing arrangement or that the Glenora Lease was a month to month tenancy; and

(i) At all relevant times, the Glenora landlord has conducted itself in a manner consistent with the intention of the parties when entering into the Glenora Lease Assignment to extend the Glenora Lease and assign the Glenora Lease to the WHN.

34. It is submitted that these actions, taken together demonstrate a promise or assurance on the part of the Glenora landlord that WHN could operate out of the Glenora location under the terms of the Glenora Lease pending the finalization of an assignment agreement to amend and extend the term of the Glenora Lease. It was not until after the NOI filing that the Glenora landlord took the position that the Glenora Lease was inoperative and that the premises were subject to a month to month tenancy. This position is inconsistent with the Glenora landlord's own actions in, among other things, enforcing rent increases contemplated by the Glenora Lease[27], accepting government COVID subsidies on the basis of the existence of a long term lease and agreeing to amortize deferred rent over a period of at least six months. As a result, the legal relations between the parties were affected and the Applicants' position changed to rely on the terms of the Glenora Lease as though it continued to be in full force and effect pending the finalization of an assignment agreement to extend and amend the terms of the Glenora Lease. For the above reasons, the Applicants submit, by operation of the Glenora landlord's promises and assurances, that it ought to be estopped by this Court from denying the existence of the Glenora Lease.

ii. Estoppel by Convention

35. In the alternative, the Applicants submit that Glenora landlord is estopped from denying the existence of the Glenora Lease by reason of estoppel by convention.

36. Where parties have agreed upon, and proceeded to act on the basis of, a common, mistaken assumption or understanding of facts or law, estoppel by convention operates to hold those

[24] *Ibid* at para 30, Exhibit J.
[25] *Ibid* at para 31.
[26] *Ibid* at Exhibit J.
[27] Cross-examination of Jeffrey Baker conducted on June 7, 2021 at page 5 lines 17-27 and page 6 lines 1-13. **[Tab 3]**

parties to that understanding. As best phrased by Justice Bastarache in *Ryan v Moore*, the doctrine operates as follows:

> ... [estoppel by convention] is founded, not on a representation made by a representor and believed by a representee, but on an agreed statement of facts or law, the truth of which has been assumed, by convention of the parties, as a basis of their relationship. When the parties have so acted in their relationship upon the agreed assumption that the given state of facts or law is to be accepted between them as true, that it would be unfair on one for the other to resile from the agreed assumption, then he will be entitled to relief against the other according to whether the estoppel is as to a matter of fact, or promissory, and/or proprietary. [28]

37. Estoppel by convention requires proof that: (i) the parties' dealings, arrangement or agreement is based on a shared assumption or understanding of fact or law, (ii) that one party acted in reliance on, and (iii) it would be unjust, and to the detriment of the relying party, to allow the other party to resile or depart from that common assumption. Establishing the shared assumption or common understanding as to the law arising from an agreement is generally achieved by proving some statement, conduct or communication between the parties of the convention being relied upon. Although the operative clauses in a contract are the proper subject of contract law and not estoppel, "to the extent that they implicitly convey or indicate joint assumptions made by the parties that underpin the contractual obligations" estoppel by convention may be available.[29]

38. The evidence before this Court demonstrates that the Glenora landlord executed the Glenora Lease Assignment, and the parties' post-agreement conduct suggests that they each proceeded with the Glenora Lease on the mutual assumption that the Glenora Lease was in full force and effect. The Applicants submit that it would be unjust for this Court to permit the Glenora landlord to resile from the mutual convention or assumption that the Glenora Lease was a long-term lease that was extended by the Glenora Lease Assignment.

iii. The Glenora landlord has not come to this Court with clean hands.

39. As this Court knows well, the starting point for equity is that those who come to a Court to seek it, must come with "clean hands".

40. The evidence before this Court demonstrates that the Glenora landlord "waited in the weeds" to advise the Applicants that it viewed the Glenora Lease to be a month to month tenancy, while simultaneously allowing WHN to expend significant resources on re-branding the Glenora location, agreeing to a long-term amortization of deferred rent, and accepting government subsidies from the CECRA program on the basis of the existence of the Glenora Lease.

41. The Applicants submit that the Glenora landlords late timed month to month tenancy position is opportunistic and takes advantage of a crisis situation suffered by the Applicants as a result of a global pandemic. The fact is the record shows that the Applicants and Glenora landlord have conducted themselves in a manner consistent with a long-term landlord tenant relationship under the terms of the Glenora Lease.

42. The Applicants submit that the "clean hands" doctrine should apply to prevent the Glenora

---

[28] *Ryan v. Moore,* 2005 SCC 38, at paragraph 54-55 **[TAB 4]**
[29] *Ibid* at paragraph 59

landlord from benefiting from its misconduct by succeeding in its Application for declaratory relief from this Court. This application should be dismissed in its entirety.

B. This Court has the jurisdiction to order the assignment of the Assumed Leases.

43. In the present case, the section 84.1 factors have been satisfied and it is appropriate to assign the rights and obligations under the Assumed Leases to the Purchasers.

44. Section 84.1 of the BIA authorizes the Court, on application by a trustee and on notice to every party to an agreement, to make an order assigning the rights and obligations of a bankrupt pursuant an agreement to any person who is specified by the Court and who agrees to the assignment.[30]

45. Section 84.1, like bankruptcy and insolvency laws generally, is premised on the balancing of stakeholder interests. In *Dundee Oil and Gas Limited (Re),* the Ontario Superior Court of Justice (Commercial List) in approving a section 11.3 application under the CCAA (the section 84.1 equivalent) stated as follows:

> Bankruptcy and insolvency always involves a balancing of a number of such competing interests. Creditors, contract counterparties - all of these have rights arising under agreements with the debtor that are either actually compromised or at risk of being compromised by insolvency. The CCAA and BIA regimes are predicated on facilitating a pragmatic approach to minimize the damage arising from insolvency more than they are concerned to advance the interests of one stakeholder over another.[31]

46. Section 84.1(4) specifies that this Court is to consider two factors on an application for an assignment order: (a) whether the person to whom the rights and obligations are to be assigned is capable of performing the obligations; and (b) whether it is appropriate to assign the rights and obligations to that person.[32]

47. Section 84.1(5) provides that this Court may not grant an assignment order under Section 84.1(1) unless it is satisfied that all monetary defaults in relation to the agreement to be assigned, other than those arising by reason of that person's (i) bankruptcy, (ii) insolvency, or (iii) failure to perform a non-monetary obligation, will be remedied on or before the day fixed by this Court.[33]

C. The criteria for the assignment of the Assumed Leases have been satisfied.

48. In the present case, the section 84.1 factors have been satisfied and it is appropriate to assign the rights and obligations under the Assumed Leases to the Purchasers.

i. Purchasers are able to perform the obligations under the Assumed Leases.

49. In order to assign the agreements under the BIA, this Court must conclude the assignee will be able to perform its obligations under the assigned agreement. However, this does not

---

[30] BIA, Section 84.1(1)
[31] *Dundee Oil and Gas Limited (Re),* 2018 ONSC 3678 at para 27 ("*Dundee*") **[Tab 5]**
[32] BIA, Section 84.1(4)
[33] BIA, Section 84.1(5)

require "iron-clad guarantees" and does not permit counterparties to demand additional assurances that they did not previously enjoy under the contract.[34]

50. The Transaction contemplates the sale of the Applicants' business as a going concern. On closing, the Purchasers' have provided evidence that they will be able to fulfill the Applicants' business and obligations under the Assumed Leases at the Canyon Meadows and Glenora locations.[35] The Purchasers have the capital to maintain and improve the Applicants' business, as well as satisfy the Cure Costs, fund the working capital needs to reposition the business and operate in accordance with the Assumed Leases.[36]

ii. It is appropriate to assign the Assumed Leases to the Purchasers.

51. The sale of the IFH Group business as a going concern is dependent upon the Purchasers ability to occupy and operate in each of the IFH Locations. The IFH Locations for which the Assumed Leases relate are key IFH Locations that are instrumental to the seamless and successful transition to new ownership and have the following desirable characteristics:

    (a) The fitness centre at the Canyon Meadows location is a female-only fitness centre and has a successful track record as one of the best performing fitness centers of the IFH Group, with over 6,000 members at its peak. The fitness centre is located in a good caption area in the southeast quadrant of Calgary and is important to the IFH Group's fitness centre network, as the IFH Group has female-only fitness centers in each other quadrant of the city. Further, there is a co-ed GoodLife fitness center in the same building, which complements IFH's female-only fitness centre well.[37]

    (b) The fitness centre located at the Glenora location has historically performed very well. It is located in a residential neighborhood which is home to a diversified demographic. The fitness centre occupies approximately 80% of the building at this location and has its own parking lot. As a result, the Glenora location is prominent and accessible. Further, when the IFH Group shut down its operations at its fitness centers in West Edmonton Mall, the Edmonton City Centre and Mayfield, it notified members of those fitness centers that the memberships would be transferred to the Glenora location. The loss of the Glenora location would thus have a detrimental impact on the IFH Group's operations in Edmonton following the closing of the Transaction.[38]

52. As a result of the successful historical performance of the above IFH Locations, the Purchasers believe that the assignment of the Assumed Leases is important to the overall success of the IFH Group's business as a going-concern following the closing of the Transaction.[39] Granting the Assignment order will ensure that the IFH Group business is able to seamlessly transition on the closing of the Transaction without any interruption to the business or its members.

53. Other factors supporting the requested Assignment Order include:

    (a) The Purchasers will assume all obligations associated with the Assumed Leases arising following closing of the Transaction;

---

[34] *Dundee* at para 30.
[35] Affidavit of I. Kennedy, sworn June 6, 2021 at para 9.
[36] *Ibid*.
[37] Fourth Melynchuk Affidavit at para 21.
[38] *Ibid* at para 34.
[39] *Ibid* at paras 21 and 34.

(b) The Purchasers will cure any and all monetary defaults;

(c) The Applicants have made significant good faith efforts to obtain consents from counterparties to consensually assign all agreements; and

(d) Counterparties were provided with notice of the assignment and were advised early in the process that the Applicants would seek a court order to assign their contract if their consent was not procured.

54. Lastly, neither of the Assumed Leases are (a) an agreement entered into on or after the day on which the NOI Proceedings commenced; (b) an eligible financial contract; or (c) a collective agreement.[40]

iii. The Proposal Trustee is in support of the Assignment Order.

55. The Proposal Trustee supported this Court's approval of the Transaction and is also supportive of granting the Assignment Order, subject to this Courts determination of the legal issues pertaining to the Glenora Lease.[41]

V. RELIEF CLAIMED

56. For the reasons discussed above, the Applicants submit that the assignment of the Assumed Leases (a) meets the statutory requirements of section 84.1 of the BIA; (b) is required for the completion of the Transaction approved by this Court; and (c) is in the best interest of the Applicants and their stakeholders generally. For these reasons, the Applicants submit that the granting of the Assignment Order is appropriate in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of June, 2021

STIKEMAN ELLIOTT LLP

Karen Fellowes, Q.C. / Elizabeth Pillon
kfellowes@stikeman.com / lpillon@stikeman.com
Tel: (403) 724-9469 / (416) 869-5623
Fax: (403) 266-9034

Counsel for the Applicants, International Fitness Holdings Inc., International Fitness Holdings LP and World Health North LP

[40] Fourth Melynchuk Affidavit at para 19.
[41] Proposal Trustee Report.

VI. TABLE OF AUTHORITIES

1. *Maracle v. Travelers Indemnity Co of Canada*, 1991 CarswellOnt 450 1019
2. *Med-Chem Health Care Inc. Re*, 2000 CarswellOnt 3820, 2000 O.J. No. 4009
3. Cross-examination transcript except of Jeffrey Baker conducted on June 7, 2021
4. *Ryan v. Moore,* 2005 SCC 38
5. *Dundee Oil and Gas Limited (Re),* 2018 ONSC 3678

TAB 1

Most Negative Treatment: Distinguished
Most Recent Distinguished: Seidel v. Telus Communications Inc. | 2009 BCCA 104, 2009 CarswellBC 608, [2009] B.C.W.L.D. 1852, [2009] B.C.W.L.D. 2019, [2009] B.C.W.L.D. 2020, [2009] B.C.W.L.D. 2021, [2009] B.C.W.L.D. 2028, [2009] B.C.W.L.D. 2056, 88 B.C.L.R. (4th) 212, 267 B.C.A.C. 266, 450 W.A.C. 266, 176 A.C.W.S. (3d) 323, [2009] 5 W.W.R. 466, [2009] B.C.J. No. 469, 304 D.L.R. (4th) 564, 68 C.P.C. (6th) 57 | (B.C. C.A., Mar 13, 2009)

1991 CarswellOnt 450
Supreme Court of Canada

Maracle v. Travelers Indemnity Co. of Canada

1991 CarswellOnt 1019, 1991 CarswellOnt 450, [1991] 2 S.C.R. 50, [1991] I.L.R. 1-2728, [1991] S.C.J. No. 43, 125 N.R. 294, 27 A.C.W.S. (3d) 70, 3 C.C.L.I. (2d) 186, 3 O.R. (3d) 510 (note), 3 O.R. (3d) 510, 47 O.A.C. 333, 50 C.P.C. (2d) 213, 80 D.L.R. (4th) 652, J.E. 91-959, EYB 1991-67614

TRAVELERS INDEMNITY COMPANY OF CANADA v. ANDREW CLIFFORD MARACLE JR.

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

Heard: February 28, 1991
Judgment: June 6, 1991
Docket: Doc. No 21725

Counsel: *Joshua Liswood* and *Linda Dolan*, for appellant Travelers Indemnity Co. of Canada.
Ross V. Smiley, *Q.C.* and *Will O'Hara*, for respondent.

Subject: Contracts; Torts; Civil Practice and Procedure; Corporate and Commercial; Insurance
Related Abridgment Classifications
Civil practice and procedure
VII Limitation of actions
VII.4 Actions in contract or debt
VII.4.d Actions on insurance policies
VII.4.d.ii Waiver or estoppel
Civil practice and procedure
VII Limitation of actions
VII.4 Actions in contract or debt
VII.4.d Actions on insurance policies
VII.4.d.iii Miscellaneous
Contracts
XIV Remedies for breach
XIV.7 Effect of delay in seeking remedy
Headnote
Limitation of Actions --- Actions in contract or debt — Actions on insurance policies — General
Limitation of Actions --- Actions in contract or debt — Actions on insurance policies — Waiver or estoppel
Limitation of actions — Actions in contract or debt — Actions on insurance policies — Waiver or estoppel — Admitting liability and continuing to negotiate not foreclosing reliance on limitation period defence — Appeal allowed from judgment which held there was promissory estoppel precluding reliance on limitation period — Insurance Act, R.S.O. 1980, c. 218, s. 125, statutory condition 14.

2. Did the insurer's admission of liability create a debtor-creditor relationship between the insurer and the insured and thereby an implied promise to pay the insured an amount to be ascertained either by agreement or by a reference, and as such, constitute a separate contract between the insurer and the insured wherein the limitation for suit would be 6 years?

Issue 1: Promissory Estoppel

13 The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, 68 D.L.R. (2d) 354, Ritchie J. stated [at p. 615, S.C.R]:

> It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

This passage was cited with approval by McIntyre J. in *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641, 51 B.C.L.R. 273, 49 C.B.R. (N.S.) 257, 47 N.R. 379, 146 D.L.R. (3d) 577, at p. 647 [S.C.R.]. McIntyre J. stated that the promise must be unambiguous but could be inferred from circumstances.

14 In *Collavino v. Employers' Mutual Liability*, Holland J., in applying these principles to a case in which an admission of liability had been made, stated [at p. 101, C.C.L.I.]:

> Promissory estoppel can prevent the insurer from relying on a limitation period where there has been either (1) an admission of liability of [sic: 'or'] (2) a promise not to rely on the limitation period relied on by the insured.
>
> . . . . .
>
> Before the principle applies there must be some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced.

15 This passage would imply that an admission of liability per se is an alternative basis on which promissory estoppel can be based. In my view, while an admission of liability is clearly one of the factors from which a court may infer as a finding of fact that a promise was made not to rely on the limitation period, it is not an alternate basis of promissory estoppel. In *Gillis v. Bourgard*, the Ontario Court of Appeal, per Brooke J.A., dealt with a case in which an admission of liability was the basis for a claim of promissory estoppel. In concluding that the necessary ingredients for promissory estoppel had not been established, Brooke J.A. stated [at p. 109, O.R.]:

> It seems to us that what occurred here was, at best, no more than normal dealings between parties attempting to resolve an insurance claim. To hold that it could or did give rise to any admission of liability or a promise not to rely upon a condition of the contract, the limitation period, is completely unwarranted and puts in jeopardy the benefit of such dealings to litigants.

16 An admission of liability is frequently made in the course of settlement negotiations. This is often a preliminary step in order to clear the way to enter into a discussion as to quantum. Indeed, when an offer to pay a stated amount is made by one party to the other, an admission of liability is usually implicit. In this type of situation, the admission of liability is simply an acknowledgment that, for the purpose of settlement discussions, the admitting party is taking no issue that he or she was negligent, liable for breach of contract, etc. There must be something more for an admission of liability to extend to a limitation period. The principles of promisor estoppel require that the promissory, by words or conduct, intends to affect legal relations. Accordingly, an admission of liability which is to be taken as a promise not to rely on the limitation period much be such that the trier of fact can infer from it that it was so intended. There must be words or conduct from which it can be inferred that the admission was to apply whether the case was settled or not, and that the only issue between the parties, should litigation ensue, is the issue of quantum. Whether this inference can be drawn is an issue of fact. If this finding is in favour of the plaintiff

TAB 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: 2373322 Ontario Inc. v. Nolis | 2017 ONSC 1518, 2017 CarswellOnt 3220, 84 R.P.R. (5th) 291, 277 A.C.W.S. (3d) 404 | (Ont. S.C.J., Mar 7, 2017)

2000 CarswellOnt 3820
Ontario Superior Court of Justice [Commercial List]

Med-Chem Health Care Inc., Re

2000 CarswellOnt 3820, [2000] O.J. No. 4009, 101 A.C.W.S. (3d) 10

In the Matter of the Bankruptcy of Med-Chem Health Care Inc.

Swinton J.

Heard: October 13, 2000
Judgment: October 24, 2000
Docket: Doc. 31-OR-206247-T

Proceedings: reversing (April 28, 2000), Doc. 31-OR-206247-7 (Ont. Bktcy.)

Counsel: *Nando De Luca* , for Appellant, PricewaterhouseCoopers Inc.
Mr. Louis A. Frapporti , for 1166710 Ontario Inc.

Subject: Insolvency; Contracts
Related Abridgment Classifications
Estoppel
II Estoppel in pais
II.4 Promissory estoppel
II.4.c Miscellaneous
Headnote
Estoppel --- Estoppel in pais — Promissory estoppel
Table of Authorities
Cases considered by *Swinton J.* :
Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd. (1981), [1982] Q.B. 84, [1981] 3 All E.R. 577, [1981] 3 W.L.R. 565 (Eng. C.A.) — referred to
Engineered Homes Ltd. v. Mason, [1983] 1 S.C.R. 641, 146 D.L.R. (3d) 577, 47 N.R. 379, 51 B.C.L.R. 273, 49 C.B.R. (N.S.) 257 (S.C.C.) — applied
Maracle v. Travellers Indemnity Co. of Canada, [1991] I.L.R. 1-2728, 125 N.R. 294, 80 D.L.R. (4th) 652, 47 O.A.C. 333, *(*sub nom. *Travellers Indemnity Co. of Canada v. Maracle)* [1991] 2 S.C.R. 50, 50 C.P.C. (2d) 213, 3 C.C.L.I. (2d) 186, 3 O.R. (3d) 510 (note) (S.C.C.) — applied
Owen Sound Public Library Board v. Mial Developments Ltd. (1979), 8 R.P.R. 113, 102 D.L.R. (3d) 685, 26 O.R. (2d) 459 (Ont. C.A.) — applied
Statutes considered:
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

***Swinton J.* :**

1 PricewaterhouseCoopers Inc., the Trustee in Bankruptcy of the estate of Med-Chem Health Care Inc., appeals a decision of Registrar Ferron dated April 28, 2000, which allowed in part an appeal by 1166710 Ontario Inc. ("116") and set aside the Notices of Disallowance issued by the Trustee in respect of Proofs of Claim filed in the estate of Med-Chem.

2 Med-Chem was the tenant of three properties owned by 116 pursuant to an assignment from the previous tenant, Medical Sciences Laboratories of Newmarket Ltd. ("MSL"). The assignment was made as part of an asset purchase agreement in October, 1996. Dr. Sultan Alvi was the principal of Med-Chem, MSL and 116.

3 From the outset of its tenancy to two months prior to its bankruptcy on February 1, 1999, Med-Chem paid the same monthly rents in respect of the three properties: $16,000.00, $4,012.50 and $8,025.00. In an affidavit, Salim Virani, the controller at Med-Chem from July, 1996 to February, 1999, stated that he requisitioned and authorized the monthly rent cheques payable by Med-Chem by reference to a payment schedule drawn up by Sharmi Joshi, Dr. Alvi's longtime personal assistant. That list was lengthy and contained about 200 to 250 properties. Virani never saw any written offers to lease respecting the properties in issue.

4 At some time in mid-1998, close to the time at which Med-Chem sought protection under the *Companies' Creditors Arrangement Act* in December, written leases were produced by Dr. Alvi at the request of Tom Davies, who was involved in restructuring efforts at Med-Chem. These documents, dated in 1992, showed that the rents actually being paid were not those originally specified in the leases. Instead, the amounts set out in the offers to lease were $21,666.67; $7,166.67, and $7,000.00. Thus, in two cases, the rents paid were lower than specified and in one case, higher. Nevertheless, there was no change in the amount paid by Med-Chem after the disclosure.

5 After 116 went into default on its mortgage on November 15, 1998, a receiver was appointed by the mortgagee. The receiver filed two Proofs of Claim in the bankruptcy proceedings, claiming that rental payments were owed by Med-Chem for the period from February, 1996 to January, 1999 inclusive. These claims were disallowed in part by the Trustee, who determined on April 4, 2000 that the landlord had a priority claim of $8,500.00 and an unsecured claim of $22,250.80. On appeal, Registrar Ferron determined that 116 could file a Proof of Claim for $232,571.71, which is the difference between the rents paid by Med-Chem and the amounts set out in the three offers to lease from November, 1996 to the date of the bankruptcy.

6 On this appeal, the Trustee did not take issue with the determination that the written offers to lease were binding documents. However, the Trustee argued that 116 was barred from relying on those documents because of the doctrines of promissory estoppel and waiver. The Registrar had held that these doctrines did not apply. In the course of his reasons, he stated that there was no clear and unequivocal promise by the landlord for the reduction of rent. Specifically, he stated that there had never been discussions or negotiations between the tenant and landlord for a reduction of rent. He then went on to conclude that there was no evidence of detrimental reliance by the tenant. Finally, he stated in several places in his reasons that there was evidence that the landlord and tenant were in a state of confusion about the true rent, and that the landlord thought it was receiving the appropriate rent. He concluded that the landlord could not have waived a right it never knew it had.

7 For the doctrine of promissory estoppel to apply, there must be a clear and unequivocal promise or assurance that strict legal rights will not be relied upon, an intention to affect legal relations, and reliance on the promise or assurance. However, there need not be an oral promise that a party will not rely on its legal rights, as the Registrar seems to assume in his reasons. In *Maracle v. Travellers Indemnity Co. of Canada* (1991), 80 D.L.R. (4th) 652 (S.C.C.) , Sopinka J. stated, "The principles of promissory estoppel require that the promissor, *by words or conduct* , intend to affect legal relations" (at 658, emphasis added). Sopinka J. also noted that McIntyre J. in an earlier judgment had stated that "the promise must be unambiguous but could be inferred from circumstances" (*Engineered Homes Ltd. v. Mason* (1983), 146 D.L.R. (3d) 577 (S.C.C.) at 581, discussed at 657).

8 The Ontario Court of Appeal, in *Owen Sound Public Library Board v. Mial Developments Ltd.* (1979), 102 D.L.R. (3d) 685 (Ont. C.A.) , emphasized the importance to the doctrine of promissory estoppel of finding an intention to affect legal relations. With respect to proof of that element, Lacourcière J.A. stated, "Knowledge by the promisor that the promisee is likely to regard the promise as affecting their legal relations constitutes an appropriate basis from which the inference of the existence of a sufficient intent can be drawn" (at 693).

9 The Registrar erred in requiring that there be express words before there can be a clear or unequivocal promise, since promissory estoppel can arise where the conduct of the promisor indicates an intention not to rely on contractual rights. As well, he erred in holding that there must be detrimental reliance on the part of the promisee, rather than reasonable reliance by the promisee (see *Maracle* , *supra* at 656).

10 Having reviewed the evidence, I am satisfied that the doctrines of promissory estoppel and waiver apply here. There was a course of conduct over an extended period that showed an intention by the landlord not to rely on the strict terms of the lease with respect to the amount of the rent. There was also reliance by the tenant, shown by its payment of the rents specified in the schedule provided to its controller. More precisely, according to the evidence before the Registrar, the same rents had been paid by Med-Chem from November, 1996 — a period of more than two years before the bankruptcy. These rents were always the same and never those prescribed in the offers to lease. Dr. Alvi was the principal of both the landlord company and the tenant, and it was his personal assistant who had instructed the tenant's controller as to the amounts of rent to be paid. Not only were those amounts paid without protest for two years by Med-Chem; the same amounts had been paid by MSL, another Alvi company, before that — at least, from February, 1996 when 116 took over ownership of the three properties. At the time that Med-Chem purchased the assets of MSL, Dr. Alvi signed a document, in his capacity as landlord, stating that there was no outstanding breach of any obligation of the tenant under the lease. Therefore, the landlord is estopped from claiming the higher rent at this time.

11 Closely connected to the doctrine of promissory estoppel is the doctrine of waiver. The Registrar concluded that this doctrine could not apply because the landlord was mistaken with respect to its legal rights. However, a review of the evidence shows that there is no evidence of what the landlord thought in respect of the amount of rent. In fact, as noted above, the record shows that there was a clear and consistent pattern of payment by Med-Chem of rents that did not match the amounts set out in the written offers to lease and an acceptance of those amounts by 116, without protest. I see nothing in the affidavit evidence or cross-examination that suggests the landlord was mistaken about its legal rights, despite the Registrar's references to what the landlord "thought" in his reasons. Effectively, the landlord was Dr. Alvi, the principal, and it was his assistant who instructed the controller of the tenant, Med-Chem, what to pay. In the circumstances, the logical inference to be drawn from those facts and the lengthy course of conduct between the landlord and tenant was that the acceptable rent was the amount actually paid by the tenant, not that set out in the written offers to lease.

12 Moreover, even where parties are mistaken with respect to their rights, the courts have at times applied the doctrine of estoppel (see, for example, *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.* (1981), [1982] Q.B. 84 (Eng. C.A.) at 122). On the facts here, both the landlord and the tenant have conducted themselves as if the correct rents were those actually paid by Med-Chem. In these circumstances, it would be inequitable to revert to the terms of the written leases now, given their course of conduct.

13 Counsel for the respondent, on behalf of the receiver of 116, argued that neither promissory estoppel nor waiver can operate because Dr. Alvi was the directing mind of both the landlord and the tenant. While there may be cases where that is true, I do not accept this as a general proposition. Even though Dr. Alvi was the principal of both corporations, there were separate legal entities involved here as landlord and tenant, which arranged their affairs in a certain way over a lengthy period of time. This is not a case where there is evidence that a lower rent was paid to the landlord company by a related company as tenant in order to defeat the expectations of its creditors, and where it might, as a consequence, be inequitable to apply the doctrines of promissory estoppel or waiver. In this case, there would be inequity if the creditors of 116 could claim the amounts of rent in the written offers to lease to the detriment of Med-Chem's creditors, without regard to the course of dealing between 116 and Med-Chem.

14 While the respondent argued that the Trustee had failed to observe its duty to act in an even-handed manner between the creditors, in failing to consult with Dr. Alvi and/or Tom Davies with respect to this matter, there is no basis for such a finding. The Trustee took reasonable steps to investigate the validity of the claim by the landlord, and had sufficient information to determine that the claim should not be allowed beyond the amount set out in the Notice of Disallowance dated April 4, 2000.

15 The appeal is allowed, and the Registrar's order is set aside. The Notices of Disallowance issued by the Trustee on July 20, 1999 and April 4, 2000 in respect of 116's Proof of Claim are upheld. If the parties are unable to agree with respect to costs, they may make brief written submissions.

TAB 3

COURT FILE NUMBER:	B201-731795 B201-731797 B201-731799
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	CALGARY
MATTERS:	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C.B-3, AS AMENDED, OF INTERNATIONAL FITNESS HOLDINGS INC. INTERNATIONAL FITNESS HOLDINGS LP WORLD HEALTH NORTH LP
APPLICANT:	TESLIN INVESTMENTS LTD.

QUESTIONING ON AFFIDAVIT

OF

JEFFERY BAKER
(VIA VIDEOCONFERENCE)

Taken in Edmonton, Alberta, on the 7th day of June, A.D. 2021.

K. Fellowes	Appeared for International Fitness
H. Sniderman	Appeared for Teslin Investments And Jeff Baker
M.C. McNeely, CSR(A)	Court Reporter

---

* UNDERTAKINGS *

NO.	PAGE	DESCRIPTION
1	38	CONFIRM IF THE RENTAL RATE OF $16.50 PER SQUARE FOOT WAS IN EFFECT IN NOVEMBER OF 2020
2	40	CONFIRM WAS RENTAL AMOUNT WAS BEING PAID IN 2021

---

* UNDERTAKINGS HAVE BEEN INSERTED AND INDEXED *

AS A COURTESY SERVICE TO COUNSEL TO BE

UTILIZED AT THEIR DISCRETION

of the 2012 lease?

A Yes.

Q Great. And did you have other parties assisting you like a leasing agent or a property manager at the time?

A A leasing agent. Yeah.

Q And I understand that the 2012 lease was for a term of 14 years, I believe?

A To 2025, I believe.

Q I think it was 2026.

A Okay.

Q If you look, sir, at paragraph five of your affidavit.

A Okay. Hold on. Yeah, 2026. You're right.

Q Okay. Right.

A Yeah.

Q And I'm -- I'm referring again, sir, to paragraph five of your affidavit. And it refers to a lease term of 14 years and three months with a minimum rent expressed on an increasing scale starting at $7 per square foot for the initial -- looks like the initial year or so, and then increasing to $12.50 per square foot for another four years, and then up to $14.50 for the next looks like about three years, and then finally for the last six years an increase of $16.50 per square foot.

Sir, can you confirm to the best of your knowledge that those rental rate increases did come into effect at the times and dates as indicated in your affidavit and were paid accordingly?

A Yes, they were.

Q So just to confirm, since November 1st of 2020, which was only about six months ago, a little over six months ago now, you have been receiving rent on the basis of a base rent payment, or a minimum rent payment, sorry, of $16.50 per square foot?

A I believe so.

Q Okay. Thank you. Sir, can you tell me about this property? Is -- my client, of course is International Fitness Holdings LP and World Health North LP. And they are sort of the successor corporations with respect to an operation known -- formally known as Worlds Gym or Spa Lady North and more recently operating under the brands Club Fit and GYMVT and HER GYMVT.

Sir, can you tell me at the time the 2012 lease was entered into, has there been continuously and in operation a fitness club facility in the leased premises?

A Yes, there has. The whole time.

TAB 4

Cabot Insurance Company Limited and Rex Gilbert Moore, deceased, by his Administratrix, Muriel Smith *Appellants*

v.

Peter Ryan *Respondent*

Indexed as: Ryan *v.* Moore

Neutral citation: 2005 SCC 38.

File No.: 29849.

2004: December 7; 2005: June 16.

Present: McLachlin C.J. and Major, Bastarache, LeBel, Deschamps, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR

Limitation of actions — Survival of action against deceased — Limitation periods — Estoppel by convention — Estoppel by representation — Discoverability rule — Confirmation of cause of action — Limitation period under Survival of Actions Act expiring one year after death of party to action or six months after date when letters of administration granted — Statement of claim for damages in relation to motor vehicle accident issued against defendant within two-year limitation period prescribed by Limitations Act — Defendant's death unknown to plaintiff until after shorter limitation period in Survival of Actions Act had expired — Whether doctrine of estoppel by convention or by representation applicable to prevent defendant from raising limitation defence — Whether confirmation of cause of action or discoverability rule applicable to extend limitation period of Survival of Actions Act — Survival of Actions Act, R.S.N.L. 1990, c. S-32, s. 5 — Limitations Act, S.N.L. 1995, c. L-16.1, ss. 5, 16.

Estoppel — Estoppel by convention — Requirements — Whether requirements of doctrine of estoppel by convention met.

Estoppel — Estoppel by representation — Limitation of actions — Whether defendant's silence regard-

Cabot Insurance Company Limited et feu Rex Gilbert Moore, représenté par son administratrice Muriel Smith *Appelants*

c.

Peter Ryan *Intimé*

Répertorié : Ryan *c.* Moore

Référence neutre : 2005 CSC 38.

N° du greffe : 29849.

2004 : 7 décembre; 2005 : 16 juin.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, LeBel, Deschamps, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DE TERRE-NEUVE-ET-LABRADOR

Prescription — Survie d'une action intentée contre une personne décédée — Délais de prescription — Préclusion par convention — Préclusion par assertion de fait — Règle de la possibilité de découvrir le dommage — Confirmation de la cause d'action — Délai de prescription prévu par la Survival of Actions Act expirant un an après le décès d'une partie à une action ou six mois après la date de délivrance de lettres d'administration — Déclaration relative à un préjudice résultant d'un accident d'automobile déposée contre le défendeur avant l'expiration du délai de prescription de deux ans fixé par la Limitations Act — Demandeur apprenant le décès du défendeur seulement après l'expiration du délai de prescription plus court établi par la Survival of Actions Act — La règle de la préclusion par convention ou par assertion de fait empêche-t-elle le défendeur d'invoquer la prescription comme moyen de défense? — La confirmation de la cause d'action ou la règle de la possibilité de découvrir le dommage a-t-elle pour effet de prolonger le délai de prescription prévu par la Survival of Actions Act? — Survival of Actions Act, R.S.N.L. 1990, ch. S-32, art. 5 — Limitations Act, S.N.L. 1995, ch. L-16.1, art. 5, 16.

Préclusion — Préclusion par convention — Conditions — Les conditions de la règle de la préclusion sont-elles remplies?

Préclusion — Préclusion par assertion de fait — Prescription — Le silence du défendeur concernant le

representation applies to the facts of the present case. Ryan argues that the appellants are precluded or estopped from relying on the limitation period in the *Survival of Actions Act* because of the application of either of these two types of estoppel.

50 While the principle of estoppel is often referred to in connection with cases of waiver, election, abandonment, acquiescence and laches, in the context of commercial and contractual relationships, the case law in Canada on this subject is not as abundant as that in the United Kingdom. It is therefore useful for this Court to address the issue in some detail, especially where it has long been accepted that estoppels are to be received with caution and applied with care (see *Harper v. Cameron* (1892), 2 B.C.R. 365 (Div. Ct.), at p. 383).

51 The state of the law of estoppel was articulated by Lord Denning in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 (C.A.), at p. 122, as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

prétendent que ni la préclusion par convention ni la préclusion par assertion de fait ne s'applique aux faits de la présente affaire. Selon M. Ryan, les appelants sont préclus d'invoquer le délai de prescription fixé par la *Survival of Actions Act* en raison de l'application de l'un ou l'autre de ces deux types de préclusion.

Bien que la règle de la préclusion soit souvent mentionnée à l'égard d'affaires de renonciation, d'exercice d'un choix, d'abandon, d'acquiescement et de manque de diligence dans le contexte de rapports commerciaux et contractuels, la jurisprudence canadienne sur ce sujet n'est pas aussi abondante que celle du Royaume-Uni. Il est donc utile que notre Cour procède à un examen assez approfondi de la question, d'autant plus qu'il est reconnu depuis longtemps que les préclusions doivent être admises avec prudence et appliquées avec soin (voir *Harper c. Cameron* (1892), 2 B.C.R. 365 (Div. Ct.), p. 383).

Dans l'arrêt *Amalgamated Investment & Property Co. (In Liquidation) c. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 (C.A.), p. 122, lord Denning a décrit ainsi l'état du droit en matière de préclusion :

> [TRADUCTION] La règle de la préclusion est l'une des plus souples et des plus utiles de l'arsenal du droit. Cependant, elle a été appliquée dans une multitude d'affaires. C'est pourquoi je ne les ai pas toutes examinées dans le présent jugement. Cette règle a connu, au cours des 150 dernières années, une évolution en plusieurs étapes : la préclusion propriétale, la préclusion par assertion de fait, la préclusion par acquiescement et la préclusion promissoire. On a par ailleurs cherché à en limiter la portée au moyen d'une série de maximes : la préclusion n'est qu'une règle de preuve, la préclusion ne peut pas donner naissance à une cause d'action, la préclusion n'élimine pas la nécessité de s'interroger, et ainsi de suite. On peut maintenant considérer que toutes ces maximes forment une seule règle générale dénuée de restriction. Lorsque les parties à une opération se fondent sur une présupposition sous-jacente — de fait ou de droit — peu importe qu'elle découle d'une affirmation inexacte ou d'une erreur — qui a guidé leurs rapports —, aucune d'elles ne peut revenir sur cette présupposition lorsqu'il serait inéquitable ou injuste de lui permettre de le faire. Si l'une des parties souhaite revenir sur la présupposition, les tribunaux accorderont à l'autre partie la réparation qui s'impose en equity.

The jurisprudence discloses six types of estoppel: estoppel by representation of fact, proprietary estoppel, promissory estoppel, estoppel by convention, estoppel by deed and estoppel by negligence (see Bower, at pp. 3-9). I will examine here the ones at the centre of this dispute, estoppel by convention and estoppel by representation.

(1) Estoppel by Convention

(a) *Definition and Principles*

The origin of the doctrine of estoppel by convention can be traced to estoppel by deed for which sealing and delivery were essential, and for which the foundation of duty lay not in the agreement itself, or any reliance thereon, but in the formal solemnity of the deed, reflecting the concern of ancient jurisprudence with form as opposed to substance. The modern rule has evolved enormously (see Bower, at pp. 179-80; T. B. Dawson, "Estoppel and obligation: the modern role of estoppel by convention" (1989), 9 *L.S.* 16).

Bower defines the modern concept of estoppel by convention as follows (at p. 180):

> An estoppel by convention, it is submitted, is an estoppel by representation of fact, a promissory estoppel or a proprietary estoppel, in which the relevant proposition is established, not by representation or promise by one party to another, but by mutual, express or implicit, assent. This form of estoppel is founded, not on a representation made by a representor and believed by a representee, but on an agreed statement of facts or law, the truth of which has been assumed, by convention of the parties, as a basis of their relationship. When the parties have so acted in their relationship upon the agreed assumption that the given state of facts or law is to be accepted between them as true, that it would be unfair on one for the other to resile from the agreed assumption, then he will be entitled to relief against the other according to whether the estoppel is as to a matter of fact, or promissory, and/or proprietary.

52 Six types de préclusion se dégagent de la jurisprudence : la préclusion par assertion de fait, la préclusion propriétale, la préclusion promissoire, la préclusion par convention, la préclusion du fait d'un acte formaliste et la préclusion fondée sur la négligence (voir Bower, p. 3-9). J'examinerai ici celles qui sont au cœur du présent litige, soit la préclusion par convention et la préclusion par assertion de fait.

(1) Préclusion par convention

a) *Définition et principes*

53 Les origines de la règle de la préclusion par convention remontent à la préclusion du fait d'un acte formaliste, pour laquelle le cachetage et la remise étaient essentiels et où le fondement de l'obligation résidait non pas dans la convention elle-même, ou dans le fait de s'y fier, mais dans le caractère solennel et officiel de l'acte, ce qui traduisait l'intérêt de la jurisprudence ancienne pour la forme plutôt que pour le fond. La règle moderne a changé énormément (voir Bower, p. 179-180; T. B. Dawson, « Estoppel and obligation : the modern role of estoppel by convention » (1989), 9 *L.S.* 16).

54 Bower définit ainsi la notion moderne de préclusion par convention (p. 180) :

> [TRADUCTION] La préclusion par convention, soutient-on, est une préclusion par assertion de fait, une préclusion promissoire ou une préclusion propriétale où la proposition pertinente est établie non par voie d'assertion ou de promesse faite par une partie à une autre, mais par voie d'assentiment réciproque, exprès ou implicite. Cette forme de préclusion repose non pas sur une assertion faite par une personne et crue par celle à qui elle est destinée, mais sur un exposé conjoint des faits ou du droit dont la véracité est supposée constituer, par convention entre les parties, un fondement de leurs rapports. Lorsque, dans leurs rapports, les parties ont agi en fonction de la présupposition conventionnelle qu'elles devraient tenir pour véridique l'état de fait ou de droit en question, de sorte qu'il serait inéquitable pour l'une d'elles que l'autre revienne sur cette présupposition conventionnelle, alors cette partie aura un recours contre l'autre selon qu'il s'agit d'une préclusion relative à une question de fait, ou encore d'une préclusion promissoire ou propriétale, ou les deux à la fois.

55 S. Wilken, *Wilken and Villiers: The Law of Waiver, Variation and Estoppel* (2nd ed. 2002), at p. 223, affirms that estoppel by convention will occur where:

(i) the parties have established, by their construction of their agreement or a common apprehension as to its legal effect, a convention basis; (ii) on that basis the parties have regulated their subsequent dealings; (iii) one party would suffer detriment if the other were to be permitted to resile from that convention.

See also *Chitty on Contracts* (29th ed. 2004), vol. 1, at p. 283.

56 The Court of Appeal of Newfoundland and Labrador, after a review of the case law in the United Kingdom and in Canada, formulated the following four elements which need to be proven (at para. 79):

(i) The evidence establishes an assumption in common between the parties as to a state of facts;

(ii) The parties have adopted the common assumption as the conventional basis for a transaction into which they have entered;

(iii) The dispute in respect of which the estoppel by convention is asserted arises out of that transaction; and,

(iv) A detriment would flow to the party asserting the estoppel if the other party is permitted to resile from the assumed stated facts.

These requirements were accepted by the respondent.

57 The appellants submit that there are six requirements for the estoppel by convention. They cite as support the New Zealand Court of Appeal decision in *National Westminster Finance NZ Ltd. v. National Bank of NZ Ltd.*, [1996] 1 N.Z.L.R. 548, at p. 550. In fact, they simply advocate a more detailed description of the requirements also found in other foreign cases.

58 The jurisprudence in the United Kingdom is indeed abundant in contrast to that in Canada (see,

Dans *Wilken and Villiers : The Law of Waiver, Variation and Estoppel* (2e éd. 2002), p. 223, S. Wilken affirme qu'il y a préclusion par convention lorsque :

[TRADUCTION] (i) les parties ont, par leur interprétation de leur convention ou par leur compréhension commune de ses effets juridiques, établi un fondement conventionnel; (ii) les parties ont réglé leurs rapports subséquents sur ce fondement; (iii) une des parties subirait un préjudice s'il était permis à l'autre partie de revenir sur cette convention.

Voir également *Chitty on Contracts* (29e éd. 2004), vol. 1, p. 283.

Après avoir examiné la jurisprudence du Royaume-Uni et du Canada, la Cour d'appel de Terre-Neuve-et-Labrador a énoncé les quatre éléments suivants qui doivent être prouvés (par. 79) :

[TRADUCTION]

(i) la preuve établit l'existence d'une présupposition commune aux parties quant à un état de fait;

(ii) les parties ont adopté la présupposition commune comme fondement conventionnel de l'opération qu'elles ont conclue;

(iii) le litige à l'égard duquel la préclusion par convention est invoquée découle de cette opération;

(iv) la partie qui invoque la préclusion subirait un préjudice s'il était permis à l'autre partie de revenir sur l'état de fait présupposé.

L'intimé a reconnu ces conditions.

Les appelants affirment que six conditions doivent être remplies pour qu'il y ait préclusion par convention. À l'appui de cette affirmation, ils citent l'arrêt de la Cour d'appel de la Nouvelle-Zélande *National Westminster Finance NZ Ltd. c. National Bank of NZ Ltd.*, [1996] 1 N.Z.L.R. 548, p. 550. En fait, ils préconisent simplement une description plus détaillée des conditions qui sont également énoncées dans d'autres décisions étrangères.

La jurisprudence du Royaume-Uni est effectivement abondante comparativement à celle qui existe

e.g., *The "Indian Grace"*, [1998] 1 Lloyd's L.R. 1 (H.L.), at p. 10; *The "August Leonhardt"*, [1985] 2 Lloyd's L.R. 28 (C.A.), at pp. 34-35; *The "Vistafjord"*, [1988] 2 Lloyd's L.R. 343 (C.A.), at pp. 349-53).

This Court is not bound by any of the above analytical frameworks. After having reviewed the jurisprudence in the United Kingdom and Canada as well as academic comments on the subject, I am of the view that the following criteria form the basis of the doctrine of estoppel by convention:

(1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly).

(2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.

(3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

See Wilken, at pp. 227-28; *Canacemal Investment Inc. v. PCI Realty Corp.*, [1999] B.C.J. No. 2029 (QL) (S.C.), at para. 35; *Capro Investments Ltd. v. Tartan Development Corp.*, [1998] O.J. No. 1763 (QL) (Gen. Div.), at para. 31.

(b) *Application of the Law*

The majority of the Court of Appeal held that estoppel by convention applied in the circumstances of this case. It concluded that there was an assumption between the parties as to a state of facts, namely: that Moore was alive; that the parties adopted this assumption as the basis upon which

au Canada (voir, par exemple, *The « Indian Grace »*, [1998] 1 Lloyd's L.R. 1 (H.L.), p. 10; *The « August Leonhardt »*, [1985] 2 Lloyd's L.R. 28 (C.A.), p. 34-35; *The « Vistafjord »*, [1988] 2 Lloyd's L.R. 343 (C.A.), p. 349-353).

59 Notre Cour n'est liée par aucun des cadres analytiques susmentionnés. Après avoir examiné la jurisprudence du Royaume-Uni et du Canada ainsi que les commentaires de certains auteurs sur le sujet, j'estime que les critères suivants constituent le fondement de la règle de la préclusion par convention :

(1) Les rapports des parties doivent avoir reposé sur une présupposition de fait ou de droit commune : la préclusion exige qu'une assertion manifeste émanant d'une déclaration ou d'une conduite ait créé une présupposition commune. La préclusion peut néanmoins résulter (implicitement) d'un *silence*.

(2) Une partie doit avoir agi sur la foi de cette présupposition commune, et ses actes doivent avoir entraîné une modification de sa situation juridique.

(3) Il doit également être injuste ou inéquitable de permettre à l'une des parties de revenir sur la présupposition commune ou de s'en écarter. La partie qui cherche à établir la préclusion doit donc démontrer que, s'il est permis à l'autre partie de revenir sur la présupposition, elle subira un préjudice en raison du changement de la situation présupposée.

Voir Wilken, p. 227-228; *Canacemal Investment Inc. c. PCI Realty Corp.*, [1999] B.C.J. No. 2029 (QL) (C.S.), par. 35; *Capro Investments Ltd. c. Tartan Development Corp.*, [1998] O.J. No. 1763 (QL) (Div. gén.), par. 31.

b) *Application du droit*

60 La Cour d'appel, à la majorité, a décidé que la préclusion par convention s'appliquait en l'espèce. Elle a conclu que les parties avaient présupposé l'existence d'un état de fait, à savoir que M. Moore était vivant, que les parties avaient convenu d'agir sur la foi de cette présupposition dans leurs

TAB 5

CITATION: Dundee Oil and Gas Limited (Re), 2018 ONSC 3678
COURT FILE NO.: CV-18-591908-00CL
DATE: 20180613

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DUNDEE OIL & GAS LIMITED

BEFORE: S.F. Dunphy J.

COUNSEL: *E. Patrick Shea and B. Arnold* for the Applicants

Grant Moffat and Rachel Bengino, for the Monitor FTI Consulting Canada Inc.

J. Wallace for purchaser Lagasco Inc.

S. Kromkamp and B. McPherson for HMQ in right of Ontario

Aubrey E. Kauffman for the National Bank of Canada

M. P. Gottlieb for Canadian Overseas Petroleum Limited

HEARD at Toronto: June 11, 2018

REASONS FOR DECISION

[1] Dundee Oil and Gas Limited brought an application, supported by the Monitor, seeking approval of a sale of substantially all of its assets before me on May 23, 2018. I approved the proposed sale subject to requiring further evidence regarding the requested assignment of executory contracts under s. 11.3 of the *Companies' Creditors Arrangement Act* on June 11, 2018.

[2] The matter came back before me on June 11, 2018 where, based upon the new evidence filed, I approved the transaction including the assignment of the executory contracts with reasons to follow. These are those reasons.

Background facts

[3] Dundee entered into an Asset Purchase Agreement subject to court approval dated April 4, 2018. The sale was the result of a long process that began in August 2017 when Dundee was operating under the protection of the proposal provisions of the *Bankruptcy and Insolvency Act*. Those proceedings were continued under the CCAA on February 13, 2018.

[4] Dundee's assets consist primarily of a large number of petroleum and natural gas leases as well as associated equipment, gathering pipelines, etc. Many of the assets are in fact leased or are otherwise the subject of contractual arrangements between Dundee and the owner of the affected land. Accordingly, a significant aspect of the proposed sale transaction was a requirement that an assignment of the underlying contracts be accomplished by an order pursuant to s. 11.3 of the CCAA.

[5] On May 23, 2018 I indicated to the parties that I was satisfied with the necessity and advisability of ordering the requested relief and the process leading up to it save and except one aspect. In approving an assignment using the authority vested in me by s. 11.3 of the CCAA, I am required to inquire into a number of matters about which I found the record before me that day to be deficient. One landowner, Mr. Whittle, had made a formal objection and availed himself of the opportunity to express his concerns by telephone. He raised a number of objections to what he perceived to be concerns regarding the operational stability of the purchaser and their ability to see to eventual remediation obligations.

[6] During the course of the hearing, the Applicant indicated that the purchaser was prepared to proceed without an order compelling the assignment of agreements between Dundee and Mr. Whittle. The Applicant's position was that the form of agreements used in the case of Mr. Whittle's contracts at least required no consent for a valid assignment. The Purchaser was prepared to run the risk of that assessment proving accurate in Mr. Whittle's case.

[7] In the result, I adjourned the hearing until June 11, 2018 in order to grant the applicant additional time to address the concerns raised by me regarding s. 11.3 of the CCAA. I indicated that there were no other issues.

[8] The specific concerns raised by me were these:

a. The operation of a natural resource extraction business such as an oil and gas business is one that entails a degree of environmental risk that, in the event of insolvency of the lessee/contract holder may visit the remediation or well-capping costs upon the landowner, a factor that makes the capacity and ability of the proposed assignee to manage those

responsibilities a matter of concern when assessing the suitability of the proposed assignee; and

b. The affidavit material at the motion provided no solid evidence of the expected financial stability or durability of the purchaser post-closing, a rather critical factor to assess in considering the suitability of a proposed assignee.

[9] Three things happened during the intervening delay, two planned one unexpected.

[10] Firstly, the Monitor arranged to notify the landowners of the delay. No further objections were received from that front. Mr. Whittle maintained his objection despite the Applicant's concession that it was not seeking to compel assignment of his agreements.

[11] Secondly, the Applicant filed a Supplementary Affidavit of Jane Lowrie, President and Chief Executive Officer of Lagasco Inc, the purchaser sworn June 5, 2018. This affidavit provided further details regarding the financial status of the purchaser.

[12] Lastly, one of the "runner-up" bidders (Canadian Overseas Petroleum Limited) sent a letter to the Monitor on June 7, 2018 which letter COPL decided to send directly to the court on June 8, 2018 when the Monitor did not agree to bring the letter to my attention directly.

[13] This intervention generated a flurry of reaction or overreaction, depending upon your point of view. It was, in the final analysis, a tempest in a teacup.

[14] The Applicant and National Bank (who strongly supports the sale and, despite the sale, will end up with a significant shortfall on its secured claim) were understandably taken aback by a last-second threat to a transaction they have worked very hard to bring to the threshold of completion and that, from their perspective at least, is clearly the best option available. They asked me not to consider the submissions of a mere "bitter bidder".

[15] They needn't have had so little faith in the editorial judgment of the court. COPL had experienced counsel who was well aware of the stiff currents flowing against any attempt of an unsuccessful bidder to gain standing to upset a transaction. There was no request for standing. The principal message of the communication was an opportunistic one perhaps, but not unfair. In light of the issues raised on May 23, 2018, COPL wanted to remind the Monitor and eventually the court that it remains ready willing and able to move forward with a transaction should Lagasco drop the ball. Of course, COPL did not resist ensuring that a few helpful bits of analysis/argument that might serve to persuade the court to think about moving in that direction also managed

to find their way into the communication. It was not an attempt to introduce fresh evidence through the back door.

[16] As I remarked during the hearing, I did not fall off the turnip truck yesterday. The motivation behind the communication was not cloaked nor was its simple object.

[17] A few take-away admonitions from this:

a. Communications directly with the judge are to be discouraged generally;

b. Where necessary, such communications should be copied to the service list generally absent some very compelling reason not to do so; but

[18] I would have preferred that this course of conduct had been followed here. The Monitor was copied and the integrity of the process was in no way compromised.

[19] The substantive question before me was whether I ought to approve the provisions of the requested approval and vesting order that would compel the assignment of certain executory contracts under s. 11.3 of the CCAA.

[20] Section 11.3 of the CCAA authorizes the court to assign "the rights and obligations of the company" to an agreement to any person specified in the court order that is willing to accept the assignment. Post-filing contracts, eligible financial contracts and collective agreements may not be assigned in this fashion.

[21] There was no issue in this case with the technical aspects of the case. Proper notice was given. No prohibited categories of contracts were proposed to be assigned. The terms of the proposed assignment were designed to ensure the payment of cure costs would be made. A procedure for resolving any disputes about cure costs was designed to avoid compromising the rights of affected parties.

[22] The issue to be decided was whether this was an appropriate case for me to exercise my jurisdiction to make the order under s. 11.3. Section 11.3 does not provide an exhaustive code of the factors for me to consider. Rather, s. 11.3(3) lists three factors that, among others, I am to consider:

> (a) whether the monitor approved the proposed assignment;
>
> (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
>
> (c) whether it would be appropriate to assign the rights and obligations to that person.

[23] In the present case, the Monitor has approved the proposed assignments and has made detailed and thoughtful submissions to me outlining the basis of that approval. The concerns expressed by me on May 23, 2018 did not fall on deaf ears.

[24] The purchaser Lagasco is largely a shell company for the time being. It will own the business being purchased. The evidence before me indicates that substantially all of the purchase price is to be debt financed – partly through financing secured by the equipment to be purchased and party through a credit facility. On day one there will be little to no equity in the purchaser and the significant leverage will have to be serviced entirely from cash flow.

[25] Taken in isolation, this factor raised grave concerns in my mind as to whether the assignee would be able to perform the obligations or whether, in light of the potential fragility of the assignee, it would be appropriate to compel the contract counterparties to accept the assignee.

[26] I still have those concerns. I think it helpful that I should elaborate somewhat on what the concerns are and how I have resolved them. The Monitor's dispassionate and frank analysis of the issues has been very helpful in this process.

[27] Section 11.3 of the CCAA is an extraordinary power. It permits the court to require counterparties to an executory contract to accept future performance from somebody they never agreed to deal with. But for s. 11.3 of the CCAA, a counterparty in the unfortunate position of having a bankrupt or insolvent counterpart might at least console themselves with the thought of soon recovering their freedom to deal with the subject-matter of the contract. Unlike creditors, the counterparty subjected to a non-consensual assignment will be required to deal with the credit-risk of an assignee post-insolvency and potentially for a long time. Creditors, on the other hand, will generally be in a position to take their lumps and turn the page.

[28] Of course, insolvency is not always a catastrophe for such counterparties. Sometimes it is a godsend. Assets locked into long-term contracts at advantageous prices may be freed up to allow the counterparty to re-price to current market. In such cases, the creditors are at risk of seeing the debtor lose critical assets while the counterparty receives an unexpected windfall. The business and value of the debtor's assets may evaporate in the process – be it from one large contract lost or many smaller ones.

[29] Bankruptcy and insolvency always involves a balancing of a number of such competing interests. Creditors, contract counterparties - all of these have rights arising under agreements with the debtor that are either actually compromised or at risk of being compromised by insolvency. The CCAA and BIA regimes are predicated on facilitating a pragmatic approach to minimize the damage arising from insolvency more than they are concerned to advance the interests of one stakeholder over another.

[30] It seems to me that a fundamental condition precedent to requiring a contract counterpart to be locked into an involuntary assignment post-insolvency is that the court sanctioning the assignment is able to conclude that the assignee will, in the words of s. 11.3(3)(b) of the CCAA, "be able to perform the obligations". This does not imply iron-clad guarantees. It does not give license to the counterparty to demand the receipt of financial covenants or assurances that it did not previously enjoy under the contract it originally negotiated with the debtor.

[31] A proposed purchaser starting life with close to 100% leverage gives this judge a considerable degree of heartburn when it comes to answering the question of whether the assignee is a person who will be able to perform the obligations. That concern is amplified when one adds the prospect of landowners being made liable for environmental remediation caused by lessees and others on their land.

[32] So, if that is my concern, by what process have I allayed it?

[33] Firstly, the financial information before me is that cash flow from these operations has been quite solid. Dundee's insolvency has not been a result of operating losses.

[34] Secondly, while any projection of future business results will always be subject to a number of contingencies and imponderables outside of the control of the parties, the forecast reserves prepared by Deloitte in this case have been prepared under NI 51.01 which means at the very least that they have been prepared to reviewable standards of reasonableness. The forecasts, such as they are, justify the inference that there is a *reasonable basis* to conclude that the cash flow from the acquired assets will sustain operations and the acquisition debt. It will be a while before an equity cushion will be built though.

[35] Thirdly, the purchaser has a plan to reduce G&A and operating costs to provide a further margin of safety and a level of institutional experience to make such a plan credible.

[36] Fourthly, the environmental risk is mitigated somewhat by the fact that Ontario's regulatory model operates on a "pay as you play" basis requiring the building of reserves to handle capping costs as wells move past their expected lives. Dundee has had no trouble in the past funding capping expenses from operations and these expenses are accounted for in the cash flow forecasts used.

[37] Finally, the MNR has agreed to a voluntary assignment of its leases (off-shore) while no on-shore landowners have seen fit to object to the proposed assignments despite quite adequate notice being given.

[38] I must also be mindful that contract counterparties are not expected to *improve* their situation by reason of an assignment. A counterpart to an executory contract that is subject to involuntary assignment under s. 11.3 of the CCAA has managed to find

itself contractually bound to an insolvent debtor notwithstanding whatever contractual safeguards were negotiated to avoid that outcome. The debtor is now insolvent. The desire to ensure the assignee is a reasonably fit and proper one should not morph into an exercise in patching up contracts previously negotiated by requiring financial covenants and safeguards never before required.

[39] In all the circumstances, I was led to the conclusion that it would be appropriate to assign Dundee's rights and obligations to the purchaser and that the purchaser is someone who will be able to perform the obligations assigned. I have carefully reviewed the proposed order and am satisfied that the method of ascertaining cure costs and, if needs be, resolving disputes arising about the quantum satisfies the requirements of s. 11.3(4) and s. 11.3(3)(c). There is a fair process to resolve disputes about quantum should they arise.

[40] In the result, I approved the transaction and the form of Approval and Vesting Order presented to me subject to minor amendments made at the hearing.

_____

S.F. Dunphy J.

Date: June 13, 2018