

Court File No. CV-16-11511-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

WEST FACE CAPITAL INC., as agent

Applicant

-and-

**CHIEFTAIN METALS INC. AND
CHIEFTAIN METALS CORP.**

Respondents

**FACTUM OF HER MAJESTY THE QUEEN IN
RIGHT OF THE PROVINCE OF BRITISH COLUMBIA
(RE: MOTION RETURNABLE AUGUST 11, 2020)**

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TO: THE SERVICE LIST

PART I - OVERVIEW

1. This is a motion by a receiver for an order granting its discharge. The companies in receivership own a mine in a remote part of British Columbia. The mine has been leaking acidic waste into the local watershed for years.

2. The bulk of the order sought is not controversial. This Honourable Court is being asked to decide one issue. That is whether the secured creditor which applied for the appointment of the receiver may have an unlimited period of time *after* that receiver's discharge within which to move, in this proceeding, to appoint a second receiver for the purpose of selling the mine. The province of British Columbia does not object to the creditor having two years within which to move for another appointment, but does object to the granting of an unlimited period. It objects because due to the mine operators' failure to address acidic drainage into the watershed, the province has begun to take steps toward the implementation of a remediation and closure plan for the mine. This process could take years and millions of dollars. If this Court grants the unlimited period sought by the secured creditor, a receiver re-appointed (in five, ten or more years, whenever the clean-up is done) would sell for the benefit of the creditor that which the interim expenditure of work and millions of dollars has made saleable.

PART II – THE FACTS

The Mine

4. The Tulsequah Chief mine (the "**Mine**") is located 100 km south-west of Atlin, British Columbia, which is close to Alaska. From 1950 to 1957, it was operated by the

Consolidated Mining and Smelting Company Limited (now known as Teck Resources Limited (“**Teck**”)) as a copper, lead, zinc, silver and gold mine.¹

5. Forty years later, in 1997, Redfern Resources Ltd. (“**Redfern**”) applied to Her Majesty the Queen in right of the Province of British Columbia (“**the Province**”) to develop a 2,250-tonne-per-day underground copper, lead, zinc, silver and gold mine at the Mine. Redfern conducted development activities until being placed in receivership in 2009.²

6. In 2009, Chieftain Metals Inc. (“**CMI**”), a company incorporated in Ontario, purchased the Mine out of the receivership of Redfern. Chieftain Metals Corp. (“**CMC**”) is the parent company and sole shareholder of CMI.³

7. On September 6, 2016, on the application of West Face Capital Inc. (“**West Face**”), this Honourable Court appointed Grant Thornton Limited as receiver (the “**Receiver**”) over CMI and CMC (the “**Companies**”). West Face is the Companies’ main secured creditor and is owed some \$26,873,768.05.⁴

The Province Attempts to Curtail Drainage from the Mine

8. For many years, acid rock drainage has been discharging from the Mine into the

¹ Affidavit of Nathaniel Amann-Blake sworn July 8, 2020 (the “**Amann-Blake Affidavit**”), Tab 2 in the Responding Motion Record of Her Majesty the Queen in Right of the Province of British Columbia (the “**BC Record**”), at paragraph 2(a)

² Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 2(c)

³ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 2(d)-(e)

⁴ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 2(f)-(g)

Tulsequah River (the “**River**”). The River is a tributary of the Taku River. The Taku River is a transboundary river that flows into Alaska downstream of its confluence with the River.⁵

9. On July 7, 2011, the Province required CMI to construct a water treatment plant and associated water management structures at the Mine in order to prevent further acid rock drainage into the River.⁶ Although the plant was built, CMI shut it down after three months, due to design problems and because CMI was unable to pay for necessary improvements and continued operations. As a result, CMI was thereafter in breach of an effluent permit (the “**Effluent Permit**”) issued by the Province’s Ministry of the Environment and Climate Change Strategy.⁷

10. An exfiltration pond (the “**Pond**”) linked to the Mine and located adjacent to the Tulsequah River was also constructed in 2011, as a condition of the granting of the Effluent Permit. The Pond was designed to remove fine acidic rock sludge from water flowing from the Mine to the River.⁸

11. In October 2015, the Province’s Ministry of Energy, Mines and Petroleum Resources (the “**Ministry**”) inspected the Pond, and determined that it had not been built in accordance with the design provided to the Ministry. Although the Pond was capturing

⁵ Affidavit of Mark Love sworn July 8, 2020 (the “**Love Affidavit**”), Tab 1 in the BC Record, at paragraph 4

⁶ Love Affidavit, Tab 1 in the BC Record, at paragraphs 7-8 and Exhibit “A”

⁷ Love Affidavit, Tab 1 in the BC Record, at paragraphs 9-10 and Exhibits “B”-“C”

⁸ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraphs 4-5 and Exhibit “D”

underground drainage, contaminated surface water was migrating directly into the River. CMI was ordered to bring the Mine into compliance with the Effluent Permit.⁹

12. On February 8, 2016, the Companies requested that the Effluent Permit be amended to reduce the monitoring requirements and to effectively relieve CMI of the obligation to monitor and treat effluent discharges from the Mine, until such time as CMI was able to obtain additional financing.¹⁰ The Province did not relieve CMI of this obligation.¹¹

13. In September 2016 (and shortly after the appointment of the Receiver), the Ministry, accompanied by a member of the local Taku River Tlingit First Nation (the “**First Nation**”), inspected the Mine and the Pond again. The Pond was not functioning effectively, likely because it had not been maintained, and untreated water was flowing into the River. Accordingly, on September 26, 2016, an Inspector of Mines ordered CMI to:

- a. appoint a mine manager;
- b. appoint an engineer of record;
- c. alleviate drainage concerns at the Pond; and
- d. remove and/or secure hazardous materials at the Mine site.¹²

⁹ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 6 and Exhibit “E”; Love Affidavit, Tab 1 in the BC Record, at paragraphs 13-14 and Exhibits “E”-“F”

¹⁰ Love Affidavit, Tab 1 in the BC Record, at paragraph 17 and Exhibit “I”

¹¹ Love Affidavit, Tab 1 in the BC Record, at paragraph 19 and Exhibit “J”

¹² Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 7 and Exhibit “F”

14. Neither the Receiver nor the Companies did anything to comply with this order, or with a similar order made on July 4, 2017 (together, the “**Repair Orders**”).¹³

15. On July 28, 2017, at the Receiver’s request, the Chief Inspector of Mines (the “**Chief Inspector**”) rescinded the July 4, 2017 order as against the Receiver, although the Repair Orders remained outstanding against CMI.¹⁴

16. In September 2017, the Ministry began taking steps to reduce the environmental risks caused by the Mine. It did so as a result of CMI’s non-compliance with the Repair Orders and the Ministry’s concern about continuing drainage into the River. Among these steps was the construction of a spillway at the Pond, which reduced the risk of a catastrophic failure of the Pond, which failure would suddenly send a large amount of contaminated water into the River.¹⁵ The \$148,000 used by the Ministry in this manner came from security for the costs of the reclamation of the Mine previously posted by CMI, in the total amount of approximately \$1.3 million (the “**Security**”).¹⁶

17. On October 27, 2017, the Chief Inspector ordered CMI to provide, by November 30, 2017, a plan to mitigate the acidic drainage into the River. CMI did not comply.¹⁷ On February 2, 2018, the Chief Inspector extended his deadline to February 28, 2018.¹⁸

¹³ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraphs 8-12 and Exhibit “G”

¹⁴ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraphs 10-11 and Exhibit “I”

¹⁵ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 12

¹⁶ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraphs 12 and 20

¹⁷ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 14 and Exhibit “K”

¹⁸ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraphs 15 and Exhibit “L”

18. On February 12, 2018, West Face provided the Province with a consultant's report which included recommendations for remediation of the Mine (the "**West Face Report**").¹⁹

19. On August 8, 2018, the Chief Inspector advised the Companies that the order requiring CMI to provide a remediation and implementation plan remained outstanding, because none of i) the cost of the proposed remediation approach, ii) the timelines for the remediation, or iii) the management of sludge had been addressed in the West Face Report. The Chief Inspector gave the Companies two months to provide that information. The Companies never provided the information.²⁰

The Reclamation Plan

20. On December 13, 2018, the Chief Inspector notified the Companies and the Receiver that the Chief Inspector would enforce the *Mines Act* to ensure that the necessary remediation was implemented at the Mine, and that the remaining \$1,154,687 in Security would be used to that end.²¹ The Receiver responded to say that it was not opposed to this use of the Security.²²

21. On February 1, 2019, the Ministry retained SNC-Lavalin Inc. and SRK Consulting (the "**Consultants**") to develop a preliminary reclamation, remediation and closure plan for the Mine.²³

¹⁹ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 16 and Exhibit "M"

²⁰ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraphs 17-18 and Exhibit "N"

²¹ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 20 and Exhibit "P"

²² Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 21 and Exhibit "Q"

²³ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 22

22. The Ministry provided a copy of the resulting draft plan to West Face on January 29, 2020, and to the Receiver on February 4, 2020.²⁴ The Ministry also provided a copy to a working group which advises the Ministry respecting the Mine, which group consists of representatives from the First Nation, the State of Alaska, and Teck Resources Limited.²⁵

23. On April 15, 2020, the Consultants submitted the final version of the plan, entitled *Closure and Reclamation Plan for the Tulsequah Chief Mine Site, Near Atlin, British Columbia* (the “**Closure Plan**”). The Closure Plan contemplates a phased approach to the reclamation of the Mine. During phase one, the Mine’s portals would be plugged and the Mine flooded in order to reduce sulphate and metal leaching. There would also be more investigation of how best to address the ongoing discharge of contaminated water.²⁶

24. On April 24, 2020, the Ministry provided a copy of the Closure Plan to the Receiver and to West Face.²⁷

The Cost of Reclamation and Closure

25. The Province has spent \$978,486 from the Security posted by CMI, in addition to staff time and other resources, to get to this stage. That means that as of the end of May, 2020, approximately \$317,000 remained of the Security.²⁸ This sum will be insufficient to

²⁴ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 23 and Exhibit “R”

²⁵ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 24

²⁶ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 25 and Exhibit “S”

²⁷ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 26 and Exhibit “T”

²⁸ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraphs 27-28

cover the future costs associated with developing and implementing a final remediation and closure plan.

26. The Province anticipates:

- (i) that the costs of further investigations and field work, the development of a final reclamation and closure plan, and the implementation of that plan, will be significantly greater than the amounts expended to date;
- (ii) that in the next two years the Province will deplete the remaining Security and will require additional funding; and
- (iii) that the management and administration of the final Closure Plan will require at least one full-time Ministry employee.²⁹

27. The Receiver has moved for its discharge. The form of order sought by West Face on this motion includes the following language.

THIS COURTS ORDERS that this Order, including the discharge of the Receiver as Receiver of the Property of Chieftain granted hereunder, shall be without prejudice to West Face's right to bring a motion before this Honourable Court to seek the appointment of a receiver and/or manager of the Companies and the Property pursuant to section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, and section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended, in the within receivership proceedings, bearing Court File No. CV-16-11511-00CL, and any such motion shall be served on Her Majesty the Queen in right of the Province of British Columbia.

²⁹ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 28

PART III – THE ISSUES AND THE LAW

28. The issue before this Honourable Court is as follows.

1. Should West Face be granted an unlimited period within which to move, in this proceeding, to re-appoint a receiver for the purpose of selling the Mine?

ISSUE ONE

29. If West Face is granted an unlimited period within which to move for the re-appointment of a receiver for the purpose of selling the Mine, the Province will be required to run an unlimited risk that any costs it incurs and resources it expends with respect to the remediation of the Mine will either i) be made redundant, or ii) be for the benefit of West Face.³⁰

30. Stated differently, it would be *rational* for West Face to wait until the Mine had been expensively remediated by the Province and then market it for sale. West Face has certainly not proposed to do anything to cause CMI to ameliorate the unauthorized discharge and come into compliance with the Effluent Permit and the Repair Orders. West Face is content for the Province to solve the problem, while it retains its rights forever. In such circumstances, the re-appointment of a receiver (perhaps a decade or more from now) for the purpose of completing a sale of the Mine would be convenient for West Face, but it would certainly not be *just*. It would be blessing a free-rider.

³⁰ Amann-Blake Affidavit, Tab 2 in the BC Record, at paragraph 29

31. In one of the guiding cases³¹ on the appointment of a receiver, Justice Blair, (as he then was) held that:

*...the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.*³²

32. In this case, the “potential cost” to the Province is the time, effort and money expended upon work towards the development and implementation of a final remediation and closure plan that is ultimately for the benefit of West Face and its buyer.

33. West Face is proposing that it have a temporally-unlimited opportunity to conduct a “quick flip” transaction, as that term was described by Justice D.M. Brown (as he then was). Such transactions are to be *more carefully* scrutinized than normal receivership sales, so as to ensure that the interests of all parties are respected.

10 *"Quick flip" or "pre-pack" transactions are becoming more common in the Ontario distress marketplace. In certain circumstances, a "quick flip" involving the appointment of a receiver and then immediately seeking court approval of a "pre-packaged" sale transaction may well represent the best, or only, commercial alternative to a liquidation. In such situations the court still will assess the need for a receiver and the reasonableness of the proposed sale against the standard criteria set out in decisions such as Bank of Nova Scotia v. Freure Village on Clair Creek and Royal Bank v. Soundair Corp., respectively. However, courts will scrutinize with especial care the adequacy and the fairness of the sales and marketing process in "quick flip" transactions:*

³¹ [Bank of Nova Scotia v. Freure Village on Clair Creek, \(1996\) 40 C.B.R. \(3d\) 274 \(Ont. Commercial List\) \(“Freure Village”\)](#)

³² [Freure Village](#), at paragraph 13, emphasis added

Part of the duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to a related party, the overall fairness of the proposed related-party transaction. As stated by Morawetz J. in the Tool-Plas Systems Inc. case:

[T]he Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the quick flip transaction would realistically be any different if an extended sales process were followed.³³

34. West Face's proposal cannot bear such scrutiny. It would, absurdly, permit the re-appointment of a receiver in a century, possibly subject only to (current or future) procedural codes respecting dismissal of the application for delay. That there should be *some* limit on West Face's right to come back to this Court is therefore obvious. The question is what that limit should be. The draft order provided by the Receiver in its Motion Record would see the possibility of re-appointment terminated at the conclusion of two years.³⁴

PART IV - ORDER SOUGHT

35. The Province seeks an order which limits to two years the period within which West Face can move for the re-appointment of a receiver in this proceeding, and costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY



**COLBY LINTHWAITE
OF COUNSEL FOR HER MAJESTY
THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA**

³³ [*Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.*, 2013 ONSC 6905 \(Commercial List\)](#) at paragraph 10, emphasis added and citations omitted

³⁴ Motion Record of the Receiver, Volume III, Tab C, page 524, paragraphs 10-14

SCHEDULE “A”

Authorities Cited

1. *Bank of Nova Scotia v. Freure Village on Clair Creek*, (1996) 40 C.B.R. (3d) 274 (Ont. Commercial List)
2. *Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.*, 2013 ONSC 6905 (Commercial List)

SCHEDULE "B"

Statutes Cited

None.

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Proceeding Commenced at Toronto

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