
District of British Columbia
Division No. 3 - Vancouver
Court No. 227894

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

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

AND

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

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF GREAT PANTHER MINING LIMITED

**APPLICATION RESPONSE**
**(Opposing Extension of CCAA Stay of Proceedings)**

**APPLICATION RESPONSE OF:** Asahi Refining Canada Limited ("**Asahi**")

**THIS IS A RESPONSE TO** the Notice of Application of Great Panther Mining Limited ("**GPML**") filed on October 19, 2022

**TAKE NOTICE** that an application will be made by the applicant to the Honourable Mr. Justice Walker at the Courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia, on October 21, 2022 at 10:00 a.m. for the orders set out in Part 1 below.

## PART 1 ORDERS CONSENTED TO

1. None.

## PART 2 ORDERS OPPOSED

1. Asahi opposes the orders set out in GPML's Notice of Application, which can be described as follows:

a. an order extending the Stay of Proceedings in these CCAA Proceedings; and

b. an order deleting paragraphs 11(b), 11(c) and 11(f) of the Amended and Restated Initial Order (the "ARIO") pronounced by this Court on the 14th day of October 2022.

## PART 3 ORDERS ON WHICH NO POSITION IS TAKEN

1. None.

## PART 4 FACTUAL BASIS

*A. Introduction*

1. All capitalized terms used in this Notice of Application, unless otherwise noted, have the meanings ascribed to them in the Affidavit #2 of Paul Healey (the "**Healey Affidavit #2**") made October 18, 2022.

*B. Background*

2. The facts supporting this Response are more fully set out in the Healey Affidavit #2.

*C. Extension of Stay Period*

3. GPML seeks the approval of the Stay Period for 2 weeks to November 3, 2022. According to the First Report of the Monitor dated October 13, 2022 (the "**Monitor's the First Report**") the cash drain for the two week period will be USD$352,000,000. These are funds which would have otherwise been available to satisfy claims of creditors.

4. GPML, in its Notice of Applcation, states that the extension is critical to allow GPML to develop a restructuring plan. The restructuring plan has been formulated but not voted upon. GPML intends to liquidate its only asset of material value being the Tucano Mine. If that restructuring plan were put to its creditors today, it could fail.

5. The sale of the Tucano Mine is speculative.

6. The three parties who are closest to the value which can be attributed to the Tucano Mine have said the following:

a. GPML

"I verily believe that there is a reasonable likelihood that a sales process which include the Tucano Mine will return material value to GPML's Canadian stakeholder."

(Affidavit #2 of Sandra Daycock made October 12, 2022)

b. The Monitor

"Based on the preliminary indication of value presented by the investment bank it appears that they may be a recovery, which could be significant, to GPR's stakeholders from a transaction involving Mina Tucano in its current state."

(Monitor's First Report, para 8.4)

c. Financial Advisor

"[redacted]"

(Affidavit #5 of Sandra Daycock made October 19, 2022 at Exhibit A)

7. It is abundantly clear that parties closest to the potential value of the Tucano Mine are equivocal on its value. Both GPML and Financial Advisor are not independent and are self interested. The employees of GPML, including Ms. Daycock are going to keep their jobs if the process continues. The Financial Advisor will collect a work fee and a success fee. The Monitor is basing its view of the value based on information provided by GPML or the Financial Advisor and the Monitor has not done any independent verification of value.

*D. Shareholders Equity v. Creditor Debt*

8. GPML has stated it needs time to negotiate the definitive terms of the Proposed Financial Advisors Engagement (the "**FA Engagement**").

9. In the most current materials filed in application this is no indication as to:

a. the progress in respect of the FA Engagement

b. the conditions which would need to be satisfied before the FA Engagement could be entered into, for example the approval of the Brazil Administrator or the Court in Brazil

c. who is to bear the cost of the fees of Financial Advisor (GPML had suggested a portion of the work fee may be paid by Mina Tucano but no further details have been provided)

10. The first phase of the SISP is estimated to take 6-8 weeks after the commencement of the FA Engagement. According to the cash flow in the Monitor's First Report, the weekly "burn rate" of GPML is approximately USD$250,000,000 per week. This amount does not include any amounts to be paid to the Financial Advisor as a work fee. Therefore, the cost of running the first phase of the SISP would be approximately (using 8 weeks as the benchmark) USD$2,000,000 or CAD$2,800,000.

11. The cost of running the first phase the SISP would significantly dissipate the cash held by GPML to the detriment and prejudice of Asahi.

12. Clearly this entire proceeding is meant to benefit the shareholders to the detriment of the creditors.

13. The law is very clear, that the rights of the shareholders of an insolvent company cannot be paramount to the rights of the creditors of an insolvent company.

*E. The Stakeholders*

14. Ms. Daycock, in her Affidavit #2 made October 12, 2022 (the "**Daycock #2 Affidavit**"), stated at paragraph 25:

"Accordingly, I believe that maintaining the relationship between GPML and Mine Tucano as a going concern is likely to be crucial in ensuring the success of the SISP and preserving and maximizing value for all GPML's stakeholders including creditors, employees, shareholders and the environment."

15. One would have to presume that the stakeholder group referred to as "employees" are the 17 employees who are currently employed at GPML (the "**GPML Employees**").

16. Given that the mines in Peru and Brazil are under care and maintenance, the GPML Employees are only there to support the proposed non-binding sale in Peru and assist with the proposed liquidation of the mine in Brazil.

17. The interest of the GPML Employees cannot be paramount to the interest of the creditors of GPML whose eligible assets are being eroded by continuing to pay the GPML Employees. The GPML Employees are devoting their efforts to a speculative sale of an asset with uncertain value (the "**Tucano Mine**").

18. The other stakeholder mentioned by Ms. Daycock is "the environment". Ms. Daycock does not mention which environment she is referring to but we have to assume it is the environment associated with the Peru mine.

19. Assuming the environmental concern raised by Ms. Daycock related to the allegations that the mine in Peru (located 90 kilometers from the City of Lima) would potentially cause the drinking water to the City of Lima to be tainted, then the stakeholders who Ms. Daycock identifies would be the citizens of Lima (the "**Lima Citizens**").

20. There is no evidence that the shutting of the Peru mine could cause any change to the drinking water of Lima. Lima is city of 9,000,000 people and one would have expected this group of "stakeholders" would be appearing before this Court to plead their case and describe the devasting affects the mine closure in Peru would have on their drinking water.

21. In the absence of any proof that "the environment" is being affected by a Canadian CCAA proceeding, the interests of the Lima Citizens cannot be paramount to the interests of the creditors of GPML.

*F. Models and Validations*

22. Ms. Daycock in the 4th Affidavit made October 19, 2022 (the "**Daycock 4th Affidavit**") goes to great lengths to describe how modelling works .

23. In the Daycock 4th Affidavit (para 8) Ms. Daycok states as follows:

"My experience has been that the financial models I have developed have generally remained accurate in the long-term, subject to revisions resulting from material changes in circumstances (which recently affected certain models developed by GPML, as described in further detail below)."

26. In other words, Ms. Daycock believes the models she has developed are accurate until they are not.

27. Ms. Daycock also states in para 20(h) of the Daycock Affidavit #4 that:

"It is true that amounts ultimately recoverable in a sale process for any given asset will be determined in large part by market factors and there is no guarantee that a properly conducted valuation will prove accurate in the result."

28. In her own works, Ms. Daycock says that modelling and valuation are speculative. In a Court supervised reorganization, the exigible assets of a company which would otherwise be used to repay creditor debts should not be used for speculative purposes over their objection.

*G. Cash Flow*

29. Ms. Daycock in her 1st Affidavit made September 28, 2022 (the "**Daycock #1 Affidavit**") stated at para 25:

"A&M has assisted GPML's management in preparing a (13) week cash flow projection. At the time of swearing this Affidavit, GPML and A&M are finalizing the details of the cash flow projection."

30. No 13-week cash flow projection has ever been produced.

31. If we run off a 13 week cash flow projection from the October 21, 2022 hearing until January 20, 2023 (13 weeks) and apply the "burn rate" of USD$250,000 per week (which does not include any payments to the proposed Financial Advisor), that would mean in excess of USD$3,250,000 would have been drained from the cash available to creditors.

32. In the Daycock 4th Affidavit (para 32(b)) Ms. Daycock states that the "market discovery" phase ("**Phase 1**") of the proposed SISP will "quickly reveal whether there is material value to be realized from the Tucano Mine over a period of six (6) to eight (8) weeks." It is clear from this statement that the value of the Tucano Mine is speculative and may be "revealed" only after a market discovery phase of the SISP. The total cost to creditors for a market discovery phase is USD$2,000,000.

33. The Court should not continue to countenance the very significant erosion of the assets of this insolvent company by allowing an GPML to engage in a speculative flight of fancy at the expense of the creditors.

34. GPML requests that the Court delete paragraphs 11(b), 11(c) and 11(f) of the ARIO. No justification is given for this request. No evidence as to why these provision which are attempting to preserve cash for the benefits of the creditor should be removed.

*H. Peru*

35. The non-binding, deposit free, conditional transaction with the prospective purchaser, Newrange Gold Corp. ("**NRG**") is an unmitigated disaster and it should be terminated.

36. Ms. Daycock's statement in the Daycock Affidavit #4 (para 23(a)) illustrates the degree to which GPML has unrealistically justified this continued cash drain. She stated:

"Accordingly, the LOI represents a net gain of $9.25 million as compared to the most recent Valuation of the Coricancha Mine, after accounting for both assets and liabilities as most recently reported in the Financial Statements."

37. The reality is there is no agreement to sell the shares of the Peru mine at any price and there will be no USD$9.25 million gain. There is a non-binding, conditional offer to buy the shares for USD$750,000,000.

38. The LOI made September 12, 2022 between GPML and NRG (the "**LOI**") is non-binding. There is no deposit paid. There are no dates for fulfillment of conditions precedent.

39. The LOI contemplates that within 21 days of the LOI (Oct 2/22) the LOI could be terminated if NRG failed to demonstrate if it "has sufficient financing or financing commitments to fund a Transaction."

40. At the hearing on October 14, 2022, GPML did not provide any update on NRG's having obtained financing.

41. In her Daycock Affidavit #4, Ms. Daycock states (para 62) that:

"On or around October 4, 2022 GPML's management determined that it was satisfied that Newrage had provided sufficient evidence of investor interest to warrant advancing to Definitive Documentation in respect of the Peruvian Transaction."

42. There has been no evidence proffered of what the "investor interest" was but clearly it is not "sufficient financing or financing commitments." Therefore, as of October 19, 2022 there is no evidence that NRG has the financing to close any transaction with GPML.

43. Ms. Daycock goes further in her Daycock Affidavit #4 to state that she believes that the parties "will likely" be able to finalize the Definitive Documents this week.

44. However, a closing could not take place until various condition precedent have been fulfilled. At best this transaction is over 6 weeks away from a closing at a cost of USD$100,000 per week. It is a transaction that cannot be rationally justified.

## PART 5 LEGAL BASIS

1. Asahi relies on:

   a. the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36;

   b. the *Supreme Court Civil Rules*;

   c. the inherent and equitable jurisdiction of this Honourable Court; and

   d. such further and other legal basis and authorities as counsel may advise and this Honourable Court may permit.

*I. Summary of Asahi's Position*

2. Asahi submits that the Stay Period should be terminated on sound reasons consistent with the scheme of the CCAA, including that:

   a. any plan of arrangement or compromise proposed in the CCAA Proceedings will be doomed to fail;

   b. Asahi no longer has confidence in the management of GPML to operate the Tucano Mine or to execute a plan of compromise and arrangement;

   c. Asahi will be materially prejudiced in the CCAA Proceedings if the Stay Period is extended;

   d. the BIA provides a better mechanism for liquidation of GPML's assets and will realize a better return to GPML's creditors; and

   e. it is in the interests of justice to do so.

*J. Terminating a CCAA Stay of Proceedings*

3. Pursuant to s.11.02(2) of the CCAA, a court may terminate a stay of proceedings in a CCAA proceeding if it is satisfied on the material before it that it is appropriate to do so having regard to the objectives of the CCAA, the balance of convenience, the relative prejudice to the parties, and the actions of the debtor company.

CCAA at s.11.02.

*Re Azure Dynamics Corporation.*, 2012 BCSC 781 ("**Re Azure**") at para 5.

*Rio Nevada Energy Inc. (Re)*, 2000 CanLII 28206 (ABKB) at paras 12 – 17.

4. In the province of British Columbia, an applicant seeking to terminate a CCAA proceeding must satisfy the Court that the plan of arrangement and compromise is "doomed to failure."

*Philip's Manufacturing Ltd. v. Hong Kong Bank of Canada*, 1992 CanLII 2174 (BCCA) at pages 2 – 5.

*3S Printers Inc. (Re)*, 2011 BCSC 630 at paras 31 – 33.

5. This Honourable Court has established a number of factors for consideration in deciding whether it is appropriate to terminate CCAA stay of proceedings, which include the following:

   a. the lifting of the stay is discretionary;

   b. there are no statutory guidelines and the applicant faces a "very heavy onus" in making such an application;

c. there are no set circumstances where a stay will or will not be lifted, although examples of situations where the courts have lifted stay orders are set out in *Canwest Global Communications Corp.*, which include:

(i) when the plan is likely to fail;

(ii) the applicant shows hardship caused by the stay, independent of any pre-existing condition of the applicant creditor;

(iii) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

(iv) after the lapse of a significant time period, the debtor company is no closer to a proposal than at the commencement of the stay period;

(v) it is in the interests of justice to do so;

d. factors to be considered will include the status of the CCAA proceedings and what impact the lifting of the stay will have on the proceedings. The Court may consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the relative prejudice to parties and, where relevant, the merits of the proposed action; and

e. as an overarching consideration, the court must consider whether it is in the interests of justice to lift the stay.

*Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 at para 73.

*Canwest Global Communications Corp., Re*, 2011 ONSC 2215 at para 26.

*Re Azure* at para 6.

6. Important factors for consideration in determining whether to allow a CCAA restructuring to proceed include the following:

a. where there is no active business to protect;

b. where there is no equity to preserve;

c. when significant additional liquidity would be required in order to resume business operations and carrying costs; and

d. generally where a CCAA shield does not appear to serve a purpose, and does so to the detriment of creditors.

*Encore Developments Ltd. (Re.)*, 2009 BCSC 13 ("**Encore**") at paras 23-24.

7. Where there is a significant risk to creditors that the assets of the debtor will dissipate over the course of the CCAA Proceedings, to not allow the creditors to enforce sooner would

allow the debtor the opportunity to speculate while the risk of prejudice is weighed heavily against the creditors.

*Redekop Properties Inc., Re*, 2001 BCSC 1892 ("**Redekop**") at paras 60-62.

8. In insolvency matters, creditor claims take priority over equity claims. Shareholders should not reasonably expect to have any financial interest in an insolvent company where creditor claims are not paid out in full. Courts are further prohibited from sanctioning a plan of arrangement unless all debt claims are paid in full before the payment of any equity claims. As stated by Justice Morawetz in *Sino-Forest* (and affirmed by the Ontario Court of Appeal), equity claims are subordinate to creditor claims in a CCAA proceeding:

> [23] Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise.
>
> [24] The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential.
>
> [25] As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement. [Citations omitted.]

*CCAA at s. 6(8).*

*Sino-Forest Corporation (Re),* 2012 ONCA 816 ("**Sino-Forest**") at para 30.

*Bul River Mineral Corporation (Re)*, 2014 BCSC 1732 at paras 65 and 76.

*All Canadian Investment Corporation (Re)*, 2019 BCSC 1488 at paras 41-43.

*All Canadian Investment Corporation (Re)*, 2020 BCSC 1683 at para 9.

*K. Treatment of Social Stakeholders*

9. In respect of the welfare of the citizens of the City of Lima, Peru (the "**Lima Citizens**") as they relate to the environmental remediation obligations in respect of the mine in Peru, Asahi states that the Lima Citizens are, at best, social stakeholders in these CCAA Proceedings. GPML has no direct obligation to protect the Lima Citizens.

10. "Social Stakeholders" are non-traditional stakeholders in a formal restructuring who do not have a direct financial interest in a company's restructuring, but whose interests may nonetheless be impacted by a formal restructuring.

Sarra, Janis, *Creditor Rights and the Public Interest:*

*Restructuring Insolvent Corporations*, 2003
(University of Toronto Press Incorporated, Toronto)
("**Creditor Rights**") at pages 114-115.

11. The impact of a formal restructuring on the public interest may me a factor in a to a court's decision-making process. Canadian Courts have recognized both public interest considerations and social stakeholder standing in a number of CCAA restructuring instances.

*Re Canadian Airlines Corporation*, 2000 ABQB 442 ("**Canadian Airlines**") at paras 95, 171-177.

*Canadian Red Cross Society, Re*, 1998 CanLII 14907 (Ont. Gen. Div. [Commercial List]) at para 50

*Anvil Range Mining Corp., Re*, 1998 CarswellOnt 5319 (Ont. Gen. Div. [Commercial List]) at para 9

*Imperial Tobacco Canada Limited, et al, Re*, unreported, October 3, 2019
Endorsement of Mr. Justice McEwan to the request of
the Canadian Cancer Society to participate in the CCAA Proceedings

12. However, if the creditors of a corporation do not support a CCAA plan of arrangement or compromise, then public interest considerations in favour of a plan should not override the minimum statutory requirements for creditor approval in a CCAA proceeding, absent relevant evidence of bad faith on the part of the company or voting creditors.

*Canadian Airlines*, supra at para 106

Creditor Rights, supra at pages 228.

*L. Application of Law to Facts*

13. Asahi is the overwhelmingly dominant creditor of GPML, therefore its decision regarding GPML's proposed plan of arrangement and compromise will determine the outcome of GPML's restructuring. Asahi will not support any plan of arrangement and compromise as presently being structured by GPML. Accordingly, any such plan of arrangement and compromise is doomed to fail.

14. GPML seeks to restructure for the benefit of its shareholders at the expense of Asahi. Asahi is seriously prejudiced by GPML's restructuring plan, which would see no revenue from the Tucano Mine for the balance of 2022 and all of 2023. Asahi is certain that GPML's assets will deteriorate as a result, all to the prejudice of Asahi.

15. Asahi has no confidence in the information that GPML has provided to Asahi, A&M, and this Honourable Court regarding its operations and financial position. GPML has repeatedly provided inaccurate information to Asahi regarding the production and profitability of the Tucano Mine.

16. A bankruptcy proceeding in respect of GPML will be more cost effective than protracted restructuring proceedings under the CCAA, particularly if A&M is appointed as trustee in bankruptcy of GPML, given the existing working knowledge that A&M has in respect of GPML.

17. Taking into consideration the guidance set out by this Honourable Court in the *Redekop* and *Encore*, as well as the Ontario Court of Appeal's reasons in *Sino-Forest*, Asahi submits that the Stay Period should not be extended for the following reasons:

    a. GPML requires significant liquidity in order to pursue a sale of the Peru Mine and proceed with a SISP with the burden of the costs associated with those speculative pursuits being borne by Asahi.

    b. the only meaningful purpose of the Stay serves is to prevent Asahi from exercising its enforcement rights against GPML and to allow GPML to burn through any remaining cash reserves at Asahi's expense;

    c. Asahi is significantly prejudiced by the Stay;

    d. a plan of arrangement and compromise is doomed to fail; and

    e. it is in the interests of justice to lift the Stay.

*M. Summary*

*18.* Asahi submits that this Honourable Court should decline to extend the Stay Period in the CCAA Proceedings in order that Asahi may bring an application for a Bankruptcy Order regarding GPML.

## PART 6 MATERIAL TO BE RELIED ON

1. This Application Response.

2. Second Affidavit of Paul Healey (redacted), sworn on October 17, 2022.

3. The First Report of the Monitor dated October 13, 2022

4. Such further materials as may be filed with this Honourable Court.

The applicant estimates that the application will take **one day**.

☒ The application respondent has filed in this proceeding a document that contains the application respondent's address for service

☐ The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is

Dated: October 20, 2022

Signature of William E. J. Skelly
Lawyer for applicant, Asahi Refining Canada Limited