CITATION: Ernst & Young Inc. v. Essar Global Fund Ltd et al, 2017 ONSC 1366
COURT FILE NO.: CV-16-11570-00CL
DATE: 20170306

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ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ERNST & YOUNG INC. in its capacity as Monitor of all of the following: ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY and ESSAR STEEL ALGOMA INC. USA

Plaintiff

- and -

ESSAR GLOBAL FUND LIMITED, ESSAR POWER CANADA LTD., NEW TRINITY COAL, INC., ESSAR PORTS ALGOMA HOLDINGS INC., ALGOMA PORT HOLDING COMPANY INC., PORT OF ALGOMA INC., ESSAR STEEL LIMITED and ESSAR STEEL ALGOMA INC.

Defendants

HEARD: January 31, February 2, 3, 4 and 5, 2017

BEFORE: NEWBOULD J.

COUNSEL: *Clifton Prophet, Nicholas Kluge, Michael Watson, Marco Romeo, Delna Contractor and Brent Arnold* for the Monitor

Patricia D.S. Jackson, Andrew Gray, Jeremy R. Opolsky, Davida Shiff and *Alexandra Shelley,* for Essar Global Fund Limited, Essar Ports Algoma Holdings Inc., Algoma Port Holding Company Inc., Port Of Algoma Inc. [the "Essar Defendants"]

Peter H. Griffin, Monique J. Jilesen and Matthew B. Lerner, for GIP Primus, LP and Brightwood Loan Services LLC

Eliot Kolers and Patrick Corney, for the Applicants

John A. MacDonald and Alex Cobb, for Deutsche Bank AG, Intervenors

L. Joseph Latham and David Conklin, for the Ad Hoc Committee of Essar Algoma Noteholders, Intervenors

Karen Ensslen, for the Retirees, Intervenors

Robert A. Centa, for USW and Local 2724, Intervenors

Alexandra Teodorescu, for USW Local 2251, Intervenors

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REASONS FOR JUDGMENT

[1] Ernst & Young Inc. was appointed Monitor of Essar Steel Algoma Inc. ("Algoma"), Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA (the "Applicants") pursuant to the CCAA on November 9, 2015.

[2] This is not the first time that Algoma has been under CCAA protection. It went through a restructuring in CCAA proceedings in 1991 and again in 2001. In late 2013 Algoma faced another liquidity crisis and restructured in 2014 under the CBCA.

[3] Essar Global Fund Limited ("Essar Global") is a Cayman Island company. Its investments are managed by Essar Capital Limited ("Essar Capital") based in London, U.K. The Essar Group of companies has worldwide interests in assets across the core sectors of energy, metals and mining, infrastructure and services. It was founded in India by two brothers, Shashi and Ravi Ruia, and members of the Ruia family are the beneficial owners of the Essar Group.[1]

[4] Essar Global is also the ultimate parent of Port of Algoma Inc. ("Portco") through a chain of subsidiaries, which includes Essar Port Holdco and Algoma Port Holding Company Inc.

[5] Essar Global acquired all of the shares of Algoma Steel Inc. through subsidiaries in April, 2007 and changed the name to Essar Steel Algoma Inc. ("Algoma").

[6] On September 26, 2016, the Monitor was authorized by court order to commence oppression proceedings under section 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C. 44 ("CBCA") in relation to a number of related party transactions, including the transactions involving the conveyance of Algoma's Port facility assets (the "Port Transaction") to Portco. The action was commenced shortly thereafter. The claims regarding the Port Transaction proceeded first and these reasons for judgment deal solely with those claims.

[7] The Port assets are located immediately adjacent to the Algoma buildings and facilities. Algoma is dependent upon the Port to receive the raw materials to make steel, and to ship its steel products to market. Algoma could not function economically without unfettered access to the Port. The Port has always been utilized almost exclusively by Algoma. It is not viable without Algoma as a customer. Algoma employees have always operated the Port.

The Algoma Restructuring and the Port Transaction

[1] All statements of fact in these reasons are findings of fact unless indicated otherwise.

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[8] By the end of 2013, it was clear that Algoma was facing significant financial issues involving a liquidity crisis and upcoming debt maturity issues. Algoma was operating with very tight liquidity, resulting in low inventory levels. Algoma's capital structure was untenable and it would not be able to meet a coupon payment to unsecured bondholders due in June 2014 and an approximately $300 million term loan maturity payment due in September 2014. While support from Essar Global had been enabling Algoma to meet its liabilities as they came due, by early 2014 Essar Global was increasingly hesitant to advance cash to Algoma.

[9] Steps were taken to refinance Algoma. These steps ultimately resulted in two main transactions which closed at the same time on November 14, 2014, being a recapitalization transaction (the "Recapitalization") and the Port Transaction. There is a huge record of what took place in 2014 leading to these transactions. It need not all not be described. However there were events that are of some relevance to the issues raised.

[10] On January 17 2014, a refinancing plan was presented to Algoma's board of directors in a memo dated January 16, 2014. Two scenarios were proposed. "Plan A" contemplated the refinancing of the entire capital structure, which required a minimum cash infusion of $200 million ($300 million was ideal); "Plan B" contemplated refinancing only the term loan.

[11] At the time, there were eight directors of Algoma. Five were not independent and were affiliated with the Essar Group or the Ruia family. Three were independent of Essar, being Thomas Dodds, Hans J. Jacobsen and Navin Dave. In the fall of 2013 these three began expressing concerns about their role on the Board, noting that the disclosure of information to the independent directors was limited, especially when compared to the information being provided to the other members of the Board. Through December 2013 and into January of 2014, their concerns became more acute due to the serious financial challenges facing Algoma. The refinancing plans in the January 16 memo were presented to them for the first time on January 17, 2014 at an informal meeting of the Algoma Board and they felt that they had little or no time to review and reflect on the memo, which was a concern to them.

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[12] As a result, they prepared an email proposing a committee of independent directors to work with outside financial advisors to advise the Board. Mr. Dave sent it to the Algoma directors on January 19, 2016. The email stated in part:

> Further, the company's internal forecast indicates that the company will not have internally generated cash to pay the interest payments due in mid-March. As of the 17th of January there were no solutions as to how the company will find this cash. Of course, one option is for the shareholder to put in the required cash as it has in the past. However, there is no firm commitment to do so.
>
> Given that we do not know where we will get the funds to pay the interest amount due about two months from now and not having seen a plan for unforeseen events, we believe the Company should be prepared and not be surprised in the event the scenario does not unfold as laid out. The probability of something internal or external event happening is high, and this may have a detrimental effect on the refinancing effort and significant adverse consequences for the Company.
>
> It is with this in mind that we are proposing that the company appoint a committee made of Independent Directors to work with outside financial advisors selected by the committee to advise the Board on a contingency plan which will hopefully not be needed. If it is needed, then we will have it ready for implementation and it will be very helpful in serving the best interest of the Company.
>
> We are asking that a special Board meeting be called to discuss and vote on a resolution to appoint a special committee of Independent Directors to advise the Board on contingency plans and recommendations emanating there from.

[13] At the board meeting on February 11, 2014, Mr. Dave asked that his memo and its request for an independent committee of the Board be added to the agenda and approved. In the Board discussion which ensued, the other directors, including the chairman of the Board, Mr. Jatinder Mehra of Essar Global in India, expressed the view that a special committee of independent members to address refinancing issues was not needed and provided assurances that independent members of the Board would be informed and engaged as Algoma's refinancing plans moved forward. As the three independent directors had been given similar assurances in

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the past without material change, it was their view that the matter could not be dealt with in this way and they requested a vote on their independent committee motion. By a vote of 4 to 3, with the three independent directors voting against, the Board held that the independent committee request was not approved.

[14] Mr. Jacobsen came to the conclusion that he could no longer serve as an independent director in the absence of the governance changes proposed in the independent committee motion. He resigned a few hours after the meeting.

[15] It is said that there is no evidence that Mr. Ghosh, the CEO, was not free to vote at that meeting as he wished. That may be, just as there was no evidence that any of the directors were not free to vote as they wished. But it cannot be overlooked that prior to becoming CEO of Algoma, Mr. Ghosh had been with Essar Steel India. Mr. Marwah, the CFO of Algoma, described the four directors who voted against the independent committee as "Essar-affiliated directors". That accords with the common sense of the situation, and I accept it. It was clear that the Ruia family did not want an independent committee.

[16] On February 17, 2014, Mr. Dodds wrote an email to Prashant Ruia, the son of one of the founders of the Essar Group and a director of Essar Capital which controls Essar Global's investment decisions. He was the chair of Algoma's board at the time, although he did not attend board meetings during the recapitalization efforts of Algoma. The email requested the opportunity to discuss the situation directly with Mr. Ruia, and stated in part:

> If your expectation of ESAI [Algoma] Board is to simply be a formality and our role as independent directors is to essentially "rubberstamp" shareholder and management decisions, we are not prepared to continue serving as directors.
>
> As you know, Directors and particularly independent directors have a legal, fiduciary responsibility to all the stakeholders of the Company starting with the Company first, followed by the shareholders, employees, community and others. This Director responsibility may on occasion conflict with the objectives of the

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> shareholder who may, understandably, be more interested in matters of import to themselves. Most of the time there will be no conflict between the responsibilities of the Directors, objectives of the shareholder and that of the Company stakeholders as broadly defined. However, there are other occasions when they do.
>
> What we as independent directors have experienced in the last few Board meetings is a complete disregard for any discussion or wholesome debate on alternatives to re-financing or contingency planning at ESAI.
>
> As an example, we are very happy that Essar Global, acting on behalf of the shareholder, has appointed Mr. Joe Siefert to lead the effort on refinancing the debt and restructuring the balance sheet of ESAI. We hope he comes through with all he has promised. The ESAI Board, in particular the Independent Directors, had no input on this appointment, the scope of the work, or the output. For a company like ESAI, with its urgent need for refinancing, the Directors need to be actively involved in the whole refinancing effort. Not only were we not all involved; we are not getting any regular, timely progress reports. In addition when we ask questions, or propose alternatives, we are asked to wait a while for additional information and told that everything will work out.
>
> We cannot discharge our obligations under such an environment.

[17] The two remaining independent directors were not able to meet with Mr. Ruia and felt their concerns were not adequately recognized. Mr. Dave resigned as a director of Algoma on February 21, 2014. Mr. Dodd resigned on May 5, 2014. In his resignation letter, he described the reason behind his decision:

> The fundamental reason for the decision to resign was my conclusion that as an independent director, that I lacked confidence that I was receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company and or its parent. This became more acute over the past months, when short term liquidity and long term debt issues have increasingly become problematic. I have been of the understanding that as a Director, I would be provided information and engaged in decision-making on the affairs of the company at the board governance level on equitable and timely basis in the manner as non-independent directors. The role I had envisioned is that what

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> I and the former independent directors (Dave and Jacobsen) have described to you verbally and in writing.

[18] It is apparent that the Recapitalization and Port Transaction efforts were run by Mr. Joe Seifert of Essar Capital. As will be discussed, I do not accept the contention of the Essar Defendants that Mr. Siefert was merely an advisor to the Algoma Board that independently made all of the critical decisions.

[19] Leading to the Recapitalization, Essar Global entered into a Restructuring Support Agreement ("RSA") with Algoma and some of its unsecured noteholders dated July 24, 2014 which set out the principal terms of a restructuring. As a condition in the RSA, Essar Global agreed to make a cash investment of $250 to $300 million in Algoma under an Equity Commitment Letter dated July 24, 2014.[23]

[20] The Recapitalization as contemplated by the RSA was first approved as an arrangement under section 92 of the CBCA on September 15, 2014. It was a condition of the plan of arrangement that Essar Global would comply with its financing obligations under the RSA to provide a cash equity infusion of $250 million to $300 million. However, as early as March 28, 2014, representatives of the Ruia family had made clear that they did not have $250 million for equity. Different amounts of an equity cash injection were proposed by Essar Global, including at one point $90 million that was shown to potential investors in a roadshow presentation that failed. In the end, the RSA was amended on November 6, 2014 and approved by an amended approval order on November 10, 2014. It provided for a cash injection into Algoma of only $150 million to be funded largely not by Essar Global but by a loan from third party lenders to Portco of $150 million. The Monitor asserts this was a breach of the equity commitment made by Essar Global. In the consent plan of arrangement that followed, based on an Amended RSA, Essar Global was released from its obligations under the Equity Commitment Letter.

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[2] All dollar amounts in this decision are US dollars unless otherwise stated.
[3] Up to $50 million of this could be provided by third party inventory financing.

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[21] The reorganized debt structure in the amended plan of arrangement of Algoma was as follows:

(a) Algoma's unsecured noteholders (the "Unsecured Noteholders") were paid a portion of their principal and were issued new junior secured notes pursuant to the CBCA plan of arrangement;

(b) $375 million of senior secured notes were issued pursuant to an offering memorandum;

(c) Algoma entered into a new $50 million senior secured asset-based revolving credit facility (the "ABL Facility" (the lenders under the facility are referred to as the "ABL Lenders"));

(d) Algoma entered into a new $350 million term loan (the "Term Loan" (and the lenders under the loan are referred to as the "Term Lenders"); and

(e) all other Algoma lenders, including the pre-Recapitalization senior secured noteholders and the revolving credit facility, were repaid in full.

[22] The Port Transaction involved (i) Algoma selling to Portco the Port assets consisting of the buildings, the plant and machinery but excluding the land, (ii) Algoma leasing to Portco the realty for 50 years, (iii) Portco agreeing that it would provide the services necessary for the operation of the Port assets in return for a monthly payment from Algoma to Portco and (iv) Algoma agreeing that it would provide to Portco the services necessary to operate the Port, in return for a monthly payment from Portco to Algoma that would be less than the monthly payment paid by Algoma to Portco.

[23] The Port Transaction was carried out under a master purchase and sale agreement between Algoma and Portco dated November 14, 2014 (the "MPSA"). Under the terms of the MPSA:

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(i) Algoma conveyed to Portco all of the fixed assets owned and used by Algoma in relation to the Port. Portco agreed to pay to Algoma $171.5 million for the purchased assets to be satisfied by the payment of $151.6 million and a one-year promissory note for $19.8 million. The total payable was allocated $3.8 million in respect of the purchased assets, $154.8 million in respect of the leasehold interest and $12.9 million in respect of the cargo handling services.

(ii) Portco agreed to pay the $154.8 million to Algoma as prepaid rent under the Lease.

[24] Under the MPSA, Algoma and Portco entered into four agreements dated November 14, 2014 to effect the transaction:

(a) A promissory note for $19.8 million payable by Algoma to Portco with interest at 10% per annum. Under an assignment and assumption agreement dated the same day, the promissory note was assigned by Portco to Essar Global which is now the obligor under the promissory note, and Algoma released Portco from any obligation under the promissory note. The promissory note matured and was payable in full on November 13, 2015. It has not been paid.

(b) A Lease of the land used by the Port from Algoma to Portco (the "Lease") for 50 years. Under the Lease, Algoma has responsibility for all maintenance and repairs, insurance and property taxes.

(c) A Cargo Handling Agreement under which Portco agrees to provide cargo handling services to Algoma for an initial term of 20 years. The contract is a take or pay contract under which Algoma is required to pay for at least 6 million net tons of cargo at the Port each year at a cost of approximately $6 per ton. That is, Algoma is obliged to pay Portco at least $36 million per year under the Cargo

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Handling Agreement for 20 years, subject to escalation beginning in 2016 at the rate of 1% per annum.

(d) A Shared Services Agreement under which Algoma is responsible for providing all the services necessary for Portco to fulfill its obligations under the Cargo Handling Agreement, and all such services are to be performed by employees of Algoma who will not be employees of Portco. Portco agreed to pay Algoma $11 million annually subject to escalation beginning in 2016 at the rate of 3% per annum.

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[25] The Cargo Handling Agreement contains a change of control clause that requires Portco's consent to a change of control of Algoma. The Monitor takes the position that this clause gives Essar Global, the ultimate parent of Portco, a veto over any party acquiring Algoma in the CCAA process and that it is negatively affecting the sales process. The Monitor says that the clause in itself constitutes oppression.

[26] The cash amount to be paid by Portco to Algoma under the MPSA was largely funded by a $150 million Term Loan made to Portco by GIP Primus, LP (as to $125 million) and Brightwood Loan Services LLC (as to $25 million)[4]. The loan is secured by all of Portco's assets, has an 8 year term and an interest rate between 9.25% and 8.375%, depending on the year. When the costs of operating the Port (shared services) are netted from the cargo handling charges, the result is that Algoma will pay approximately $25 million per year to Portco, which is the amount required by Portco to service the Term Loan each year. That amount of $25 million for 20 years comes to $500 million, far more than the amount needed to repay the $150 million GIP loan.

Form of the proceeding

[4] GIP Primus, LP took the lead in negotiating the loan to Portco and for ease of reference, both will be referred to simply as GIP.

[27] Because of the urgency to select a buyer for the Algoma business and conclude a transaction in the CCAA process under the SISP, it was important that the issues in this case be tried quickly. A number of pre-trial conferences were held to iron out how the case would be presented. Pleadings were ordered. It was agreed that the evidence in chief would be provided by affidavit evidence or expert reports and that cross-examination would take place during the trial. Eventually, however, after all of the affidavits and expert reports were delivered, the parties decided to cross-examine the witnesses and experts before the trial and so the trial consisted of argument on the affidavits and expert reports, the transcripts of the cross-examinations and exhibits made to the affidavits or put to witnesses on their cross-examinations. Subsequently, written argument was submitted in accordance with the protocol agreed by the parties. The argument in this case therefore has taken place during and after the hearing, with parties relying on what was argued during the motions to strike the claim, what was argued during the hearing and what was argued in the written submissions made after the hearing.

[28] At one of the case conferences prior to the trial, counsel for the Essar Defendants and counsel for GIP said they intended to move to strike the claim of the Monitor at the opening of the trial for the purpose of educating me on their defences. I permitted the motions to be argued on the understanding that I would not rule on the motions at that time. I see no need to decide on these motions as my decision on the merits of the claim and defences will dispose of them.

[29] This was real time litigation to be sure. All counsel are to be commended for the professional way in which they dealt with the case, which was no easy task.

Standing of the Monitor to be a complainant

[30] The Essar Defendants and GIP contend that the Monitor is not a proper complainant to bring this oppression action involving the Port Transaction. They contend that the action is in substance for alleged damage caused to Algoma and that any action, if it existed, could only be a derivative action which has not been brought. They contend that an oppression action can only

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be brought by persons who have been damaged directly by the oppressive conduct. For a number of reasons I do not accept these arguments.

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[31] When the Monitor delivered particulars of its claim it initially cast the net of stakeholders affected by the Port Transaction quite widely. Currently, those stakeholders who the Monitor says were harmed are mainly the trade creditors, Algoma pensioners and retirees.

[32] As of the date of the Portco Transaction, Algoma had a number of creditors who were owed significant amounts, including:

a. Accounts payable and accrued liabilities owing to trade creditors in the amount of approximately CDN$136.6 million;

b. Municipal taxes and interest owed to the city of Sault Ste. Marie in the amount CDN$13.4 million;

c. A solvency deficiency owed to the pension plans of Algoma retirees in the amount of CDN$400.9 million; and

d. Post-employment life insurance, health care and dental benefits for Algoma retirees in the amount of CDN$361 million.

Together, these outstanding debts of Algoma totalled $911.9 million as of the date of the Portco Transaction.

[33] A person who may be a complainant under the oppression provisions of the CBCA is contained in section 238, which provides:

> In this Part,…
>
> complainant means

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (c) the Director, or
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

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[34] While it is the case that normally a Monitor, as an officer of the court, is to be neutral in its role and not take sides in favour of one stakeholder against another, there are exceptions. Under section 23(1)(k) of the CCAA, the Monitor shall carry out any function in relation to the debtor that the court may direct. In this case, the Monitor was authorized and directed to take this oppression action by court order.

[35] This is not the first action in which a monitor has been authorized to act as a litigant. In *Nortel*, orders were twice made that gave the Monitor all of the powers of the Nortel debtors in Canada after all of the directors and senior executive had resigned. This resulted in the Monitor litigating in defence of claims made against Nortel and in favour of an allocation of the sale proceeds of the business. The Monitor did so in *Nortel* to protect the interests of Nortel's Canadian creditors.

[36] Whether a person can be a complainant is a discretionary matter. In *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp*. (2003), 46 C.B.R. (4th) 313 (Ont. C.A.), a trustee in bankruptcy acting on behalf of the creditors of the bankrupt estate was held to be entitled to be a complainant in an oppression action against a non-arm's length party that had entered into an agreement with the debtor that was alleged to be an oppressive agreement. Goudge J.A. expressed the wide flexible discretion contained in the OBCA to determine if a person is a proper complainant in an oppression case:

> 45 …s. 245(c) confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence oppression proceedings under s. 248. This provision is designed to provide the court with flexibility in determining who should be a complainant in any particular case that accompanies the court's flexibility in determining if there has been oppression and in fashioning an appropriate remedy. The overall flexibility provided is essential for the broad remedial purpose of these oppression provisions to be achieved. Given the clear language of s. 245(c) and its purpose, I think that where the bankrupt is a party to the allegedly oppressive transaction, the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.
>
> 46 In this case the appellants were affiliates of OYDL, the party with which the allegedly oppressive transaction was concluded. In that transaction, OYDL gave up something of significant value (the OYSF note) in return for something of no value (additional shares in OYRC). It would have been reasonable for the trial judge to conclude that since the appellants unfairly disregarded the interests of the OYDL creditors, those creditors have properly been recognized as complainants. Thus it was equally reasonable in the circumstances for the trial judge to find that this was a proper case in which to conclude that the trustee of OYDL was a proper person to be a complainant in effect on behalf of the creditors of OYDL. This conclusion is consistent with the bankruptcy principle of collective action to pursue the claims of the creditors of the bankrupt and the trustee's role as their representative. See *Husky Oil Operations Ltd. v. Canada (Minister of National Revenue)*, [1995] 3 S.C.R. 453. The appellants have put forward no reason why this principle should not be followed in this case. The trial judge therefore exercised his discretion reasonably in finding that the respondent was a proper person to be a complainant here and I would dismiss the appellants' first argument.

[37] I see no reason why the principle of collective action to pursue the claims of creditors in a bankruptcy should not be followed in this CCAA proceeding. There are very large amounts owing to trade creditors, pensioners and retirees. Aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gives the parent control over who can be a buyer of the Algoma business, are harmful to a restructuring process and

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negatively impact creditors. The Monitor has taken this action as an adjunct to its role in facilitating a restructuring.

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[38] The Essar Defendants and GIP contend that this action should be dismissed because it is properly a derivative action. Under section 241(2) of the CBCA, relief may be granted if an action of the corporation or its affiliates is oppressive or unfairly prejudicial to or unfairly disregards the interests of any security holder, creditor, director or officer. It is said that no such person has been harmed beyond the harm that may have been done to Algoma.

[39] Reliance is placed on *Rea v. Wildeboer*, 2015 ONCA 373. I do not see that case as supporting the argument. That case involved a shareholder who sued for a wrong done only to the company and the case was dismissed on a summary judgment motion. The reasoning for the result was stated by Blair J.A.:

> 27 However, I agree with the respondents that claims must be pursued by way of a derivative action after obtaining leave of the court where, as here, the claim asserted seeks to recover solely for wrongs done to a public corporation, the thrust of the relief sought is solely for the benefit of that corporation, and there is no allegation that the complainant's individualized personal interests have been affected by the wrongful conduct.

[40] In this case it is asserted by the Monitor that the personal interests of the creditors have been affected. *Rea* created no new law, but merely set out a number of well-known principles, including the principle that a derivative remedy and an oppression remedy are not mutually exclusive and can co-exist as there may be overlap in the factual circumstances. Blair J.A. cited a number of such cases involving creditors who successfully pursued an oppression remedy in circumstances in which a derivative remedy also existed, such as *Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111; *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Gen. Div.); *C.I. Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (S.C.), aff'd [2001] O.J. No. 3918

(Div. Ct.); and *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.) at para. 526, leave to appeal refused, [2004] S.C.C.A. No. 291. *Olympia & York* is no different in that respect.

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[41] This is not a case such as in *Rea* in which the thrust of the relief sought was solely for the benefit of the corporation. In *Rea*, there was no allegation that the complainant's individualized personal interests were affected by the wrongful conduct.

[42] I find that the Monitor is a proper complainant in this oppression claim.

Who directed the Recapitalization and Port Transaction?

[43] The Monitor says that these transactions were directed by Essar Global personnel, particularly the Ruia brothers and Mr. Joe Seifert who worked for Essar Capital, which is responsible for Essar Global investments world-wide. The Essar Defendants say that Mr. Seifert was only an advisor to the Algoma board of directors and that it was the Algoma board that made the decisions, acting in good faith in accordance with its fiduciary duties.

[44] In some respects it does not really matter who made the decisions. If they were oppressive or unfairly prejudicial to or unfairly disregarded the interests of the creditors, relief can be granted under section 241 of the CBCA whether the decisions were made by Essar Global or by the Algoma board of directors. Section 241(2) provides:

> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

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[45] Moreover, it is settled law that conduct need not have been in bad faith to attract sanction under section 241. See *Brant Investments Ltd. v. KeepRite Inc*. (1991), 3 O.R. (3d) 289 (C.A.) at para. 47; *Ford Motor Co. of Canada v. Omers* (2006), 79 O.R. (3d) 81 (C.A.) at para. 91; and *BCE v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 in which it was stated:

> 67 Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations: see Koehnen, at pp. 81-88. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

[46] *Palmer v. Carling O'Keefe* (1989), 67 O.R. (2d) 161 (Div. Ct.) is an example of a finding of oppression despite the good faith actions of the corporate directors.

[47] Based on my reading of the evidence, however, and I find, the direction and decision making in so far as the Recapitalization and Port Transaction are concerned was by Essar Global and Essar Capital, particularly led by Mr. Seifert. While the board of directors of Algoma in form made the decisions for Algoma, the strategic decisions were made by Essar Global and Essar Capital.

[48] The Essar Defendants contend that Messrs. Ghosh and Marwah, the CEO and CFO of Algoma, were particularly instrumental in the decision making process leading to the Recapitalization and the Port Transaction. In my view, this argument greatly overstates their roles.

[49] I do not intend to refer to all of the evidence on this issue. I will refer to only some of it, although it is overwhelming in substantiating that Essar Global and Essar Capital were calling the shots.

[50] In January 2014, Algoma's board of directors received a presentation dated January 16, 2014 that outlined the plans for a debt refinancing. The presentation set out the names of the individuals who would be responsible for various aspects of the transactions. All of the names listed but one were employees of Essar Capital or Essar Services in India. The then VP Finance & Capital Markets of Algoma, Mr. Bakshi, was named as having some tasks but never actually performed any tasks relating to the Port Transaction. He held other roles within the Essar Group and did not spend the majority of his time in Sault Ste. Marie. Notably, neither Mr. Ghosh nor Mr. Marwah were named as having any responsibility.

[51] Algoma's Annual Business Plan dated February 3, 2014, which was shown to Mr. Prashant Ruia for his approval before it went to the Board of Algoma, stated that "Refinancing of the balance sheet is critical for the company and beyond management control. The refinancing is headed and coordinated by Essar Global." The Plan also stated that Essar Global was developing a strategy and referred to Mr. Seifert of Essar Capital, Mr. Pankaj (sic, meaning Mr. Pankaj Saraf) of Essar Services, Mr. Bakshi and Mr. Iqbal of Essar Capital as comprising the Essar Global team. Management, including Messrs. Ghosh and Marwah, did not play any strategic role. Mr. Ghosh was told by the chairman of the board of Algoma, Mr. Mehra, and by Prashant and Ravi Ruia that Mr. Seifert and his team would lead the refinancing.

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[52] Both Mr. Ghosh and Mr. Marwah said they did not negotiate the economic terms of the Debt Refinancing or the Portco Transaction. I accept this evidence. It is consistent with the statements in the Algoma February 3, 2014 business plan that the refinancing was beyond management control and was headed by Essar Global. The fact that Mr. Ghosh spent a great deal of time in New York was explained by him and I accept that he was not negotiating any deal. I put little weight on internal lists of things to be done and where on the list Mr. Ghosh appeared. Mr. Seifert was on those lists as well.

[53] For the same reason, I do not accept the evidence in Mr. Seifert's affidavit that his role was merely as an advisor to the management team of Algoma and that all material decisions were made by its board and senior management. It is inconsistent with the statements in the Algoma February 3, 2014 business plan that the refinancing was beyond management control and was headed by Essar Global. Mr. Seifert was somewhat evasive in his evidence on cross-examination. He did, however, admit that he was leading the efforts with specific investors in March 2014. Mr. Saraf of Essar Services India Limited said that Mr. Seifert was the point person for the meetings with investors at that time.

[54] Mr. Seifert's role never changed throughout 2014. At a meeting of the board of Algoma on October 30, 2014, he stated that he was leading an effort on several alternatives with specific investors to place the remaining debt and was considering other alternatives if this should prove unsuccessful. I do not accept his evidence on cross-examination that he was leading the effort to help Algoma on the transaction as an advisor. It is contrary to the October 30, 2014 board meeting minutes and it was his experience in the capital markets at JP Morgan that made him fit to lead the effort. Neither Mr. Ghosh nor Mr. Marwah were involved in the renegotiation of the RSA.

[55] In a February 25, 2014 email to Mr. Dodds, one of the independent directors of Algoma at the time, Mr. Prashant Ruia, a director of Essar Capital and of Algoma, said that there was a need to recapitalize the Algoma balance sheet and that "We [meaning Essar Global as investors]

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deployed the services of Joe Seifert, CFO of Essar Capital, to undertake this exercise." This was no statement that Mr. Seifert was asked to advise the Algoma board of directors who would be making the decisions. On his cross-examination Mr. Prashant Ruia made clear that Mr. Seifert was given the responsibility by Essar Capital to manage the investment in Algoma and that it was Mr. Seifert who had the responsibility for the discussions relating to the Recapitalization of Algoma.

[56] The evidence is clear that the decisions were being made by Essar Global or its subsidiary, Essar Capital, throughout the piece. In a July 1, 2014 email, Mr. Rewant Ruia, identified in the Essar Groups's material as responsible for the strategic oversight of Essar Group's North America operations including Algoma, said that the financing was "our responsibility" and that they would not talk about any asset sales with the unsecured creditors. In spite of his waffling on his cross-examination, it is clear that Mr. Rewant Ruia was the family lead in the Essar Group's North American operations. I do not accept Rewant Ruia's evidence on cross-examination that he was not responsible for the North American operations of Essar or that it was Mr. Ghosh, as CEO of Algoma, that was responsible for the refinancing of Algoma, with Mr. Seifert merely providing assistance.

[57] Mr. Rewant Ruia, like Mr. Seifert, was evasive in much of his testimony. Mr. Rajiv Saxena, the Executive Director of Essar Steel India Ltd. based in Mumbai, was also somewhat evasive on his examination, saying at first that he did not know the roles played by Rewant and Prashant Ruia in the Essar Group but eventually after being shown a publication from Essar's website conceded that Mr. Rewant Ruia's role was to oversee the North American operations of the Essar Group including Algoma. Mr. Saraf of Essar Services India Ltd who assisted Mr. Seifert with the Recapitalization of Algoma acknowledged on his examination that the views of Rewant Ruia and the other members of the Ruia family as to the cash equity that could be invested were extremely influential to the Recapitalization team.

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[58] Prashant Ruia, a director of Essar Capital and clearly involved in the affairs of Essar Global and its affiliates, although quite evasive on his cross-examination about this, admitted that Essar Capital had given the responsibility for managing the investment in Algoma to Mr. Seifert and it was Mr. Seifert that was given responsibility for running Algoma, the refinancing by the Port Transaction and the discussions on the Recapitalization.

[59] The Portco Transaction documents (the Master Purchase and Sale Agreement, the Lease, the Cargo Handling Agreement and the Shared Services Agreement) were negotiated with GIP primarily by Mr. Seifert, along with Messrs. Harrold and Anshumali Dwivedi. Mr. Dwivedi was an Essar Global employee during the relevant period and is the current CEO of Portco. Algoma personnel provided operational information as necessary. I am satisfied that Mr. Seifert had primary carriage over the negotiations, as stated by Mr. Ghosh. The evidence of Mr. Sreckovic of GIP supports this conclusion. Mr. Sreckovic was clear that the primary negotiators on behalf of Algoma were Mr. Seifert and Mr. Harrold of Essar Capital who reported to Mr. Seifert. It was those negotiated terms that became the reason for the Port Transaction.

[60] I am satisfied that representatives of Essar Global including Essar Capital carried out the Recapitalization and Port Transaction negotiations and made the critical decisions. Algoma management were handed the economic terms of the Recapitalization and Port Transaction and implemented them from an operational perspective. Algoma management did not negotiate the terms. Their role was to support the negotiations with regard to non-economic, primarily operational, issues.

Reasonable expectations

[61] It is clear from the authorities that an action under section 241 of the CBCA requires a two-step process. The first is to consider whether the evidence supports the reasonable expectation asserted by a claimant and the second is to consider whether the evidence establishes

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that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest. See *BCE* at para. 68.

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[62] As to how a reasonable expectation may be established, the evidence may take many forms depending on the facts of a case. See *BCE* at para. 70:

> 70 At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. As stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression, as discussed, generally turns on particular expectations arising in particular situations. The question becomes whether the claimant stakeholder reasonably held the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.

[63] Expectations can be established by direct evidence or by drawing reasonable inferences from circumstantial evidence. It is not the case that a claimant must give direct evidence as to his or her expectation; caution is to be exercised in not proving an expectation based on a claimant's wish list.[5] See *Ford Motor Co. of Canada v. Omers* at paras. 65-66:

> [65] I can find no support for the proposition that there must be evidence, in the form of testimony, from the shareholders as to their expectations. The existence of reasonable expectations is a question of fact and like any question of fact can be proved by direct evidence or by drawing reasonable inferences from circumstantial evidence. …
>
> [66] Where the minority shares in a public company are widely held it may be difficult to adduce cogent direct evidence of the reasonable expectations of the shareholders. In such cases, it is open to the trial judge to infer reasonable expectations from the company's public statements and the shared expectations about the way in which a public company should be run. As Farley J. said in

[5] The Essar Defendants contend that a party must have a subjective expectation, relying on a statement of Justice Myers in *Couture v Toronto Standard Condominium Corp. No. 2187*, 2015 ONSC 7596 at para. 58. The authority that Myers J. referred to for this statement says no such thing, and I do agree with it. As stated in BCE, the expectation held must have been reasonably held and the evidence of that may take many forms. As stated in Ford, there is no requirement that there be testimony from claimants as to their expectations.

> *820099 Ontario Inc. v. Harold E. Ballard Ltd.*, [1991] O.J. No. 266, 3 B.L.R. (2d) 113 (Gen. Div.), at para. 129, affd [1991] O.J. No. 1082, 3 B.L.R. (2d) 113 (Div. Ct.), "It does not appear to me that the shareholder expectations which are to be considered are those that a shareholder has as his own individual 'wish list'. They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders."

[64] In this case, the reasonable expectations asserted by the Monitor relate to the loss by Algoma of a critical asset and value to Portco and the change of control clause in the Cargo Handling Agreement. The Monitor contends that the reasonable expectations of the creditors of Algoma, including the trade creditors, employees, pensioners and retirees, were that Algoma would not deal with its core assets like the Port in such a way as it would lose long-term control and value over those assets to a related party on terms that permitted the related party to veto or thwart Algoma's ability to do significant transactions or restructure, as was done in this case.

[65] The Monitor relies on two affidavits of trade creditors. One is by Mr. Brian Wallenius, the General Manager of Sling Choker Manufacturing (Sault) Ltd that has supplied sling and cable products to the steel mill at Algoma since 1975 and has consistently carried a balance owing on its invoices to Algoma that varies, but is generally above $300,000. In November of 2015 the balance owing by Algoma to Sling-Choker was approximately $637,370.45. This amount remains unpaid. The other affidavit is by Mr. Donnie Varcoe, the President and sole shareholder of Lakeway Truck Centre Ltd. which has leased heavy trucks, boom trucks and other types of vehicles, provided vehicle repair and sold vehicle parts to Algoma since 1959. In November of 2015 the balance owing by Algoma to Lakeway was approximately $599,000. It remains unpaid. Both state that, as a creditor of Algoma, they want Algoma Steel to come out of bankruptcy and may suffer if the arrangements made by Portco and its parent company concerning the Algoma port facilities, including any arrangement giving Portco control over the port, make it harder for Algoma Steel to come out of bankruptcy. Both say they were not aware of the transaction between Algoma and Portco in November of 2014 and are surprised to learn

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that Algoma no longer has full control over its port facility. They say they would not have expected this outcome.

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[66] This evidence is not very surprising. Creditors dealing with Algoma over the years would likely expect that if Algoma got into financial trouble, it would have the ability to take steps itself to try to get out of the financial trouble. I hesitate however to put too much reliance on this evidence as it suffers from the risk that it is a hindsight view rather than a view held contemporaneously with the events in 2014 when the Recapitalization and the Port Transaction were worked out and settled.

[67] I would not disregard the evidence, however, on the argument advanced that these witnesses or trade creditors had no expectation to be consulted on corporate transactions involving Algoma. In some cases, past practices and contractual terms may be of importance, as discussed in *BCE*, but I do not see them as particularly relevant in considering the expectations of trade creditors here. Nor do I agree that the expectations of the other creditors, such as the employees, pensioners and retirees, are governed only by their agreements with Algoma.[6]

[68] In *BCE* at para. 72, the Court referred to factors from case law that are useful in determining whether a reasonable expectation exists. I do not read that as requiring each listed factor to be satisfied in any particular case. In para. 71, the Court began by saying that it is impossible to exhaustively catalogue situations where a reasonable expectation may arise due to their fact-specific nature. I do not think in this case, for example, that the prior sale of a non-critical asset, such as a co-gen power facility, would lead to the creditors in question expecting a critical asset to be sold to a related party. The co-gen power facility was not necessarily the sole

[6] The USW collective agreement for Local 2251 provides for a joint steering committee of representatives of the company and the union. One of its functions is to review proposed major sale, lease or rental of assets. Mr. Da Prat, the president of Local 2251, could not say how many times the committee had met over the past two years, i.e. in the two years since the Recapitalization and Port Transaction, but said no grievance had been brought with respect to the joint committee. In the CCAA proceedings, the union had complained that the decision to disqualify a bid by a numbered company owned by Essar Global had not been discussed with the union. I do not see this evidence as relevant to what expectations were at the time of the Recapitalization and Port Transaction in 2014.

source of electricity for Algoma, whereas the Port is necessary for all of Algoma's business. Nor do I see the fact that change of control provisions may be the norm in infrastructure lending as being helpful in considering the expectations of the creditors.

[69] The Essar Defendants argue that the creditors knew, or ought to have known, about Algoma's history of insolvency and yet, despite the fact that the trade creditors, unions, and retirees all have rights defined by contract, no steps were taken to protect themselves from related party transactions or the disposition of assets. I find this an astonishing argument. Trade creditors or retirees could not expect to bargain for any such rights. So far as the union is concerned, it has acknowledged that it had no right to be making decisions regarding the disposition of assets. Management rights clauses in the union contract make that clear. These creditors had no functional control over decisions made by Algoma and its board and no expectation of being able to control those decisions.

[70] There is evidence that Ms. Dale, the president of Local 2724, expected that any sale of the Port facilities would be given full value. Whether she had any other expectations was not explored. She did not learn that Algoma no longer owned the Port facilities until May, 2015 when she was told that there would be no job losses. There is also evidence that Mr. Da Prat, the president of Local 2251, thought that the Port Transaction was positive, although when he formed that idea was not clear. However, in my view the evidence of local union officials is not neutral because the USW and its Locals have aligned themselves with the attempts by Essar Global to acquire the Algoma assets in the CCAA process.

[71] Essar North America, a subsidiary of Essar Global submitted a bid during the CCAA sales process through a numbered company. It was disqualified to be a Phase II bidder because it failed to provide sufficient evidence of the financial ability to pursue the assets. Local 2251, supported by Local 2724 and the USW, brought a motion on May 13, 2016 to have the Essar Global bid qualify as a Phase II bidder. At the motion, counsel for Essar Global said that Essar Global still wanted to be a bidder. That motion was dismissed. On July 18, 2016, Local 2251

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served a motion authorizing Local 2251 to advance a transaction in accordance with a term sheet under which Ontario Steel Investments Ltd., owned by Essar Global, proposed to acquire all of the Algoma assets. Apparently, Local 2251 and Ontario Steel signed the term sheet. The affidavit of Mr. Da Prat in support of the motion stated that Local 2251 had been approached by Ontario Steel and that Local 2251 supported the term sheet. The motion was adjourned. Essar Global is still interested in purchasing the assets of Algoma. On January 30, 2017, Essar Capital served a motion for an order directing the applicants to re-open the SISP. The motion referred to the continued interest of Essar Global.

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[72] There is support in the evidence for a finding that the expectations relied on by the Monitor have been established by drawing reasonable inferences from the circumstances that existed at Algoma in 2014. Algoma has gone through a number of insolvencies and court proceedings to restructure since the early 1990s. In 2014, Algoma was under financial distress with a highly leveraged debt structure and liquidity issues. Given the cyclical nature of the steel business, it was entirely reasonable in the circumstances for all stakeholders to expect that significant corporate changes might be necessary for Algoma in the future, i.e. a restructuring might be necessary again. GIP made it clear that it had concerns that Algoma might find it necessary to go through another insolvency proceeding in light of its history and for that reason structured its loan and the resulting Port Transaction to provide some protection against that. It was reasonable for the stakeholders to expect that Algoma would not lose its ability to restructure in the future without the agreement of its parent, Essar Global.

[73] Often equity is entirely wiped out in a restructuring. This substantially occurred at Algoma in 1992 when majority ownership of the restructured company ended up in the hands of the employees. It would not seem reasonable to expect in 2014 that the equity holder would in the future have the right to veto any restructuring in a CCAA process in which it was not an applicant and thus the right to prefer its own interests to those of other stakeholders. That would not be fair treatment of creditors. Stakeholders have a reasonable expectation of fair treatment.

See *BCE* at para. 70. This is particularly the case in Sault Ste. Marie in which Algoma is of critical importance and the major industry which trade creditors and employees rely on.

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[74] I do not accept the argument that the Algoma secured lenders or senior noteholders, who were informed of the Recapitalization and Port Transaction at the time and decided to support it, could be considered as proxies for all stakeholders and that their expectations should be accepted as the expectations of all stakeholders. Different groups of stakeholders can have different expectations, particularly from sophisticated institutional participants who were quite able to negotiate for themselves in the new capital structure. See *BCE* at para. 64.

[75] I find that the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

Were the reasonable expectations violated?

[76] These reasonable expectations were violated in two principle ways, being (1) the Port Transaction itself and (2) the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

(1) **The Port Transaction**

[77] The Port Transaction, which was caused as a result of the breach by Essar Global of the Restructuring Support Agreement and the Equity Commitment Letter under which Essar Global agreed with Algoma to inject $250 to 300 million into Algoma, transferred control of the Port

facilities from Algoma to Portco/Essar Global. This transfer of control was caused by the Port Transaction under which the fixed assets were transferred to Portco and a lease of the land used by the Port was given by Algoma to Portco for 50 years. The Cargo Handling Agreement, under which Portco agreed to provide cargo handling services to Algoma, provided for an initial term of 20 years and automatic renewal for successive three year periods unless either party gave notice of termination. Thus Essar Global will be in a position to terminate the Cargo Handling Agreement after 20 years which would give it leverage to negotiate a new payment schedule from Algoma, assuming it wanted to continue providing services to Algoma. Algoma will be at its mercy.

[78] The transfer of the Port assets to Portco was driven by the desires of GIP. GIP first became involved in April, 2014 when it was approached by Barclays, which was exploring alternative financial structures for Algoma on behalf of Essar Global. Mr. Seifert of Essar Capital was introduced to GIP by Barclays.

[79] On May 12, 2014, representatives of GIP met with representatives of Essar Global and Barclays to discuss Algoma's infrastructure assets and potential asset disposition transactions. They discussed the possibility of a Port transaction in which Algoma might sell its Port assets to a new corporate entity as a means to generate cash proceeds. GIP thought it of critical importance that an independent corporate entity for the Port assets be set up. On May 22, 2014, GIP sent Barclays a term sheet for a $150 million facility described as a facility "with a bankruptcy remote SPV that includes the ports and related infrastructure of Essar Steel Algoma Inc."

[80] Regarding the need for a "bankruptcy remote structure", GIP was aware that Algoma had sought insolvency protection twice in the last 25 years, largely due to high leverage combined with economic downturns and the cyclical volatility of the steel industry. One of GIP's main concerns was bankruptcy remoteness. It would only lend to a new entity that would purchase the Port assets if that entity was separate and distinct from Algoma and had a mechanism in place,

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i.e a take or pay contract, to receive a stable cash flow stream rather than cash flow dependent upon fluctuating steel prices. The utilization of a "bankruptcy remote" structure is apparently very common in project finance transactions associated with infrastructure assets and frequently utilized by banks and other institutional investors such as GIP.

[81] That the Port Transaction took on a form dictated by GIP does not, however, excuse the actions of Essar Global in breaching its equity commitment to Algoma, without which breach the Port Transaction would not have been necessary.

[82] The entire Port Transaction and the GIP secured loan to Portco would not have been necessary had Essar Global lived up to its obligations under the Restructuring Support Agreement it made with Algoma and the accompanying Equity Commitment Letter dated July 24, 2014 pledging a cash investment of $250 to $300 million. However, it is quite clear from the evidence that, despite its obligations to Algoma under these agreements, Essar Global had no intention of living up to its promises. Essar Global acted in bad faith in this regard.

[83] On March 28, 2014, the Ruias made it clear to Mr. Saraf of Essar Services India Limited in Mumbai that they did not have $250 million for an equity investment in Algoma, that they did not want to tell any banks or investors that they would put in $250 million of equity and that they could only put in $120 million but would just take it out to reduce liabilities of Algoma owed to Essar companies.

[84] Mr. Saraf was dealing with Goldman Sachs, who were advising on the Recapitalization that would pay out Algoma's junior unsecured noteholders. Goldman Sachs advised that up to $300 million was needed as an equity contribution. On July 29, 2014, just five days after Essar Global signed the Equity Commitment Letter obliging it to provide equity of $250 to 300 million (less $50 million in potential third party inventory financing), Mr. Saraf advised Goldman Sachs that Essar Global wanted to limit its equity contribution to Algoma to $150-160 million and asked if it could be reduced to $100 million. On his cross-examination, Mr. Seifert referred to the

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equity commitment in the Restructuring Support Agreement as "a temporary agreement to an ultimate refinancing". That agreement was not by its terms a temporary agreement. While the Equity Commitment Letter provided for a payment to be made if it or the RSA were breached, it did not make the agreement temporary.

[85] Beginning in October, 2014, Mr. Seifert led a series of roadshow presentations to potential investors, marketing the securities being offered through the recapitalization. The transaction presented in the roadshow presentation was not what was contemplated by the RSA. Instead, it described a transaction in which the Essar Group contributed less than $100 million of cash to Algoma, rather than the $250-$300 million required under the Equity Commitment Letter. This alternative transaction also contemplated cash being contributed to the recapitalization through the sale of the Port, something forbidden by the terms of the RSA without the express consent of the noteholders which had not been obtained. This roadshow presentation failed, and one reason given by Deutsche Bank, the lead bookrunner in the roadshow, was an insufficient contribution of cash equity into Algoma by Essar Global. This concern of potential investors over current and previous support from Essar Global was referred to at a board meeting of Algoma on October 30, 2014.

[86] The Essar Defendants argue that a shareholder has no obligation to inject cash equity into the company in which it owns shares. In the abstract that is certainly the case. But it was not the case with Essar Global which had obligated itself to inject $250 to 300 million in cash into Algoma.

[87] The Essar Defendants also argue that there was no connection between the Essar Global equity commitment, i.e., the failure to advance under that commitment, and the Port Transaction and that the Port Transaction was a "key component" of the Recapitalization by May, 2014. I do not accept that. It is the case that the Port Transaction was contemplated as a possible transaction when first introduced in May, 2014, but it was by no means a certainty. In the first plan of arrangement to effect the Recapitalization that was approved by the Court on September 15,

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2014, it was a condition of the plan that Essar Global comply with its cash funding commitment of $250 to 300 million under its Equity Commitment Letter. The Port Transaction was not a part of the plan at all.

[88] It was Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter that made it necessary to carry out the Port Transaction. The Port Transaction was the result of the structure required by GIP to support the loan of $150 million to Portco that was advanced to Algoma net of costs. That reduced the amount of cash equity previously promised by Essar Global to be advanced to Algoma. In the amended RSA, $150 million of historical debt owed by Algoma to Essar Global was converted into preferred equity for Essar Global. That however was not cash as had been agreed to be advanced by Essar Global to Algoma in the Equity Commitment Letter. Moreover, the $150 million debt had been at the bottom of the capital structure of Algoma and its value was certainly questionable, making the conversion of debt to equity also of questionable value. On cross-examination, Mr. Seifert chose not to "speculate" on what he would pay for the $150 million debt and said the value was something in the eye of the beholder. This is confirmatory of the fact that the loans and equity conversion was of questionable value and certainly less than the cash infusion that Essar Global had previously agreed to put into Algoma and later reneged on.

[89] In my view, Essar Global's failure to inject cash equity into Algoma as agreed was the root cause of the Port Transaction and the resulting long-term effect on Algoma and its stakeholders of the transfer of control over the Port facilities from Algoma to Portco/Essar Global. The cash equity injection agreed to by Essar Global was a contractual alternative and clearly more beneficial to Algoma. That root cause was an exercise in bad faith. Had an independent committee of the board of directors of Algoma been struck, it may have been that steps may have been taken to hold Essar Global to its bargain rather than simply look to third party financing from GIP under the structure of the Port Transaction. The failure of the board of

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Algoma to look to some other way to effect a Recapitalization was in itself an indication of a lack of regard for the interests of stakeholders of Algoma.

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[90] The Essar Defendants contend that there was no legal requirement to appoint an independent committee of the Algoma board. However, actual unlawfulness is not required to invoke section 241 of the CBCA. The remedy is focused on concepts of fairness and equity rather than legal rights. A court is to look beyond legality to what is fair, given all of the interests at play. See *BCE* at para. 71.[7]

[91] The Monitor argues that although it is no longer claiming that the Port assets were transferred to Portco at an undervalue, the long-term value given to Essar Global, after the GIP loan is repaid, was itself oppressive. Essar Global paid cash to Algoma of under $5 million, but will receive a stream of payments of $25 million each year after GIP has been repaid. It would not be in the interests of the lenders to Algoma to want such a stream being paid out after the GIP loan was repaid. Their interest, as understood by Ms. Glass, was that they wanted to ensure that the port charges did not result in an ever increasing cost to Algoma and thus the reason for the amount to be paid by Portco annually for the shared services was to escalate at a higher rate of 3% as against an increase in the annual cost to be paid by Algoma to Portco for access to the Port facilities of 1%. It also would not be in the interests of the trade creditors, pensioners and retirees of Algoma.

[92] Two critical assumptions in the Duff & Phelps valuation of the cash flows were (i) that the amount of $6 per ton to be paid by Algoma to Portco under the Cargo Handling Agreement

[7] On June 16, 2014 Prashant Ruia resigned as a director of Algoma. On June 23, 2014 Mr. Mirchandani became a director and on August 24, 2014 Mr. Kothari became a director. The four directors were then Mr. Mehra of Essar Global, Mr. Ghosh and Messrs. Mirchandani and Kothari. In an October 2014 offering memorandum, it was said that there were two independent directors, presumably being Messrs. Mirchandani and Kothari. They may have been legally independent of Essar Global, but there is no evidence of what their business connections to Essar Global were, or why they were appointed. Mr. Kothari had over 19 years' experience in financial services in India. Mr. Mirchandani had over 25 years' experience in the finance and accounting fields, having held numerous senior positions in major international firms. As will be seen, they took no steps to hold Essar Global to its original equity commitment under the RSA, despite being advised by Algoma's legal advisors to do so.

was reasonable and (ii) that the price would escalate by 1% for each of the 50 years. The Monitor is critical of the evidence of the comparable transactions used by Duff & Phelps and Susan Glass to test the $6 per ton to be paid by Algoma to Portco under the Cargo Handling Agreement. I am not satisfied that the criticism is warranted. I accept the evidence of Duff & Phelps and Susan Glass in that regard that the $6 per ton at the time in 2014 was reasonable.

[93] Regarding the assumption that the price to be paid by Algoma to Portco would be $6 per ton escalated by 1% for 50 years, I find it somewhat difficult to accept that anyone can anticipate what the price of anything will be for 50 years, particularly in the steel industry, which on the evidence is quite cyclical. While the Cargo Handling Agreement provides for such an increase, an issue is whether that could be considered to be an indication of the market value over 50 years, albeit discounted to the present value. Duff & Phelps assumed that to be the case without any analysis to support it. The comparables they looked at were for three years only. Ms. Glass said that in her experience, annual price escalation can be something less than one percent or slightly higher than one percent and that the one percent in the Cargo Handling Agreement was not out of line with industry practice. No particulars were provided as to any other agreements and how long the escalation terms were, except for three comparables and two years of pricing in 2013 and 2014. No evidence of any comparable transaction for any port for anything close to 50 years was provided.

[94] One cannot question the expertise of Duff & Phelps or Ms. Glass. But I must say that the assumption that the price to be paid by Algoma to Portco of $6 per ton for 50 years increased by 1% each year for 50 years was reasonable is weakly supported (in reality virtually not at all). Thus whether the amount paid to Algoma for the lease represented market value is to my mind somewhat questionable. Thus whether it was fair to the stakeholders whose reasonable expectations are to be taken into account is also questionable. The concern is heightened by the fact that Essar Global advanced only approximately $4.2 million of its own money for this right to the cash flow, with by far the lion's share of the money going to Algoma coming from the

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$150 million GIP Loan advanced to Portco. Essar Global also became obligated to pay the $19.8 million promissory note from Portco to Algoma that was assigned to Essar Global, which Essar Global has refused to pay since due in November 2015.

[95] There is evidence that Mr. Ghosh voted in favour of the Port Transaction as being in the best interests of Algoma at the board meeting in November 2014. However, it is clear that he did so not because it was ideal, but because there was no other option given the failure of Essar Global to capitalize Algoma with the $250 to $300 million.

[96] Mr. Ghosh said that on a stand-alone basis, he would not have done the Port Transaction as it was too expensive with effective interest at 20%, being a cost of $25 million annually on $150 million. However, he said he had to agree to the Port Transaction as it was the only way to close the refinancing that was bringing in $150 million and it was the only deal on the table because Essar Global was not providing $250 to $300 million in equity as previously agreed. He did not think that the refinancing at the time was adequate for Algoma's needs. I accept this evidence.

[97] Mr. Marwah, the CFO of Algoma (but not a director), said the same thing. He thought the payment of $25 million annually on $150 million was high and said that it did not concern him as it was the only option available at that point in time. In his words, there was no other option to keep the company alive. I accept that evidence as well.

[98] The Essar Defendants submit that Mr. Marwah, in his capacity as CFO, swore an affidavit in support of the arrangement application deposing that Algoma's trade creditors, retirees and employees "will not be affected" by the Recapitalization. I do not see that as assisting Essar Global. That was an affidavit in support of the first plan of arrangement approved by the Court. It was a condition of that plan of arrangement that Essar Global would comply with its financing obligations under the RSA to provide a cash equity infusion of between $250 million to $300 million. Mr. Marwah referred to this in his affidavit and said that Essar Global

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will fund up to $300 million by way of equity on the closing of the Recapitalization. When Essar Global failed to provide that equity and a revised plan of arrangement was approved, there was no affidavit of Mr. Marwah saying that the trade creditors, retirees and employees would not be affected. Whether he was obliged as argued by the Essar Defendants to say in that affidavit that these creditors would be affected was really not for him to say.

[99] The fact that Mr. Ghosh and Mr. Marwah acted in good faith thinking they were doing the best for Algoma in the circumstances is not in itself an answer to an oppression claim. Good faith is not necessary.

[100] The Essar Defendants argue that in the amended RSA and order approving it, a release was given to Essar Global for breach of the Equity Commitment Letter, and it would be an improper attempt to re-litigate an issue previously decided by Morawetz R.S.J. and an abuse of process which should not be allowed. I do not see this as an issue in this proceeding. First, the release in the amended RSA was a release of any claim arising out of the Equity Commitment Letter. The Monitor is not making a claim under the Equity Commitment Letter or asking that Essar Global provide the equity it agreed to provide in that commitment. Nor is the Monitor asking that the release be set aside. The Monitor contends, and I agree, that the failure of Essar Global to fund as agreed in the RSA and Equity Commitment Letter is a part of the factual circumstances to be taken into account in considering whether the affected stakeholders who were not party to the agreements were treated fairly by the Port Transaction.

[101] Second, it was only the failure of the roadshow to attract investor interest that left Algoma with a shortfall of funds to refinance its debt. Algoma was compelled to amend the RSA to permit proceeds from the Port Transaction to be used as a source of funding. Nowhere in the affidavits adduced in support of the amendment to the Plan of Arrangement was there any reference to the Port Transaction. The order approving the amendment to the RSA was obtained without opposition. It cannot be said that the Court adjudicated at all on the terms of the Port Transaction. Nor did the Court make any finding in the unopposed order that a release of Essar

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Global in respect of that transaction was warranted as being fair and reasonable in the circumstances. The trade creditors, employees, pensioners and retirees of Algoma were not a party to the motion approving the amended RSA.

[102] It is also argued by the Essar Defendants that the claim of the Monitor is only brought with the benefit of hindsight and that there is no evidence that a subsequent CCAA filing was reasonably foreseeable in 2014 when the amended Recapitalization was agreed and closed. I disagree. It was the concern based on Algoma's past history and its previous CCAA filings that led GIP to require a "bankruptcy remote" loan structure to protect it in the event of a future insolvency. At the time, Mr. Ghosh did not think that the amended Recapitalization was adequate for Algoma in the future without the equity injection of $250 to $300 million that Essar Global had agreed to make. That turned out to be prescient. This argument by the Essar Defendants is also somewhat inconsistent with its argument that the trade creditors, employees, retirees and pensioners knew, or ought to have known, of Algoma's history of insolvency in 2014 and taken steps to protect themselves.

[103] I conclude and find that the Port Transaction was in itself unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners and retirees.

(2) **Change of control provision**

[104] The change of control provision contained in section 15.2 of the Cargo Handling Agreement gives Portco (and thus Essar Global) effective control over who may acquire the Algoma business. It provides that the Cargo Handling Agreement may not be assigned by either party, being Algoma and Portco, without the prior written consent of the other and that a change of control of a party will be deemed to be an assignment:

> 15.2 Assignment

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> … this Agreement may not be assigned by either Party without the prior written consent of the other Party. This Agreement shall enure to the benefit of the successors and permitted assigns of the Parties hereto. For greater certainty, a change of control of a Party will be deemed to be an assignment. Any successor to PortCo or assignee of PortCo's obligations hereunder will enter into an express agreement to be bound by this Agreement in favour of ESAI.

[105] It is clear that the Port facilities are of crucial importance to the operation of the Algoma steel mill.[8] In light of the 50 year lease of the Port facilities from Algoma to Portco, and the Cargo Handling Agreement and Shared Services Agreement, any buyer of the Algoma business would require the Cargo Handling Agreement to be assigned to it in order to be able to operate the steel mill. Thus the veto of Portco under this clause, which Essar Global controls, is effectively a veto of Essar Global over any change of control of the Algoma business.

[106] The change of control clause in the Cargo Handling Agreement was driven by GIP. The evidence of Mr. Sreckovic of GIP was that GIP required the Cargo Handling Agreement to have an assignment or change of control provision (section 15.2) to ensure that Portco (and GIP) would always know who its counterparty to the agreement was. For instance, if Algoma was sold to an entity with limited financial resources or a hedge fund with no experience in running a steel company, Portco would have the ability to withhold consent to the assignment of its contract. GIP also had a change of control provision in its credit agreement with Portco for its protection. It provided that if a change of control of Portco or Algoma occurred, GIP had the right to require immediate repayment of 101% of the loan amount.

[107] Mr. Seifert, who had been chosen by Essar Global to undertake the exercise to recapitalize Algoma's balance sheet, had no discussion with any other party other than GIP regarding a debt investment, i.e. a loan to Portco. Thus it was the decision of Mr. Seifert and the controlling shareholder not to have any lender to Portco other than GIP. Had there been other

[8] The fact that the Port was referred to in an offering memorandum as a non-core asset of Algoma does not mean that it was not crucial to the operation of the steel mill. Mr. Seifert's evidence is that whether an asset is important to a business is not determinative of whether it is core and that companies regularly sell off infrastructure without which they cannot operate.

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investment advisors to an independent committee of the board of Algoma, it may have been that the purpose of the control clause given to Portco in section 15.2 of the Cargo Handling Agreement could have been achieved by some other means. There is no evidence that anyone at Essar Global or Algoma tried to avoid the clause. There was a way to achieve that purpose other than giving Portco/Essar Global a veto over a change of control of Algoma.

[108] The Essar Defendants say that any infrastructure lender would have required a clause giving Portco a veto over any change of control. It relies on the opinion of Mr. Weisdorf as to why GIP, as an infrastructure lender, would want Portco to hold a veto over any change of control of Algoma. In his report he said that it is ordinary practice in the circumstances for Portco to require change of control provisions in order to be assured that any new potential owner of Algoma would continue to operate the Port to the same standard as the prior owner of Algoma. He explained this in his cross-examination, saying that the reason why GIP would request the clause is because if GIP elected to act on its security and become the equity owner of Portco i.e. it was no longer a lender to, but an owner of Portco, it could no longer act or rely on its security that had a change of control provision and it would have to rely on the right of Portco to veto any purchaser. Mr. Weisdorf conceded that such a scenario was remote and unlikely to occur.

[109] There was, however, another way for GIP to protect itself in this scenario, but no one from Essar Global or Algoma sought to pursue it with GIP.

[110] One of the agreements signed at the time of the Recapitalization and Port Transaction on November 14, 2014 was an Assignment of Material Contracts made among a number of the secured lenders, including GIP, Portco and Algoma. It contained covenants by Algoma in favour of GIP, such as a clause precluding it from selling or assigning any material contract, which included the Cargo Handling Agreement. There was no reason why the agreement could not have contained a change of control provision that Algoma or its parent could not enter into any arrangement leading to a change of control of Algoma without the consent of GIP if GIP became

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an equity owner of Portco under its security and unable to act on the change of control provision contained in its security. Such a clause would have given GIP everything that Mr. Weisdorf said an infrastructure lender would want. It was an alternative definitively available and clearly more beneficial to Algoma.

[111] Had there been a committee of independent directors with advisors independent of the Essar Global interests, that result may have been achieved. What happened however is that GIP, the lender to Portco decided on by Essar Global and Mr. Seifert, had no real pushback on the change of control giving Portco/Essar Global a veto. It was in Essar Global's interest to have such a veto reside in Portco and it had no reason to argue against it.

[112] In its pleading, the Monitor claimed a declaration that the Port Transaction was a transfer of assets from Algoma to Portco at undervalue. At the time of the Port Transaction, GIP required that a valuation be done to assist it in later defending any possible attack in a bankruptcy that the assets had been transferred to Portco at an undervalue. For that purpose, Duff & Phelps did a valuation which would suggest that the assets were not transferred at an undervalue. For the purposes of the trial Essar Global obtained an opinion from Susan Glass of KPMG that the Duff & Phelps opinion was reasonable. It is important however to note that none of the opinions took into account the change of control provision in the Cargo Handling Agreement or attempted to value it.

[113] There is little doubt that the change of control clause is of considerable value to Essar Global. On May 10, 2016, counsel for Portco wrote to counsel for Algoma to highlight matters of particular concern to Portco in connection with the CCAA process. Included was a concern that any prospective bidder be told of the veto right of Portco/Essar Global under the change of control clause. The letter stated:

> Portco and ESAI [Algoma] are party to a Cargo Handling Agreement pursuant to which ESAI has committed to long-term use of the Port. Portco has, of course, a

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> keen interest in any successor to ESAI as counterparty to that Agreement and would like it to be clear to prospective bidders that, pursuant to the terms of the Cargo Handling Agreement, Portco has a consent right in the event of any assignment by ESAI of the Agreement or a change of control of ESAI. Again please confirm that this has been made clear to prospective bidders.

[114] This letter was sent around the time that Ontario Steel, a subsidiary of Essar Global, negotiated and signed a term sheet with Local 2251 under which Ontario Steel would acquire the Algoma business. The letter was clearly meant to be a shot across the bow of any potential buyer of the Algoma assets. Essar Global continues to have an interest in being a bidder, as is clear from the motion of Essar Capital to reopen the SISP, first made returnable on January 30, 2017.

[115] The evidence of Mr. Ghosh is that, as the Cargo Handling Agreement governs the rights of Algoma to access the Port and since Algoma cannot survive without access to the Port, this right of Portco to refuse assignment in the event of a change of control is a material impediment to restructuring Algoma. The evidence of Mr. Marwah, formed from discussions with several potential purchasers, is that Portco's right to refuse an assignment is an impediment to the sale of Algoma. This evidence is not surprising and was not challenged. I accept it. It is clear that the dictate of Portco through its solicitors that prospective purchasers should be made aware of the change of control provision was successful.

[116] I do not accept GIP's argument that they had no chance to consider this issue. It was clear from the opening bell in this proceeding in the conferences held that this change of control power was central to the claim of the Monitor. It was pleaded in the statement of claim. The affidavits of Mr. Ghosh and Mr. Marwah were served on the parties, including GIP, and GIP could have answered them in its own affidavit evidence if its wished. Mr. Ghosh and Mr. Marwah could have been cross-examined on this issue as well. They were not.

[117] In argument, counsel for Essar Capital said that it would not unreasonably withhold its consent to a transaction. There is no evidence to this effect, but I put little weight in that

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statement in any event. As long as Essar Global holds out a prospect of being a buyer, it cannot be expected to consent to another bidder buying Algoma. It would be in its interest to dissuade other buyers in order for it to achieve the lowest possible purchase price. Essar Global has moved to reopen the bidding process and indicated an interest in being a bidder, perhaps with some financial partner, and I would not be prepared to say there is no concern raised by the change of control provision on the mere say so of Essar Global.[9] The letter from counsel for Essar Global on May 12, 2016 speaks volumes. It clearly invites any bidder to understand that Essar Global has control rights.

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[118] I conclude and find that the change of control provision in favour of Portco in section 15.2 of the Cargo Handling Agreement was unfairly prejudicial to, and unfairly disregarded the interests of, Algoma's trade creditors, employees, pensioners and retirees.

The business judgment rule

[119] The Essar Defendants rely on the business judgment rule as a defence to the claims made against them. The business judgment rule was described in *BCE* at para. 40:

> 40 In considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives…. It reflects the reality that directors, who are mandated under s. 102(1) of the CBCA to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the

[9] In a decision released contemporaneously with this judgment, I have dismissed the motion to re-open the SISP. However, as stated in that decision, it is open to any person to reach out to the Term Lenders and the Consenting Secured Noteholders to propose and negotiate a transaction that they are willing to accept and support.

> corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

[120] In this case I do not think that the business judgment rule provides a defence to the Essar Defendants.

[121] The Essar Defendants argue that throughout the Recapitalization and Port Transaction, Algoma's Board had the benefit of advice from sophisticated financial and legal advisors. That surely was the case. What all the advice was that was provided is not in the record. However there was one piece of advice not heeded by the Algoma board that is of central importance in this case.

[122] Algoma's Board held meetings on October 30 and November 1, 2014. It is quite clear from the meeting minutes that it was Mr. Seifert who was leading the Recapitalization effort. At the November 1 meeting, Mr. Schrock of Weil, Gotschal & Manges advised that unsecured noteholders would not react well to proposed changes to the Port Transaction and would likely push for a higher infusion of cash/equity from Essar Global, as promised in the Equity Commitment Letter. The advisors said that the board should insist that Algoma press all parties to fully satisfy their commitments and this could include a letter to Essar Global setting forth its obligations regarding the equity commitments. That advice was not followed.

[123] I fail to see how the directors of Algoma can rely on the business judgment rule in the face of not following advice to go after Essar Global on its cash equity commitment. There was no issue about the validity of that commitment. If the Ruia interests had acquiesced to forming an independent committee of the board, or listened to the truly independent directors before they resigned in frustration, steps may have been taken differently including accepting and following Mr. Schrock's advice. What happened in the Port Transaction was an exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefited Essar Global at a time that a

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future insolvency was a possibility.[10] That would not have been necessary had Essar Global lived up to its cash injection commitment. Yet the board did not take any steps to call Essar Global on its commitment, even in the face of legal advice that it should do so.

[124] The Board of Algoma also accepted the change of control provision without considering whether other steps could be taken to protect GIP. There is no evidence that the Board even considered the issue. There were steps that could be taken and failure to consider those steps on such an important matter for Algoma was not reasonable.

The appropriate remedy

[125] The Monitor has taken somewhat different positions on the appropriate remedy as this case has progressed. In the original statement of claim, the Monitor sought to set aside the Port transaction and the relief sought against GIP was vague other than to say that its interests should be addressed. The pleading requested:

> an order setting aside the Port Transaction, and vesting Algoma with all right, title and interest in and to the lands….which are subject of the Port Transaction…free and clear of the claims of Portco, EGFL, Essar Ports Algoma Holding Inc. and Algoma Port Holding Company Inc. on such terms as this Court deems just, including terms addressing the interests of those arm's length parties unrelated to the Essar Group who have provided secured credit facilities in connection with the Port Transaction…

[126] GIP sought particulars of the relief claimed against it. In a short handwritten endorsement of January 5, 2017 I ordered further particulars as follows:

[10] I do not agree with the Essar Defendants' argument that control of the Port remained unchanged by the Port Transaction as control rested with Essar Global before and after the Port Transaction. The argument ignores the reality of Algoma as a separate company that had control of the Port assets and would continue to have control in this insolvency that would not be control in the hands of Essar Global once the Initial Order was made in the CCAA proceedings and after the SISP was ordered.

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> I appreciate that without the evidence of GIP, the plaintiff is not able to clearly articulate what specific relief should be granted and what relief to GIP, if any, should be granted.
>
> GIP needs to know what evidence to lead in its affidavit evidence to be filed, and needs to know as best it can which evidence it thinks it needs to cross-examine on.
>
> In my view, the statement of claim should be amended to provide as much particulars of possible relief against GIP it will seek, presumably in alternatives depending on the evidence.
>
> GIP should then file a defence as an intervening party setting out its position and as best as it can what relief (or protection) it seeks if the Port Transaction is set aside.
>
> There is no particular easy solution here in light of the way this trial is being structured. It may be that GIP may need to lead more than less evidence it wishes.
>
> I urge the plaintiff to give as many particulars as it can at their (sic) stage of what relief it may seek.

[127] In its amended statement of claim, the Monitor claimed an order setting aside the Port Transaction free and clear of the security interests of GIP and directing Algoma to enter into alternative arrangements as to its indebtedness to Portco and security in favour of GIP:

> (o) an Order setting aside the Port Transaction and vesting Algoma with all right, title and interest in and to the lands, fixtures and chattels which are the subject of the Port Transaction (the "Port Assets") free and clear of all security interests...[of GIP];
>
> (p) further or in the alternative, and on the condition that the Port Transaction is set aside… an order directing that Algoma enter inter alternative arrangements as to any indebtedness owed to the Port Lenders [GIP] and as to any security in favour of the Port Lenders on such terms as this Court deems just, including

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> arrangements addressing the terms of such indebtedness and the priority of such security;
>
> (q) further or in the alternative, and on the condition that the Port Transaction is set aside… an order directing that Algoma enter into arrangements as to any indebtedness owed to the Port Lenders and as to any security in favour of the Port Lenders on terms no less favourable on the whole than the terms currently in effect in favour of [GIP];

[128] In its response to the motions of Portco and GIP to strike the claim as disclosing no cause of action heard at the outset of the trial, the Monitor stated in its factum that it was no longer seeking the relief in (o) and therefor was not seeking relief against GIP directly. During the argument on the motion, counsel for the Monitor stated that the Monitor was seeking to set aside the Port Transaction as per (p) and (q) of the amended statement of claim, and that what was not being sought under (o) was the relief "free and clear of all security interests [of GIP]". What I take from counsel's statement, while not acknowledged as such, was that the factum was sloppily, and no doubt quickly, drafted.

[129] In its factum on the motion to strike, the Monitor did state:

> [29] Should an oppression remedy be granted, the plaintiff will seek to have it tailored as carefully as possible so as not to disturb the legitimate interests of the Lender Intervenors; and
>
> [30] The remedy sought is to have the Port returned to Algoma ownership so as to facilitate a restructuring. If a restructuring is ultimately successful and a new owner purchase Algoma, then if that new owner does not pay out the Lender Intervenor loan as part of the purchase transaction, the Monitor will seek to put in place substantially the same package of security currently enjoyed by the Lender Intervenors, but in a structure where the Port is under Algoma ownership.

[130] In oral argument, counsel for the Monitor said that one thing that could have been done was to insert a clause in the Assignment of Material Contracts to which Algoma and GIP were parties preventing a change of control of Algoma without the consent of GIP. He argued that I

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could strike the change of control clause from the Cargo Handling Agreement if it was found to be oppressive.[11] He also argued that it the entire Port Transaction was found to be oppressive, a remedy could be to transfer the shares of Portco to Algoma and keep all of the agreements relating to GIP in place as against Portco and Algoma. This argument was reiterated in the closing written submissions of the Monitor.

[131] GIP argues that its interests as a stakeholder in the Port Transaction must be taken into account in considering an oppression remedy and that it expected the terms of the secured loan to be respected. I have considerable doubt that GIP is a stakeholder whose interests were to be protected under oppression principles. The stakeholders whose interests were to be protected were the existing stakeholders and the issue is whether the transaction that is attacked was oppressive to those stakeholders. In *BCE* at para. 70 it is stated that "the claimant must identify the expectations that he or she claims have been violated by the conduct at issue". The conduct at issue here is the Port Transaction and the GIP loan.

[132] Nevertheless, I am reluctant to order the shares of Portco to be transferred to Algoma. GIP lent on a certain basis. That included lending to a company that was separate and not owned by Algoma with a cash flow stream generated by the Cargo Handling Agreement on a take or pay basis.

[133] I have some sympathy with the argument of the Monitor that in substance and practically, the position of GIP will realistically be no different if Portco becomes a subsidiary of Algoma. What GIP strove to do was to achieve a "bankruptcy remote" structure with its loan to Portco. As a practical matter, however, the cash flow generated by the Cargo Handling Agreement will certainly be affected if Algoma does not survive in the hands of a solvent buyer. The cash flow has already been affected by the order that payments under the Cargo Handling Agreement were

[11] GIP says that the Monitor has not sought this remedy, as it is not in its closing written submissions. I do not agree. The remedy was claimed by the Monitor in oral argument. All parties, including GIP at para. 13 of its closing written submissions, rely on their opening submissions, the submissions on the motion to strike, their oral submissions, as well as their closing written submissions.

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to be stopped, as Essar Global was not paying the $19.8 million owing to Algoma under the promissory note assigned to Essar Global and a set-off issue arose from Essar Global's refusal to pay this promissory note.

[134] Transferring the shares of Portco to Algoma would have a negative effect on GIP. GIP's security, which was to be a first ranking security, would rank behind each of several charges in the CCAA proceedings over Algoma's assets if Portco were a subsidiary of Algoma. There might also be a risk of Algoma leveraging itself and taking on additional debt. Also, GIP was prepared to lend at a higher multiple of EBITDA because Portco was considered bankruptcy remote and the loan would not have been for the full $150 million if Portco was not bankruptcy remote.

[135] Under section 241(3) of the CBCA, a court may make any interim or final order it thinks fit. It has been said, however, that a remedy for oppression should be taken with a scalpel. In *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.), Galligan J.A. quoted with approval the following statement of Farley J. in *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113:

> The court should not interfere with the affairs of a corporation lightly. I think that where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe. I would think that this principle would hold true even if the past conduct of the oppressor were found to be scandalous. The job for the court is to even up the balance, not tip it in favour of the hurt party. I note that in *Explo [Explo Syndicate v. Explo Inc*., a decision of the Ontario High Court, released June 29, 1989], Gravely L.J.S.C. stated at p. 20:
>
> > In approaching a remedy the court, in my view, should interfere as little as possible and only to the extent necessary to redress the unfairness.

[136] If there were no less obtrusive way to remedy the oppression in this case, I would order the shares of Portco to be transferred to Algoma. But in my view there are less obtrusive ways. Included under section 241(3) is the power to order a variation of a transaction.

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[137] The change of control provision in section 15.2 of the Cargo Handling Agreement was inserted at the instance of GIP. It was not something that Essar Global requested, although it is something that Essar Global wants to take advantage of now. GIP can be protected from the very thing that motivated section 15.2 according to the evidence of Mr. Weisdorf whose opinion was relied on by Essar Global and GIP. The purpose was to protect GIP in the unlikely event that GIP elected to act on its security and become the equity owner of Portco, i.e. if it were no longer a lender but an owner of Portco, it could no longer act on its security that contained a change of control provision.

[138] That purpose, however, could have been accomplished by an agreement between GIP and Algoma that if GIP became the owner of Portco, Algoma or its parent could not effect or be a party to any arrangement leading to a change of control of Algoma without the consent of GIP. GIP and Algoma were parties to the Assignment of Material Contracts agreement that contained covenants by Algoma in favour of GIP. In my view, and I so order, the appropriate relief for the oppression involving the change of control clause in the Cargo Handling Agreement is to delete section 15.2 from that agreement and to insert a provision in the Assignment of Material Contracts agreement that if GIP becomes the equity owner of Portco, Algoma or its parent cannot agree to or undertake a change of control of Algoma without the consent of GIP.

[139] GIP has not provided any argument as to why that relief would not protect it instead of relying on section 15.2 of the Cargo Handling Agreement. GIP has instead made arguments on the pleadings and said that relief was not spelled out in the claim. I am not sympathetic to this argument.

[140] As can be seen by my endorsement on the motion by GIP for particulars, I had some concerns that without the evidence of GIP, the Monitor could not clearly articulate what specific relief should be granted. I urged the Monitor to provide as full particulars as possible at that stage of the relief that it was seeking.

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[141] The evidence subsequently filed and relied on by GIP was that of Mr. Weisdorf, who was cross-examined on January 18, 2017 shortly before the trial was to commence. It is the cross-examination of Mr. Weisdorf that revealed the real reason why section 15.2 was required and it is that cross-examination that the Monitor relies on to support its claim to delete section 15.2 from the Cargo Handling Agreement. I grant leave to the Monitor to amend its claim to support this relief that I order. Neither GIP nor Essar Global were taken at all by surprise. The issue with the change of control clause was pled by the Monitor and the affidavit material filed by Essar Global and GIP dealt with the issue.

[142] The other concerns are with respect to the obligations in the Cargo Handling Agreement. I have a concern with the imbalance in the term of the lease to Portco for 50 years against the term of the Cargo Handling Agreement for 20 years with automatic renewal for successive three year periods unless either party gives written notice of termination to the other party. If Essar Global thought that it wanted an increased payment after 20 years, it could refuse to continue the Cargo Handling Agreement and put Algoma at its complete mercy. If the market did not support an increased payment, or indicated that the payments from Algoma to Portco should be less in the future, Algoma would still be at the mercy of Essar Global. As the Port facilities are critical to the operation and survival of Algoma, it would be foolhardy indeed for Algoma to refuse to extend the Cargo Handling Agreement. The language in the Cargo Handling Agreement that Algoma can refuse to extend it after 20 years is illusory and not realistic. In reality, it is a provision that is one-sided in favour of Essar Global.

[143] GIP is entitled to the assurance that the net $25 million (as adjusted by the 1% increase to be paid by Algoma to Portco and the 3% increase to be paid for shared services by Portco to Algoma) is to be paid by Algoma to Portco so long as the GIP loan to Portco has not matured and remains unpaid. That is the basis on which it made the loan and GIP is entitled to that protection. The loan terms require that any principal and interest amounts outstanding on the maturity of the loan be repaid on the maturity date of November 14, 2022. Without

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oversimplifying the details of the loan agreement and the charges under it, in the 8 years during which the loan is outstanding, the expected $25 million per year to be paid by Algoma to Portco and paid by way of a cash sweep to GIP would amount to $200 million. The loan was for $150 million. Interest was to be LIBOR plus, I believe, around 8% and there were costs. Whether Algoma is able to pay off GIP at the maturity date or required to refinance it through GIP is not known.

[144] For the balance of the first 20 years under the Cargo Handling Agreement after the GIP loan matures, if that agreement survives only to that date, Algoma will pay a further 12 years at $25 million, or $300 million, to Portco which will benefit Essar Global after the balance of the GIP loan is paid off. If the Cargo Handling Agreement is not terminated before the end of its life of 50 years, that will be another 30 years at $25 million, or $750 million, paid to Portco/Essar Global. Taken with the small amount paid by Essar Global, the $4.2 million in cash (and the $19.8 million note that it has refused to pay), it means that Essar Global will obtain an extremely large amount of cash from Algoma for little money. I realize that if Algoma became solvent and able to pay its debts, it would be able to pay a dividend to Essar Global (or the appropriate subsidiary) so long as Essar Global remained its shareholder. Whether and when Algoma could become solvent with its pension deficits that have existed for some time and be in a position to pay dividends to its shareholder is a significant unknown. But the payments under the Cargo Handling Agreement do not require any solvency test and are in the financial circumstances Algoma finds itself in, a clear contractual benefit for little money. It is an unreasonable benefit that was prejudicial to, and unfairly disregarded, the interests of the creditors on whose behalf this action has been brought by the Monitor.

[145] In my view, the appropriate relief for the oppression that I have found in the Port Transaction, and I so order, is that the Lease to Portco, the Cargo Handling Agreement and the Shared Services Agreement be amended to provide that after the GIP loan has matured and been paid, Algoma shall have at any time thereafter during which the Lease exists the option of

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terminating the Lease to Portco, the Cargo Handling Agreement and the Shared Services Agreement. Further, if the Cargo Handling Agreement continues and if Portco elects not to renew it after 20 years or after any three year extension, the Lease to Portco shall terminate at that time along with the Cargo Handling Agreement and Shared Services Agreement. Upon termination of the Lease, Algoma shall repay to Portco $4.2 million with interest from the date of the termination of the Lease calculated under the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. If there is any issue as to any payment to be made by Algoma to Portco under section 2.1 of the Lease, that issue shall be arbitrated under the provisions of article 18 of the Lease.

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[146] I do not think that any amendment to the claim of the Monitor is necessary for this order to be made. It goes partway to the full setting aside of the Port Transaction that was claimed by the Monitor. However, if necessary I would grant leave to the Monitor to amend its claim to support this relief that I order. The issues were fully canvassed in the evidence and argument.

Counterclaim

[147] Portco has made a counterclaim for a declaration that the $19.8 million note has been paid in full as a result of set-off and for payments beyond that amount said to be owing under the Cargo Handling Agreement. When and how the set-off occurred is not in the record and whether that could be affected by the stay of proceedings in the CCAA has not been argued. Nor are the amounts said to be owing set out with any precision. In my view the appropriate place to make this claim is in the CCAA proceedings and I do not intend to deal with it in this counterclaim.

Costs

[148] Any party seeking costs may make brief cost submissions in writing within two weeks along with a proper cost outline and brief responding cost submissions may be made in writing within a further two weeks.

Newbould J.

Released: March 6, 2017

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CITATION: Ernst & Young Inc. v. Essar Global Fund Ltd et al, 2017 ONSC 1366
COURT FILE NO.: CV-16-11570-00CL
DATE: 20170306

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ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

ERNST & YOUNG INC. in its capacity as Monitor of all of the following: ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY
and ESSAR STEEL ALGOMA INC. USA
Plaintiff
- and -
ESSAR GLOBAL FUND LIMITED, ESSAR POWER CANADA LTD., NEW TRINITY COAL, INC., ESSAR PORTS ALGOMA HOLDINGS INC., ALGOMA PORT HOLDING COMPANY INC., PORT OF ALGOMA INC., ESSAR STEEL LIMITED and ESSAR STEEL ALGOMA INC.
Defendants

REASONS FOR JUDGMENT

Newbould J.

Released: March 6, 2017