

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF MCEWAN ENTERPRISES INC.**

Applicant

**TRANSCRIPT BRIEF
CROSS-EXAMINATION OF DENNIS MARK MCEWAN
HELD NOVEMBER 19, 2021**

Date: November 24, 2021

AIRD & BERLIS LLP
Barristers & Solicitors
181 Bay Street, Suite 1800
Toronto, Ontario M5J 2T9

Steven L. Graff (LSO # 31871V)
Tel: 416.865.7726
Fax: 416.863.1515
Email: sgraff@airdberlis.com

Jeremy Nemers (LSO # 66410Q)
Tel: 416.865.7724
Fax: 416.863.1515
Email: jnemers@airdberlis.com

*Lawyers for First Capital Holdings
(Ontario) Corporation*

TO: **THE ATTACHED SERVICE LIST**

Court File No. CV-21-00669445-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF MCEWAN ENTERPRISES INC.**

Applicant

INDEX

TAB #	Document
A.	Transcript of the cross-examination of Dennis Mark McEwan held November 19, 2021
B.	Email exchange with and undertakings chart provided by Goodmans LLP

TAB A

Court File No. CV-21-00669445-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF MCEWAN ENTERPRISES INC.

Applicant

CROSS-EXAMINATION of DENNIS MARK MCEWAN
on his affidavit sworn November 12, 2021,
taken virtually via Zoom
on Friday, November 19, 2021, at 1:33 p.m.

APPEARANCES:

Peter Ruby
Brad Chadwick
Steven Graff
Jeremy Nemers

For the Applicant

For First Capital
Holdings (Ontario)
Corporation

Sean Zweig

For CCAA Monitor

ALSO PRESENT:

Greg Karpel, Alain Rosebush
Isabella Koltunski

(APV Technician)
(APV Technician)

Arbitration Place © 2021	
940-100 Queen Street	900-333 Bay Street
Ottawa, Ontario K1P 1J9	Toronto, Ontario M5H 2R2
(613) 564-2727	(416) 861-8720

INDEX

	PAGES
DENNIS MARK MCEWAN: Affirmed.....	3
CROSS-EXAMINATION BY MR. GRAFF.....	3
CROSS-EXAMINATION BY MR. NEMERS.....	3
CROSS-EXAMINATION BY MR. GRAFF (cont'd).....	52
CROSS-EXAMINATION BY MR. NEMERS (cont'd).....	58

LIST OF REFUSALS & UNDER ADVISEMENTS

Refusals are noted by REF and are found on the following pages: 33, 69, 89.

Under advisements are noted by U/A and are found on the following pages: 38, 47, 62, 71.

1 via Zoom

2 --- Upon commencing on Friday, November 19, 2021
3 at 1:33 p.m.

4 MARK MCEWAN: Affirmed.

5 CROSS-EXAMINATION BY MR. GRAFF:

6 1 Q. By way of introduction,
7 it is 1:33 on November 19th of 2021. This is an
8 examination of Dennis Mark McEwan on his affidavit
9 sworn November 12th of 2021, and, Mr. McEwan,
10 you've been sworn today -- or you've affirmed, if
11 I'm not mistaken, is that correct?

12 A. That's correct.

13 MR. GRAFF: Thank you. At
14 this time I'm going to turn it over to Mr. Nemers
15 to ask you the majority of the questions, and if
16 necessary I'll, as we have done in Court on
17 occasion, add cleanup as is necessary. Thank you.
18 I'll turn it over to Mr. Nemers at this point.

19 MR. NEMERS: Thank you, Mr.
20 Graff.

21 CROSS-EXAMINATION BY MR. NEMERS:

22 2 Q. Good afternoon, Mr.
23 McEwan. I'm going to try my best to use the same
24 terminology and defined terms that appear in your
25 affidavit sworn November 12th, 2021. So, for

1 example, if I'm referring to McEwan Enterprises
2 Inc., I will try to use the terms MEI or the
3 company or the applicant. But if at any time I
4 use a term that you're unsure what the term
5 relates to, please let me know, and similarly if
6 you're unsure what my -- what I'm asking you,
7 please also let me know.

8 Do you have a copy of your
9 affidavit in front of you?

10 A. Yes, I do.

11 3 Q. Can I ask you, please, to
12 turn to paragraph 2.

13 A. Okay.

14 4 Q. In that paragraph you
15 state that you have "been actively engaged in
16 discussions and negotiations surrounding the
17 proposed restructuring of MEI". I would like to
18 know what other participants on behalf of MEI have
19 been actively engaged in discussions and
20 negotiations surrounding the proposed
21 restructuring?

22 A. My counsel has been
23 involved from the time of engagement. My partners
24 at Fairfax have been involved, and we have looked
25 at every aspect of potential restructuring and

1 what it was we felt the company required to go
2 forward and have best chance of survival.

3 5 Q. Anyone else other than
4 Fairfax and your counsel?

5 A. Once the monitors were in
6 place, we definitely worked hand in hand with the
7 monitors to discuss different potentials and
8 options, and tried to get a feel for their sense
9 of the situation and what they felt was best case.

10 6 Q. The monitor of course is
11 not acting on behalf of MEI, though, you would
12 agree with me?

13 A. Well, definitely not, but
14 it's nice to get a sense of what their thoughts
15 are.

16 7 Q. I'm sure it is, and we'll
17 explore that today. But I want to go back to my
18 question about other participants acting on behalf
19 of MEI. You mentioned counsel and you also
20 mentioned your partners at Fairfax. Can you
21 advise who specifically at Fairfax has been
22 involved?

23 A. Bill Gregson has been
24 involved. Joe Coccimiglio has been involved. Tom
25 their lawyer has been involved in the

1 conversation. Prior to that Jerry McGuire has
2 been involved. It's been sort of up and down the
3 chain at the company.

4 8 Q. Just to complete the
5 record, when you refer to Mr. Gregson, Mr.
6 Coccimiglio, Mr. McGuire and Tom, could you advise
7 as to their role, their titles with Fairfax?

8 A. Bill Gregson I believe is
9 kind of a consultant for Fairfax, works with Prem
10 Watsa on special cases. Joe Coccimiglio is kind
11 of running the category. Jerry McGuire is as well
12 in a similar role, and Tom is legal counsel for --
13 I can get you his last name, I just don't have it
14 here -- but legal counsel for Fairfax.

15 9 Q. Thank you. If you could
16 undertake to provide me his last name, that would
17 be great.

18 MR. CHADWICK: It's Rob
19 Chadwick. It's Tom Rowe, R-O-W-E.

20 MR. NEMERS: Thank you.

21 MR. RUBY: Sorry. Mr. Nemers,
22 I didn't want to interrupt the flow of your
23 question, but you corrected or stopped Mr. McEwan
24 when he was giving you all the people that -- I
25 forget your exact wording, but that he was engaged

1 in discussions with, and you said, well, on behalf
2 of MEI. I don't know if you meant to restrict him
3 to all the parties that he had been talking to
4 about these issues.

5 MR. NEMERS: No, my question
6 was what other participants on behalf of MEI have
7 been actively engaged in discussions and
8 negotiations surrounding the proposed
9 restructuring.

10 MR. RUBY: This is why I'm not
11 following you. When you say "on behalf of MEI",
12 can you be a little more specific about what
13 you're asking so we can make sure that we're
14 getting you an accurate answer from the witness.

15 MR. NEMERS: Certainly. The
16 question stems from paragraph 2 of Mr. McEwan's
17 statement when he says that he has been actively
18 engaged in discussions and negotiations
19 surrounding the proposed restructuring of MEI. I
20 simply want to know who else has been actively
21 engaged with him, or if he's the only person. I
22 understood the witness's answer to be he has been
23 actively engaged with Goodmans and hes' been
24 actively engaged with the particular people from
25 Fairfax, and that the monitor has of course also

1 been involved, but not on behalf of MEI, on behalf
2 of the monitor.

3 THE DEPONENT: The only one
4 you didn't give me the opportunity to mention was
5 the fact that we had been speaking to First
6 Capital for a long, long time in respect to the
7 state of the company, the state of our go forward,
8 the --

9 BY MR. NEMERS:

10 10 Q. Mr. McEwan, I'm sorry, I
11 have to interrupt you. I'm going to ask you to
12 answer my question. I'm going to go back to my
13 question. My question was what other participants
14 on behalf of MEI have been actively engaged?
15 Clearly my client is not acting on behalf of MEI,
16 so I would ask you to please answer based on the
17 question and not provide me with commentary on
18 other issues I'm not asking you about.

19 A. My prior answer --

20 MR. RUBY: Mr. McEwan, don't
21 answer the question. Mr. Nemers, this is why I
22 asked you to clarify your question, right. So let
23 me see if I can help you help the witness. You're
24 asking, I take it now, which is not what I
25 understood originally, that you only want to know

1 about people on the MEI side of the fence, not the
2 people MEI is having discussions with. Is that
3 right? That's what you're asking?

4 MR. NEMERS: That's what I've
5 said multiple times. I have the question written
6 down in front of me and I keep reading it over and
7 over again. I'll read it one final time.

8 MR. RUBY: Mr. Nemers, when
9 you read the same question that none of us are
10 understanding, it doesn't really help.

11 MR. NEMERS: Right. Well,
12 sir, with the greatest --

13 MR. GRAFF: -- the question,
14 Mr. Ruby -- who acts on behalf of MEI? Who's
15 there on behalf of MEI? Don't make this such a
16 big difficult question.

17 MR. RUBY: It's not.

18 MR. GRAFF: God.

19 MR. RUBY: If what you're
20 asking is who is on the MEI side of the fence --

21 MR. GRAFF: That's what he
22 asked, six times.

23 MR. RUBY: No, no. Then I
24 think, Mr. McEwan, do you have anything to add
25 about just the people on the MEI side of the

1 fence, not the people MEI is talking to.

2 THE DEPONENT: No, I think the
3 people I mentioned were the primary people that
4 have been involved in the discussions, but as I
5 mentioned, we had been talking to First Capital
6 for a long time, but they are not on that side of
7 the fence.

8 BY MR. NEMERS:

9 11 Q. No, we're definitely not.
10 Thank you, Mr. McEwan. Moving on, was it your
11 decision not to run a sale process?

12 A. Not my own decision. We
13 discussed this in detail as to what we felt was
14 best for the company, for the stakeholders, for
15 the suppliers, for the employees, and for the
16 company itself, you know. Myself aside and
17 Fairfax aside, I'm looking at the health and the
18 structure of the company. And the sales process
19 for me and for others, agreed, in a very sensitive
20 business, in a very sensitive world, a COVID
21 world, a sales process is something that most
22 people don't understand. They take it very, very
23 negatively in the marketplace, and it can very
24 much destabilize a business. And going into
25 November-December --

1 MR. GRAFF: Hold on. Mr.
2 McEwan, answer the question that Mr. Nemers asked
3 you. You don't need to give a whole recitation of
4 what you say in all three affidavits. We don't
5 want that. Just answer his question.

6 MR. RUBY: Mr. McEwan, you can
7 answer the question that's been put to you in the
8 way that you think is the correct answer, period.
9 You don't have to be restricted by what Mr. Graff
10 wants.

11 MR. GRAFF: No, he has to
12 answer the questions. We're not here for a
13 history of McEwan Enterprises or his analysis of
14 what every stakeholder needs and doesn't need. He
15 was asked the specific question whose decision was
16 it. It's a question of identifying the parties
17 and that's it.

18 MR. RUBY: Mr. McEwan,
19 throughout this examination you should try and
20 answer the questions you're asked, but you should
21 answer the way you think is the correct answer to
22 the question, period.

23 MR. GRAFF: Of course. We
24 only want Mr. McEwan's correct answers. Thank
25 you, Mr. Ruby, for that brilliant insight.

1 MR. RUBY: You're welcome.

2 BY MR. NEMERS:

3 12 Q. Mr. McEwan, the answer I
4 heard from you was --

5 MR. RUBY: No, no, no. Mr.
6 Nemers, Mr. McEwan wasn't finished. Go ahead, Mr.
7 McEwan, if you can still remember what you were
8 talking about, or else we'll ask the reporter to
9 read it back.

10 MR. NEMERS: Excuse me, Mr.
11 Ruby, this is my examination, with the greatest of
12 respect. All right. If you have an objection,
13 you can note it on the record and we can deal with
14 it with His Honour. I'm sure His Honour would be
15 quite impressed to read the types of answers we
16 have received from Mr. McEwan so far in respect to
17 very simple questions. It's not your job to
18 continue to interrupt with these ridiculous
19 statements. So I will conduct this examination,
20 thank you very much.

21 MR. RUBY: If you interrupt
22 the witness, I will continue to ask him to finish
23 his answers, just like --

24 MR. GRAFF: We'll be back
25 before Justice Morawetz this afternoon at this

1 rate, Mr. Ruby. Is that what you want?

2 MR. RUBY: Wouldn't bother me,
3 but I don't think the Justice would be very --

4 MR. GRAFF: No problem. I'm
5 happy for this to be read back to him. I'll text
6 him or email him right now.

7 MR. RUBY: Go ahead. Anyways,
8 Mr. Nemers, please, I don't know if Mr. McEwan can
9 remember your last question, so if you would like
10 to ask him again, I think that would be fine.

11 THE DEPONENT: I know where I
12 left off.

13 BY MR. NEMERS:

14 13 Q. Was it your decision not
15 to run a sale process?

16 A. As I said, it was a group
17 decision that we thought long and hard about as to
18 what was best for the company --

19 14 Q. I didn't ask you what you
20 thought about. I asked you who made the decision.

21 A. I already answered your
22 question.

23 15 Q. You did already answer.
24 Correct. So it's over then. The answer is over,
25 because you have already answered the question.

1 MR. RUBY: No, it's not. Mr.
2 McEwan has more to say, but I'm not going to bog
3 us down. So why don't you keep going, and if this
4 continues, we won't be able to do this examination
5 today.

6 MR. NEMERS: How convenient.

7 BY MR. NEMERS:

8 16 Q. How did you arrive at
9 that decision as a group? Was it taking a vote?
10 Was it consensus?

11 A. It was obviously
12 consensus amongst the group after long talks and
13 examining all sides of it.

14 17 Q. Was it your decision to
15 offer 520,000 dollars as the base purchase price
16 under the original related party transaction?

17 A. Again that was a group
18 discussion, and the final decision was made within
19 the group and that was the number that was arrived
20 at.

21 18 Q. Thank you. Was it your
22 decision to offer 2.2 million dollars as the base
23 purchase price under the revised related party
24 transaction?

25 A. Again that was a group

1 discussion. After much consultation and taking
2 into account the judge's comments and all sides of
3 the issues, we came to that determination that
4 that would be a fair -- a fair amendment to our
5 offer and something that would facilitate,
6 hopefully, an agreement of some sort.

7 19 Q. When was that decision
8 made approximately?

9 A. Within the last 10 days.

10 20 Q. Okay. And that was made,
11 you said, after His Honour's decision. I think
12 you said that you were taking that into account,
13 His Honour's decision into account, is that
14 correct?

15 A. We certainly listened
16 with great intent to what the judge had to say and
17 tried to take into all sides the consideration and
18 to come back with something that was fundamentally
19 substantial and that we felt was fair. And we
20 felt that a year's rent with HST plus the advent
21 of the leaseholds being left behind, which for
22 another retailer coming in would be of great
23 advantage in my opinion, not 100 percent
24 applicable in any situation, but would be
25 advantage to anybody. So a startup going into

1 that space wouldn't take very long to get going.
2 And that was our thinking, that this was a more
3 equitable offer. We listened to the judge, and we
4 think we ticked the boxes in terms of anything
5 that might have been missing on the first.

6 21 Q. And when was this idea of
7 raising the base purchase price of 520,000 dollars
8 to 2.2 million dollars, when was this idea first
9 raised internally at MEI?

10 A. Within the same 10-day
11 time period.

12 22 Q. I guess my question is
13 had this prospect been raised internally at MEI
14 before His Honour released the decision on
15 November the 1st, or did it just -- did even the
16 idea to think about this and offer this, did that
17 come from His Honour's decision?

18 MR. RUBY: Mr. McEwan, you can
19 answer the question without reference to any
20 conversations with your lawyers.

21 THE DEPONENT: No, this was a
22 new idea. It was a new approach, and it was based
23 on listening to the judge's responses, and we
24 listened very intently to the instruction and we
25 felt we had to come back with something more

1 substantive. We did that in good faith, thinking
2 of both sides, and trying to be equitable in the
3 settlement. And we felt a year with HST was a
4 generous offer. With the leaseholds being left
5 behind, they had tremendous value in my opinion.

6 BY MR. NEMERS:

7 23 Q. I'll ask you about that a
8 little later. Was it your decision to transfer
9 MEI's interest in the one restaurant to a
10 subsidiary shortly before filing for CCAA
11 protection?

12 A. Again we had
13 consultation. It was made as a group decision
14 after lots of consultation and thought. So same
15 group, same decision-making process.

16 24 Q. Were you ever opposed
17 personally to any of these decisions? Did anyone
18 have to --

19 MR. RUBY: Sorry, can we just
20 pause for a minute. We're having a little fire
21 alarm thing.

22 --- OFF THE RECORD DISCUSSION.

23 BY MR. NEMERS:

24 25 Q. Just to repeat the
25 question before we had a quick break, were any of

1 these decisions that we were just canvassing, so
2 the decision not to run a sale process, the
3 decision to initially offer 520,000 dollars as the
4 base purchase price, the decision to offer 2.2
5 million dollars as the revised base purchase
6 price, the decision to transfer MEI's interest in
7 the one restaurant to a subsidiary shortly before
8 filing for CCAA protection, in all of those cases
9 you indicated that it was a group decision. I'm
10 wondering whether you had any personal differences
11 prior to arriving at the group decision, whether
12 anyone had to convince you to change your mind to
13 go along with any of these ideas or whether you
14 were always supportive of them at the outset?

15 MR. RUBY: From that I take it
16 you're excluding all communications with counsel?

17 MR. NEMERS: Well, I'm not
18 asking about counsel. I'm asking simply whether
19 Mr. McEwan had to have anyone convince him to
20 change his approach. I'm not asking why or who or
21 what was said. Simply whether these were things
22 he was always supportive of to begin with or
23 whether it grew on him, for lack of a better
24 expression.

25 MR. RUBY: I take from that,

1 Mr. Nemers, that you're including in your question
2 matters arising from communications with counsel,
3 and so the question is refused.

4 --- OFF THE RECORD DISCUSSION.

5 BY MR. NEMERS:

6 26 Q. Appreciating that
7 Goodmans acts as counsel for MEI, are you
8 personally receiving independent legal advice in
9 this proceeding from someone other than Goodmans?
10 I believe you're on mute, Mr. McEwan.

11 A. No, I am not.

12 27 Q. Thank you. Do you know
13 if Fairfax is receiving independent legal advice
14 in this proceeding from someone other than
15 Goodmans?

16 A. Not to my knowledge.

17 28 Q. Do you know if any of
18 Mr. Gregson -- any of the individuals you
19 previously mentioned who are part of the Gregson
20 team are receiving independent legal advice in
21 this proceeding from someone other than Goodmans?

22 A. Not to my knowledge.

23 --- OFF THE RECORD DISCUSSION.

24 MR. RUBY: Just to put on the
25 record for a second, the reason why there are

1 these pauses from time to time is there is a fire
2 alarm going off in the building.

3 MR. NEMERS: Thank you. Took
4 the words right out of my mouth.

5 BY MR. NEMERS:

6 29 Q. The question was do you
7 know if Fairfax is receiving independent legal
8 advice in this proceeding from someone other than
9 Goodmans. I believe you said no. And then I
10 asked you, do you know if any of the Fairfax
11 people that you had mentioned earlier, Mr. Gregson
12 et cetera, if any of them are receiving
13 independent legal advice in this proceeding from
14 someone other than Goodmans?

15 A. Not to my knowledge.

16 30 Q. So the gentleman Tom Rowe
17 that you mentioned as their lawyer, who -- can you
18 just specify who specifically he acts for? Is he
19 acting for Fairfax?

20 A. He is in-house counsel
21 for Fairfax, and he has been part of the
22 conversation from day one.

23 31 Q. So that would suggest to
24 me, and I leave it to you to indicate whether you
25 wish to change your answer, that Fairfax might

1 then be receiving independent legal advice from
2 him?

3 MR. CHADWICK: I don't think
4 that's a question for the witness. He is an
5 employee of Fairfax. Whether he is advising on
6 business or legal matters, that's for Fairfax --

7 BY MR. NEMERS:

8 32 Q. Correct. In that case I
9 would suggest that Mr. McEwan perhaps should not
10 have answered that question affirmatively or
11 negatively.

12 --- OFF THE RECORD DISCUSSION.

13 BY MR. NEMERS:

14 33 Q. Mr. McEwan had previously
15 indicated that to the best of his knowledge
16 Fairfax was not receiving independent legal
17 advice, and I agree with the comment made by my
18 friend a minute ago that in light of Mr. Rowe's
19 involvement, Mr. McEwan may not be in a position
20 to answer the question really one way or another,
21 so I'm giving him an opportunity would he like to
22 retract that answer that he previously gave.

23 A. It's my understanding you
24 asked me if they had outside legal advice. That
25 is internal legal advice, and that's how I

1 answered the question.

2 34 Q. I didn't use the word
3 "outside" or "inside". I used the word
4 "independent legal advice".

5 A. Well, "independent" would
6 mean to me that it would be outside of the
7 company. So that's how I answered the question.

8 35 Q. Now appreciating that it
9 might not be that way, do you wish to change your
10 answer?

11 MR. RUBY: No, no, no. Mr.
12 Nemers, are you redefining your question?

13 MR. NEMERS: I'm not
14 redefining my question.

15 BY MR. NEMERS:

16 36 Q. I'm asking, Mr. McEwan,
17 do you know if Fairfax is receiving independent
18 legal advice in this proceeding from someone other
19 than Goodmans?

20 MR. RUBY: Which you defined
21 independent as somebody inside or outside the
22 company, which clearly the witness doesn't see it
23 that way.

24 MR. NEMERS: That's perfectly
25 fine. He has given his answer then.

1 MR. RUBY: Okay.

2 BY MR. NEMERS:

3 37 Q. Paragraph 5 of your
4 affidavit, please, sir.

5 A. Okay.

6 38 Q. In this paragraph you
7 state:

8 "As discussed in previous
9 affidavits filed in these
10 proceedings, the McEwan
11 group has been facing
12 extensive financial
13 challenges as a result of
14 certain underperforming
15 and unsustainable
16 locations and the lengthy
17 and ongoing impacts of
18 the COVID-19 pandemic."

19 Do you recall swearing in the
20 previous affidavits to which this paragraph refers
21 that the McEwan group as a whole has not been
22 profitable since 2017?

23 A. Yes, I do.

24 39 Q. Thank you. Given that
25 the COVID-19 pandemic didn't commence in Ontario

1 until 2020, and given that McEwan did not open its
2 Yonge and Bloor location until 2019, what were the
3 causes of the McEwan group's unprofitability from
4 2017 onwards?

5 A. We had a couple of
6 underperforming stores, but the challenge for me,
7 Bloor and Yonge was a --

8 40 Q. No, no, I'm not asking
9 you about Bloor and Yonge in 2019. I'm going back
10 to 2017 before there was a Bloor and Yonge.

11 A. Well, I would say the
12 building of Bloor and Yonge put a bit of
13 pressure on the business --

14 41 Q. The building of Bloor and
15 Yonge was, I understand, in 2018. I'm asking you
16 2017.

17 MR. RUBY: You're only asking
18 about the year 2017?

19 BY MR. NEMERS:

20 42 Q. I'm asking, in light of
21 the fact that the COVID-19 pandemic didn't
22 commence in Ontario until 2020, and McEwan didn't
23 open its Yonge and Bloor location until 2019 and
24 didn't even -- wasn't even engaged in the
25 preparation of Yonge and Bloor until 2018, what

1 were the causes of the McEwan group's
2 unprofitability from 2017 onwards? You've
3 mentioned in your affidavit COVID-19. You've
4 mentioned unprofitable -- or excuse me,
5 underperforming and unsustainable locations. I
6 take it you're referring to Yonge and Bloor as one
7 of those locations. That was a location that
8 didn't come about -- that wasn't in existence
9 throughout the entirety of that time period. So
10 there must have therefore been some other location
11 or some other factor that also contributed to the
12 lack of profitability of the company in 2017 and I
13 would like to know what that was.

14 A. I would say specifically
15 it was the Don Mills McEwan store and Don Mills
16 McEwan Fabbrica, those two specific locations.

17 43 Q. It's my understanding
18 that only one of those two locations you were
19 proposing to close, is that correct?

20 A. That is correct, yes.

21 44 Q. You were able to, if I

22 can use the expression, sufficiently turn

23 around --

24 --- OFF THE RECORD DISCUSSION.

25 BY MR. NEMERS:

1 45 Q. Of the two locations that
2 you just mentioned, could you -- for the benefit
3 of having taken these repeated fire alarm breaks,
4 could you just rename those two locations?

5 A. Don Mills McEwan and Don
6 Mills Fabbrica.

7 46 Q. Correct. So one of those
8 two locations you are proposing to close, and
9 another of those two locations you are proposing
10 remain open. So my question to you is, I take it
11 therefore that you sufficiently believe that the
12 location that you propose to keep open is one that
13 you have sufficiently turned around such that even
14 though it was a cause of the company's
15 unprofitability previously, now you're committed
16 to it going forward, is that a fair assessment?

17 A. We are for the near
18 future. Cadillac Fairview has been very
19 cooperative and repositioning leases and making it
20 possible for Don Mills to remain open. They have
21 been a very cooperative landlord with the five
22 properties we have, and that essentially speaks to
23 the fact that Don Mills McEwan will survive and
24 continue on.

25 47 Q. The other one won't, and

1 that's also a Cadillac Fairview location, is it
2 not?

3 A. That is correct.

4 48 Q. Thank you. To what
5 degree do you believe your management of the
6 McEwan group has been a reason for its
7 unprofitability from 2017 onwards?

8 A. I guess you can always
9 lay blame, and when you're at the top of the tree
10 you take responsibility. There have been market
11 challenges with the Don Mills centre in terms of
12 performance and the actual flow of traffic through
13 the real estate development. If you look through
14 the companies, the restaurants, we've had great
15 success over the years. Retail has proven to be a
16 bit more challenging. We have been able to make
17 inroads there. So I take full responsibility for
18 my company and the successes and the challenges
19 and the failures. That's about as clearly as I
20 can answer that question.

21 49 Q. So in 2018 when you
22 decided to enter into the lease for the Yonge and
23 Bloor location, you were in a spot where the
24 company -- or I should say the McEwan group was
25 not profitable already. You decided to expand

1 rather to focus on your current challenges. Is
2 that something that you specifically take
3 responsibility for? Would you have done
4 something -- would you have acted in the same way
5 now looking back?

6 A. Well, with the advent of
7 a crystal ball, anybody may make a different
8 decision at this juncture. That's a rather
9 obvious question.

10 50 Q. Let me ask it to you this
11 way then. Did you ever stop in 2018 and say to
12 yourself, the business is facing some challenges,
13 maybe this isn't the best time to expand?

14 A. We felt after much
15 discussion with First Capital in terms of traffic,
16 the building itself being at Yonge and Bloor and
17 it being centre ice and the density in the
18 neighbourhood, we believed based on that
19 discussion that it was going to be a very
20 advantageous move for us. So at that point we
21 decided to go ahead with it, because we had felt
22 that maybe being in the suburbs with Don Mills was
23 one of the reasons we didn't have quite the
24 performance level we wanted. That was -- that was
25 the thinking there, because downtown and the TD

1 Centre with the volume of traffic and the density
2 around the store, it was able to do a very good
3 business. So our rationale was that our Don Mills
4 location was not an ideal choice originally, but
5 Yonge and Bloor might really help to rectify that
6 for us. But that did not turn out to be the case
7 at all. The traffic that was promised was not
8 there. The density of other tenants in the
9 building is not there. The quality of the street
10 traffic is not there. The vagrant problem in the
11 neighbourhood is front and centre. And none of
12 the things we thought would happen at Yonge and
13 Bloor happened. And no one is sorrier than myself
14 to see that be the case. So this is not something
15 I do with a light heart. This is a big decision.
16 It was a big decision to go there and it's the
17 biggest decision of my life to attempt to pull the
18 plug on it. I'm not used to failure, and we did
19 everything and best efforts to make that store go.
20 And there is just no flow to the traffic in the
21 neighbourhood as promised, as discussed, and the
22 realization at the end of the day is that it's
23 just not there.

24 51 Q. Right. So you weren't
25 able to make it work in Don Mills. You weren't

1 able to make it work as you've called it Yonge and
2 Bloor centre ice. Right. Okay. Can I ask you to
3 turn, please, to paragraphs 10 and 11 of your
4 affidavit.

5 A. Okay.

6 52 Q. You state in these
7 paragraphs -- I'll just give you a few excerpts:

8 "Following the issuance
9 of the November 1st
10 decision, the company has
11 reviewed and assessed its
12 potential options and
13 alternatives, has
14 discussed and reviewed
15 such matters with the
16 monitor and engaged in
17 discussions and consulted
18 with various
19 stakeholders."

20 And in paragraph 11, you go on
21 to say:

22 "Among other things, the
23 company has discussed
24 with the monitor in
25 further detail and

1 expressed its views on
2 the negative impacts of a
3 sale process."

4 I take it you were a
5 participant during these discussions with the
6 monitor?

7 A. Yes, I was.

8 53 Q. During these discussions
9 with the monitor, I take it that the monitor
10 listened to the company's views but that the
11 monitor also expressed its own views on a sale
12 process, is that correct?

13 A. Absolutely correct.

14 54 Q. To the best of your
15 recollection, do the monitor's views mirror the
16 company's views on a sale process?

17 A. I would say not 100
18 percent.

19 55 Q. Could you elaborate what
20 you mean by that?

21 A. I think you'd have to ask
22 them that question.

23 56 Q. I'm asking you that
24 question.

25 A. They aren't specific in

1 their commentary. As you say, they are supposed
2 to be a moderator in the middle. So they don't
3 offer me all the insight as to how they think.
4 They make suggestions but they're general
5 suggestions.

6 57 Q. Have they ever made a
7 suggestion with respect to a sale process that
8 you've rejected?

9 A. We've never rejected the
10 notion of a conversation of a sales process.
11 We've always listened to that. Do we agree that
12 that's in the best interests of the company? No,
13 we don't agree with that.

14 58 Q. You've never rejected the
15 conversation of a sale process with the monitor,
16 but you have rejected, I put it to you, quite
17 strongly conducting a sale process?

18 A. We don't get advice from
19 the monitor. That's not really the nature of the
20 conversation that I have had with the monitor.
21 They listen to what you have to say. They stay
22 pretty neutral on everything. So I wouldn't say
23 that I or we rejected any one of their thoughts.

24 59 Q. Do you believe MEI has
25 the support of the monitor in respect of the

1 company's motion that is scheduled for November
2 26?

3 REF MR. RUBY: Mr. McEwan, don't
4 answer that. That's not relevant. And it's
5 speculation.

6 BY MR. NEMERS:

7 60 Q. I'm going to suggest why
8 it is relevant, which is you advised us earlier,
9 Mr. McEwan, that you made -- you were part of the
10 decision-making process with the other -- with
11 Fairfax and with Goodmans in terms of the various
12 steps you were taking in this restructuring. Your
13 affidavit says that you were -- that you've been
14 actively engaged in discussions regarding a
15 restructuring.

16 Would you as one of the
17 decision-makers not be concerned going to court
18 proposing something if you didn't have the
19 monitor's support? Would that not factor into
20 your consideration as to whether you were still
21 going to propose that action, go forward in court
22 with it, knowing that you either don't or you may
23 not have the monitor's support?

24 MR. CHADWICK: I think I can
25 address that because I think it's a legal matter.

1 We discuss all matters with the monitor. You know
2 that the monitor has said as relates to the motion
3 for the 26th that they will put a report on the
4 record and that they will consider their position
5 at the time with the benefit of all of the facts
6 and circumstances that exist. No question, we
7 talked about the monitor, we talked about our
8 relief, we talked about what other relief is
9 possible. We had a very engaging discussion. At
10 no time did we take any position that is contrary
11 to the monitor's position, and we have the benefit
12 from a company perspective to have the insight of
13 the monitor and the insight of other stakeholders,
14 and we made the decision with the best information
15 that's available. And the monitor will file his
16 report, as you know, Mr. Nemers, and instead of
17 Mr. McEwan guessing at the monitor's view, it will
18 be crisp and clear, I expect, on the return of the
19 motion.

20 MR. NEMERS: Thank you. Is it
21 your understanding that the decision to proceed
22 with this motion by MEI was made not knowing what
23 the monitor -- not knowing whether the monitor
24 will support it or not?

25 MR. CHADWICK: I think I tried

1 to help you in that regard. We had the benefit of
2 a number of discussions with the monitor and we
3 were able to take that view into consideration in
4 filing the motion. I think the monitor has said
5 to both you and ourselves that their final
6 position in respect of that will be filed in their
7 court report. So we accepted that they would
8 evaluate based on all the circumstances and they
9 would set their position out crisply and
10 accurately in a court report, just like many CCAA
11 cases.

12 MR. NEMERS: Right. So you
13 don't know right now what the monitor's position
14 is?

15 MR. CHADWICK: We don't know
16 their official position, that is correct. But we
17 do have the benefit of a lot of dialogue with
18 them.

19 MR. NEMERS: Yes, I certainly
20 agree, you have the benefit of a lot of dialogue
21 with them.

22 BY MR. NEMERS:

23 61 Q. Can I ask you to go to
24 paragraph 12, Mr. McEwan, of your affidavit.

25 A. Okay.

1 62 Q. You say here in part
2 that:
3 "The company reviewed and
4 considered potential
5 changes to the
6 transaction and purchase
7 agreement and determined
8 to enter into an Amending
9 Agreement with the
10 purchaser."

11 I would like to know what
12 role, if any, did the monitor have in the company
13 making this determination to enter into an
14 Amending Agreement with the purchaser as opposed
15 to running a sale process?

16 A. I don't believe the
17 monitor had much of anything to do with that. We
18 listened to what the judge had to say very
19 intently, and we went back and reviewed our
20 position and tried to formulate something to come
21 back with that was equitable for First Capital,
22 that we felt was more generous, and that we figure
23 addressed the judge's comments. That was our
24 clear understanding of the process. That's how we
25 approached it, and we did it with the best of

1 intentions for both sides, keeping in mind we
2 tried to also fashion a deal that was survivable
3 for the company but on the face was more generous
4 than our prior offer, to try to move the ball down
5 the field.

6 63 Q. Based on whose advice did
7 the company make this determination to enter into
8 an Amending Agreement with the purchaser as
9 opposed to running a sale process?

10 A. Same group of people that
11 were involved as I mentioned from day one.

12 64 Q. Who on behalf of the
13 company had the final say in making this
14 determination to enter into an Amending Agreement
15 with the purchaser as opposed to running a sale
16 process?

17 MR. CHADWICK: That's a legal
18 question. The company entered into the agreement.
19 The company has Mr. McEwan as a director and it
20 has Mr. McEwan through a holding company and
21 Fairfax as shareholders in a private company. The
22 combination of all that make decisions.

23 BY MR. NEMERS:

24 65 Q. Factually at the end of
25 the day someone has to say we're doing this or

1 we're not doing this. Who made that call?

2 A. We put our hands in the
3 air and we agreed to agree or not.

4 66 Q. All of you. Okay.

5 A. It's a consensus of
6 opinion.

7 67 Q. Okay. That's fine.

8 Paragraph 12 still, you say that:

9 "Based on the company's
10 records, the original
11 cost of the Yonge and
12 Bloor equipment in August
13 to December 2018 was
14 approximately 2.5 million
15 dollars."

16 Can you please undertake to
17 provide these company records?

18 U/A MR. RUBY: We'll take it under
19 advisement.

20 MR. NEMERS: Thank you.

21 MR. RUBY: I also suggest to
22 you for some of these things if you ask for
23 records, as you know, there is now an NDA. Some
24 of these things will make more sense to be
25 produced under the NDA rather than in an answer to

1 a cross-examination question on a public record.

2 MR. NEMERS: Well, perhaps,
3 except Mr. McEwan has already sworn in the
4 affidavit that based on the company's records, the
5 original cost of the Yonge and Bloor equipment in
6 that time period was approximately 2.5 million
7 dollars. So Mr. McEwan has put it out there in
8 the public record already and I would like to see
9 the support for that.

10 MR. RUBY: I'm not arguing
11 with you, Mr. Nemers. I'm just telling you that
12 with respect to under advisements about documents
13 you request, for some of those requests, because I
14 expect this won't be the last one, some of them,
15 the answer you may get is you can have it under
16 the NDA, instead of just a refusal on the public
17 record.

18 MR. NEMERS: Understood. I
19 guess we'll have to deal with that on a
20 case-by-case basis.

21 MR. RUBY: I'm just trying to
22 be up front with you.

23 MR. NEMERS: Thank you, Mr.
24 Ruby. I appreciate that.

25 BY MR. NEMERS:

1 68 Q. Still at paragraph 12,
2 Mr. McEwan, you state that you:
3 "... believe that the
4 Yonge and Bloor equipment
5 would have substantial
6 value to a replacement
7 tenant at the McEwan
8 Yonge and Bloor location
9 and will greatly assist
10 the Yonge and Bloor
11 landlord in re-leasing
12 the premises to another
13 food or grocery store
14 operator."

15 MR. CHADWICK: I think you're
16 referencing paragraph 14 versus 12.

17 MR. NEMERS: I apologize.

18 MR. CHADWICK: Okay.

19 MR. NEMERS: I apologize.

20 That's correct, paragraph 14.

21 BY MR. NEMERS:

22 69 Q. I would like to ask you,
23 what is the factual basis for these beliefs?

24 A. Well, being an operator,
25 I understand what it takes to get a store up and

1 running and I know what equipment has value and
2 what equipment doesn't and what equipment has
3 flexibility and value in the market. So
4 everything is first-rate, everything is
5 essentially brand new. I understand it's not all
6 applicable and it's not all workable, but the
7 mechanics of the operation are there, which would
8 facilitate a very quick turnaround for another
9 operation to go in and essentially redesign the
10 store floor and fill it with product and get the
11 door open. It's the essentials that take all the
12 time, and I think they have value.

13 70 Q. Did you have access to an
14 updated appraisal of this equipment before you
15 swore your affidavit?

16 A. I did not at that point
17 in time. It was an estimation and kind of an
18 acknowledgment of what I believe we spent, and I'm
19 pretty accurate with that number. We have had a
20 company come in and look at it and give us a
21 valuation.

22 71 Q. Sorry, there are a lot of
23 things in that answer I would like to unpack.
24 First of all you said it was an estimate. I want
25 to make sure I understand to what you are

1 attaching the description estimate. There is a
2 reference to 2.5 million dollars as of 2018 which
3 you swear in your affidavit is the approximate
4 number reflected in the company's records.

5 A. Uh, huh. That is
6 correct.

7 72 Q. But I'm asking you about
8 the language where you say that the Yonge and
9 Bloor equipment would have substantial value to a
10 replacement tenant. I'm asking essentially about
11 the value of the equipment now, not in 2018.

12 A. When I say substantial
13 value, I -- as an operator, it would facilitate an
14 opening of an operation. It's all of very high
15 caliber, and if it's usable, it is of great
16 advantage. But that would have to be determined
17 by the person coming in, so when I say something
18 like that, it's my opinion on it that it would
19 have value. They're not 10 year old pieces of
20 equipment. They're state of the art pieces of
21 equipment.

22 73 Q. So --

23 A. It's very well thought
24 through.

25 74 Q. So when you swore that

1 you believed on November the 12th that this
2 equipment would have substantial value, did you
3 have a number in your mind or was this more of a
4 just generalization when you --

5 A. Well, I think as I stated
6 it, it's a generalization coming from an
7 operator's perspective.

8 75 Q. Okay.

9 A. Otherwise I would have
10 been more specific.

11 76 Q. Right. And you said that
12 you didn't have an appraisal -- the benefit of an
13 updated appraisal at the time, but that you have
14 one now? Did I hear you correctly on that point?

15 A. We have endeavoured to
16 look at various aspects of tearing the equipment
17 out or keeping it in and what that might look
18 like.

19 77 Q. Do you have an appraisal
20 now?

21 A. We have some numbers
22 coming to us.

23 78 Q. So you don't have an
24 appraisal now?

25 A. Yeah, we have an

1 approximation.

2 79 Q. Are you in the process of
3 getting an appraisal, is that -- I'm not
4 understanding what you're saying.

5 A. Yes, yes, we are.

6 80 Q. Okay. You're in the
7 process of getting an appraisal. And is this
8 initiative that's been taken by the company or is
9 this an initiative that's been requested of the
10 company? By First Capital specifically?

11 A. No, First Capital I think
12 came along after, well after the fact that we
13 initiated that.

14 81 Q. Just so I understand the
15 timeline, there's the company's books and records
16 in 2018 indicating the value of the equipment at
17 that time was approximately two and a half million
18 dollars. Then we fast forward to November the
19 12th of this year, you believe they have
20 substantial value based on your expertise in the
21 industry and your experience in the industry, but
22 you don't have a particular number in mind. Then
23 you go out independently, MEI goes out to begin
24 getting an appraisal after you've sworn the
25 affidavit, which appraisal is still pending, and

1 only after MEI went out to get an appraisal was
2 there a request from First Capital? Is that the
3 chronology?

4 MR. RUBY: No, that's not what
5 the witness said.

6 MR. NEMERS: I'm having
7 difficulty understanding what the witness said,
8 piecing it all together. So perhaps he can help
9 me go through the chronology.

10 THE DEPONENT: Well, I think I
11 stated in my affidavit that we spent about 2.5
12 million on equipment. The equipment is still
13 relatively new, unblemished. When I stated in my
14 affidavit that the equipment value was 2.5
15 million, that reflected what we spent on it. When
16 I talked about what I felt the value would be for
17 an incoming tenant, I said it would have great
18 value. And being an operator and assessing that,
19 I would know what I'm talking about, because in
20 previous years you go out and you buy used
21 equipment, what have you, so you understand when
22 things are in really good condition. Now, no
23 store floor is the same, but many, many things can
24 be reinstated and reused. So when I say they
25 would be of value to someone coming in, they would

1 be of value coming in.

2 BY MR. NEMERS:

3 82 Q. All right. Can we
4 please --

5 MR. CHADWICK: Maybe I can
6 help you because I don't think this is contentious
7 between the parties. The company had a third
8 party look at that equipment which was prior to
9 the swearing of the affidavit, and whether that's
10 an appraisal or whether that's a soft letter,
11 whether that is just an email, I believe there is
12 some information around that that the company had
13 in advance of the swearing of the affidavit. I
14 think subsequent to the swearing of the affidavit,
15 your client, First Capital, asked the company
16 whether they could have a third party go in and do
17 something similar to what the company did in
18 respect of the equipment, and my understanding was
19 that that was agreed to by the company and that
20 First Capital was in the process of doing
21 something very similar to what the company did.
22 And that's the time frame or the chronology that I
23 understand as counsel and understand in being
24 involved in some of the considerations but maybe
25 not all the conversations, if that's helpful to

1 you.

2 MR. NEMERS: Thank you. I
3 appreciate that. That is very helpful. And I
4 would just ask if you could please undertake to
5 provide the information you alluded to that was
6 obtained prior to swearing the affidavit with
7 respect to the value of these pieces of equipment.

8 U/A MR. RUBY: We'll take it under
9 advisement.

10 MR. NEMERS: Thank you.

11 BY MR. NEMERS:

12 83 Q. Mr. McEwan, do you have
13 any factual understanding of what the cost is to
14 remove the equipment?

15 A. We do -- we do have some
16 estimates, but they're in process. Nothing is --
17 has been concluded yet.

18 84 Q. Are you able to -- first
19 of all I would ask for an undertaking as well to
20 produce those, assuming they become available
21 prior to the hearing?

22 U/A MR. RUBY: I'll take it under
23 advisement.

24 MR. NEMERS: Thank you.

25 BY MR. NEMERS:

1 85 Q. And also, Mr. McEwan, I'm
2 wondering -- you indicated in your affidavit that
3 the equipment would have -- you believe the
4 equipment would have substantial value. I'm
5 curious whether you're able, putting on the same
6 hat as an operator with experience in the
7 industry, to provide a similar statement as to
8 whether you believe the costs to remove the
9 equipment would also be significant or not?

10 A. I've never -- I've never
11 dismantled a store, so this is going to be a
12 learning experience for myself as well.

13 86 Q. Thank you. Paragraph 16
14 of your affidavit, Mr. McEwan. Right at the end
15 of that paragraph, you conclude by stating:

16 "The company believes
17 that the amended
18 transaction provides
19 superior consideration
20 than the Y and B offer."

21 My question for you --

22 MR. CHADWICK: He should
23 finish reading the sentence.

24 MR. NEMERS: Yes.

25 BY MR. NEMERS:

1 87 Q. You believe it's the
2 better alternative for the business and the McEwan
3 Group stakeholders. I think you've said that
4 many, many times. I understand that. But I'm
5 interested in your comment of the belief that the
6 amended transaction provides superior
7 consideration than the Y and B offer. And I would
8 like to know from you, how does the amended
9 transaction which provides the equivalent of one
10 year's rent in cash to First Capital plus some
11 used equipment, how is that superior consideration
12 to the Y and B offer that assumes the totality of
13 the 12 remaining years under the lease?

14 MR. CHADWICK: That's a legal
15 question versus a factual question.

16 MR. NEMERS: I'm asking him to
17 support the statement that he made in his
18 affidavit. He believes that the amended
19 transaction provides superior consideration than
20 the Y and B offer. How is that, given that the
21 amended transaction provides for one year's rent
22 plus some equipment whereas the Y and B offer
23 assumes the totality of the 12 years that are
24 remaining under the lease?

25 MR. RUBY: I think, Mr.

1 Nemers, there is probably a way for you to ask
2 that question that won't draw an objection.
3 That's a legal question.

4 BY MR. NEMERS:

5 88 Q. Mr. McEwan, let me try
6 again. And I apologize, because I am trained as a
7 lawyer, so my mind is automatically perhaps going
8 to think of things in terms of the law. Lawyers
9 are not known necessarily for being great
10 mathematicians on the whole. But it seems, as a
11 basic proposition, that one year's value under a
12 lease is significantly less than 12 years' value
13 under a lease, would you agree with that?

14 MR. CHADWICK: I think we're
15 going down the wrong road here. You're asking him
16 to make a legal determination on an argument that
17 is going to be before the Court.

18 MR. NEMERS: I'm not asking
19 him to make any legal determination. I'm asking
20 him to justify the statement he has in his
21 affidavit. He believes one transaction provides
22 superior consideration over the other. What is
23 the basis of that?

24 MR. RUBY: We're not
25 disagreeing with you exploring that sentence.

1 It's the formulation of the questions that's
2 causing a problem.

3 MR. NEMERS: Well --

4 MR. RUBY: We're inviting you
5 to do it differently, and, Mr. Graff, I think
6 you're on mute.

7 MR. GRAFF: He just asked in
8 as lay person a manner as possible. What's the
9 basis for it?

10 MR. RUBY: Yeah, but that's
11 not what he asked.

12 MR. GRAFF: That's what he
13 just asked.

14 MR. CHADWICK: Maybe I can
15 help you, Mr. Nemers. It's your examination.

16 MR. NEMERS: Go ahead. You
17 can attempt to ask the question. If I have
18 problem with it, I'll let you know. But I
19 appreciate the assistance. Please go ahead.

20 MR. CHADWICK: Sure. You
21 could ask Mr. McEwan, why do you believe the
22 amended transaction provides superior
23 consideration to the Y and B offer.

24 MR. NEMERS: Thank you. I
25 thought I essentially asked that.

1 MR. CHADWICK: No, you had a
2 couple paragraphs of run-on about a legal argument
3 on top of that.

4 MR. NEMERS: The word "legal"
5 has come out a number of times in asking this
6 question, but it hasn't been from me.

7 BY MR. NEMERS:

8 89 Q. Mathematically, sir, do
9 you agree that one year's worth of payments is
10 significantly less than 12 years' worth of
11 payments?

12 MR. RUBY: Mr. Nemers --

13 MR. NEMERS: How is that a
14 legal argument?

15 MR. RUBY: You've already
16 drawn an objection to that, but Mr. Chadwick gave
17 you a question that we won't object to. Right out
18 of the words affidavit.

19 MR. GRAFF: I'm going to just
20 ask the question. Maybe it's slightly more
21 simplistic.

22 CROSS-EXAMINATION BY MR. GRAFF (cont'd):

23 90 Q. Other than non-tangible
24 and non-monetary consideration -- sorry, let me
25 restrict it to this. Are there any tangible or

1 monetary components to the consideration that
2 makes it superior?

3 A. I don't think you can
4 isolate just the financial. I think there's way
5 too many elements to the offer, to the
6 consideration of employees and suppliers, our
7 stakeholders, landlords being Cadillac Fairview,
8 RBC.

9 91 Q. To simplify what you're
10 saying, it's all the non-monetary considerations
11 that you consider to make it superior, is that
12 right?

13 MR. CHADWICK: I don't
14 think that's the right -- we object to that
15 question.

16 MR. GRAFF: Then let's drill
17 down on that.

18 BY MR. GRAFF:

19 92 Q. What are the monetary
20 considerations that could ever make the
21 transaction you propose to have approved better
22 than the Y and B offer?

23 MR. RUBY: Sorry, ever make?
24 That's the question?

25 BY MR. GRAFF:

1 93 Q. What are the monetary
2 considerations that make the offer any better than
3 the Y and B offer?

4 MR. CHADWICK: Monetary
5 considerations deal with a broad aspect in a
6 transaction. How each party is affected and what
7 is being paid to them and how their treatment is.
8 So when you ask a general question about monetary,
9 it's a broad question. Right? Monetary has a
10 broader implication. Financial. There is a lot
11 of different aspects other than just on a monetary
12 basis on Yonge and Bloor landlord, and we can
13 debate in court as to -- about the issue about
14 what Mr. Nemers raised as part of his question.
15 But financially, you have to look at the
16 transaction in its entirety.

17 MR. GRAFF: And you have to
18 look at the First Capital transaction in its
19 entirety.

20 MR. CHADWICK: Agreed.

21 BY MR. GRAFF:

22 94 Q. Under the First Capital
23 transaction, employees are going to be treated the
24 same, aren't they, Mr. McEwan?

25 A. I don't believe that's

1 the case.

2 95 Q. Where is there a
3 distinction?

4 A. I think it was somewhat
5 unclear as to how suppliers and employees would be
6 treated.

7 96 Q. But you don't have
8 anything to point to to show that there is a
9 distinction between how the First Capital offer,
10 the Y and B offer is any different as it relates
11 to employees than the McEwan offer?

12 MR. CHADWICK: Well, I think
13 just to be fair to the witness, this is -- this
14 was -- there may be some employees that are not
15 part of the Yonge and Bloor transaction and there
16 will be severance and termination that will be
17 required to be paid. We have obviously been
18 through that a lot on the last hearing. The
19 monitor raised that issue. So there is the
20 possibility that under the Y and B offer, that
21 there are employees that will not be part of that
22 and that they will be paid severance and
23 termination.

24 BY MR. GRAFF:

25 97 Q. Do you have any reason to

1 believe that the Y and B offer, with the exception
2 of the treatment to the Y and B landlord, is any
3 worse than the transaction that is being offered
4 by McEwan? Please identify where you imaginably
5 could identify anything worse between the two
6 transactions?

7 A. Well, I don't believe you
8 have Cadillac Fairview on side, so any amending
9 deals that we have done with Cadillac Fairview
10 would not travel. You would have to assume
11 original rent. So anything we've done to mitigate
12 challenges in the company that have been helpful
13 would be lost to the company, and that is a
14 defining factor.

15 98 Q. In other words --

16 MR. RUBY: No, no, Mr. Graff,
17 let him finish.

18 BY MR. GRAFF:

19 99 Q. In other words, if we're
20 paying Cadillac Fairview the same obligation that
21 you've committed to paying, then we're offering
22 the exact same thing, aren't we?

23 A. You wouldn't receive a
24 new valuation.

25 100 Q. It's a simple question.

1 If we were able to pay Cadillac Fairview the same
2 amount as you propose to pay them under your deal,
3 it would be the same deal, correct?

4 MR. CHADWICK: No, you're not
5 asking a fair question to the witness.

6 MR. GRAFF: Oh, my God. This
7 is so interventionist, Mr. Chadwick. It's
8 unbelievable. It's a very simple yes or no
9 question.

10 BY MR. GRAFF:

11 101 Q. If the Yonge Bloor
12 landlord is prepared to pay Cadillac Fairview the
13 same amount that McEwan is prepared to pay
14 Cadillac Fairview under its deal, then the
15 consideration is the same, isn't it?

16 MR. CHADWICK: I have to say
17 it's not a fair question, Mr. Graff.

18 BY MR. GRAFF:

19 102 Q. Let me ask you another
20 question, sir. If the Yonge Bloor landlord is
21 obligated to pay Cadillac Fairview and pays it the
22 amount that it is entitled to under its original
23 leases, not under the deal that you may have
24 negotiated with Cadillac Fairview, then the
25 consideration that the Yonge Bloor landlord would

1 be paying is considerably better than the deal
2 that you're offering to Cadillac Fairview, isn't
3 it?

4 MR. RUBY: No, you can't put
5 to him hypotheticals like that. That's not the
6 deal. You can ask him questions about the facts.

7 MR. GRAFF: Well, let me --

8 MR. NEMERS: Actually, no,
9 sorry, excuse me. Excuse me. I believe --

10 BY MR. GRAFF:

11 103 Q. Because your lawyers want
12 to be so interventionist, let me ask it a
13 different way, sir. Do you think that you're
14 paying more to Cadillac Fairview under the
15 original deals that you negotiated than the
16 revised deal that you purport to have negotiated?

17 A. We're paying Cadillac
18 Fairview less under the revised deal.

19 MR. GRAFF: Thank you. Next
20 question.

21 MR. NEMERS: Okay. Thank you.

22 CROSS-EXAMINATION BY MR. NEMERS (cont'd):

23 104 Q. Paragraph 17 of your
24 affidavit, Mr. McEwan. Here you address the fact,
25 you say you:

1 "...were advised by
2 counsel to the company
3 that they provided a form
4 of non-disclosure
5 agreement to the Yonge
6 and Bloor landlord on
7 October 11th, 2021."

8 And later in that paragraph
9 you go on to state that:

10 "The Yonge and Bloor
11 landlord provided initial
12 comments back on November
13 6th, 2021."

14 Are you aware of the terms of
15 the form of non-disclosure agreement that was
16 provided on October 11th, 2021?

17 A. As a general basis I
18 understand that it was to be kept under wraps.
19 The specific legals, I would have to refer to
20 counsel.

21 105 Q. Are you aware that one of
22 the terms was that any confidential information
23 provided under that original form of NDA could
24 only be used for the October 15th motion that was
25 to be heard four days after that form of NDA was

1 sent to us on October 11th?

2 A. What were you asking me?

3 106 Q. Are you aware that one of
4 the terms under that NDA, the original form of NDA
5 on October 11th, one of the terms under that was
6 that any confidential information provided could
7 only be used for the October 15th motion four days
8 later?

9 A. Yes, I was.

10 107 Q. You were. Thank you.

11 Still at paragraph 17, you also say:

12 "The parties worked to
13 negotiate and finalize
14 the agreement, and they
15 executed the
16 non-disclosure agreement
17 on November 11th, 2021."

18 Were you aware that requests
19 for information under the non-disclosure agreement
20 were made to Goodmans on November 11th, 2021?

21 A. I'm not understanding
22 that question.

23 108 Q. The NDA was signed on
24 November 11th, 2021?

25 A. Uh, huh.

1 109 Q. Are you aware that on
2 that same date there were requests for information
3 made by First Capital to Goodmans under that
4 agreement?

5 A. Yes. Yes, I am.

6 110 Q. Thank you. Are you aware
7 that those requests included all the previously
8 refused production requests that were made at your
9 previous two cross-examinations?

10 A. Yes.

11 MR. NEMERS: Okay. Thank you.

12 Counsel, you will recall that you previously
13 provided undertakings, under advisements and
14 refusals charts in respect of Mr. McEwan's first
15 cross-examination, and that we provided
16 undertakings, under advisements and refusals
17 charts in respect of Mr. McEwan's second
18 cross-examination. Can I ask you, please, to
19 undertake to update those charts by indicating for
20 each refusal whether such item has now been
21 produced under the non-disclosure agreement and
22 the date on which it was produced?

23 MR. RUBY: Give us a minute.

24 Yes, we'll do that.

25 MR. NEMERS: Thank you.

1 BY MR. NEMERS:

2 111 Q. Paragraph 19, you state

3 that:

4 "Following the
5 commencement of the
6 COVID-19 pandemic, the
7 company entered into
8 lease amending agreements
9 with the Cadillac
10 Fairview entities and
11 with the Yonge and Bloor
12 landlord providing for
13 various lease
14 concessions, including
15 rent abatements, rent
16 deferrals and/or reduced
17 minimum rent amounts."

18 Now, the leases and the lease
19 amending agreements with the Yonge and Bloor
20 landlord are already on the record, but can you
21 please undertake to provide the leases and lease
22 Amending Agreements with the Cadillac Fairview
23 entities?

24 U/A MR. RUBY: We'll take it under
25 advisement on the same basis we discussed earlier.

1 MR. NEMERS: Thank you. To be
2 more precise on the record, to the extent it
3 assists you, counsel, I do understand that at
4 least certain if not all of what I'll call the
5 original leases for the Cadillac Fairview entities
6 have been provided to us under the NDA. I don't
7 believe that the amending agreements have. I just
8 want to draw that to your attention.

9 MR. RUBY: Thank you. That's
10 helpful.

11 MR. NEMERS: Thank you.

12 MR. RUBY: If you -- so just
13 to be clear then, our undertaking is to provide
14 the amendments?

15 MR. NEMERS: To the extent --
16 well --

17 MR. RUBY: You say you've got
18 the other ones. Sorry, I'm taking it under
19 advisement.

20 MR. NEMERS: I believe we have
21 the other ones. I've seen documents called leases
22 with the Cadillac Fairview wording on them. I
23 don't believe I've seen any amendments. But to
24 the extent that there are also the main leases,
25 some of which have been provided, but all of them

1 may not have been. I don't know. But I'm just
2 saying all I believe we received are main original
3 Cadillac Fairview leases and I don't believe we've
4 received any amendments yet.

5 MR. RUBY: I understand.
6 You're sweeping the corners. I'll take it all
7 under advisement, but it sound like you have at
8 least some of what you're asking for already.

9 MR. NEMERS: Correct. On a
10 confidential basis, correct. Just to be clear, I
11 am asking -- I appreciate you may refuse to do
12 this, but I'm nonetheless asking, in the same way
13 the Yonge and Bloor landlord lease amendments are
14 on the record, that the same also be provided on
15 the record for Cadillac Fairview.

16 MR. RUBY: I understand, and
17 we'll consider the request.

18 MR. NEMERS: Thank you.

19 BY MR. NEMERS:

20 112 Q. Paragraph 21 of your
21 affidavit, Mr. McEwan, states that:

22 "The Cadillac Fairview
23 entities have now advised
24 the company that the
25 reduced rent arrangements

1 between the parties will
2 only be available to the
3 company upon completion
4 of its proposed
5 transaction with the
6 purchaser, and in the
7 interim the company has
8 agreed with the Cadillac
9 Fairview entities that it
10 will pay full contractual
11 rent for the period since
12 the commencement of the
13 CCAA proceedings."

14 I'm trying to reconcile
15 paragraph 19 and paragraph 21 together, and I'm
16 hoping that you can assist. Because in paragraph
17 19, you state that the company entered into lease
18 amending agreements with Cadillac Fairview that
19 provided for various lease concessions, including
20 rent abatements, rent deferrals and/or reduced
21 minimum rent amounts.

22 But then in paragraph 21, you
23 state that Cadillac Fairview has now advised that
24 the reduced rent arrangements aren't available at
25 this time. Are you able to advise, are we talking

1 about the same rent arrangements? Are we talking
2 about Cadillac Fairview not providing rent
3 accommodations that it has already agreed to under
4 a leasing amendment, or are you talking about some
5 additional future proposed leasing amendment that
6 hasn't been entered into yet?

7 MR. CHADWICK: Again if it's
8 helpful, I'm happy to try to clarify that for you,
9 or I'm happy for you to try to put that long
10 question to the witness.

11 MR. NEMERS: Well, if you're
12 able to clarify by providing the answer, maybe
13 that's the shortest way in the efforts of this
14 commercial list, Mr. Chadwick.

15 MR. CHADWICK: Sure.
16 Paragraph 19 deals with leases and amendments
17 relating to, you know, COVID and other reasons
18 that the company has, so those are the ones that
19 are in place.

20 Paragraph 21 speaks about the
21 arrangements that need to be put in place for the
22 company to be successful in restructuring, and so
23 those, which is on the record, is that we have an
24 agreement in principle with Cadillac that has not
25 been fully documented, and then Cadillac has

1 raised the concern that they -- in the interim in
2 CCAA that their contractual rent that exists under
3 their main agreement should be paid. So that is
4 the reference to that issue as relates to the end
5 of paragraph 21 in respect of the contractual
6 rent. Very similar to the issue that your client
7 has raised that they believe that the company
8 should be paying the contractual rents, and so
9 that disputed amount is in trust with the monitor.
10 So we are addressing that in paragraph 21. I hope
11 that's helpful to narrow those issues down for
12 you.

13 MR. NEMERS: That is helpful.
14 Thank you, Mr. Chadwick. So if I understand
15 correctly, you're saying that Cadillac Fairview
16 has now taken the position that the existing lease
17 amendments are going to be put aside and they are
18 reverting back to the original lease for the
19 duration of the CCAA proceedings, or at least for
20 now? Do I have you correct in saying that?

21 MR. CHADWICK: I think that's
22 right, yes.

23 MR. NEMERS: Okay. Is the
24 company going to be paying Cadillac Fairview
25 those -- or has it already paid Cadillac Fairview

1 those amounts?

2 MR. CHADWICK: We have not
3 paid Cadillac Fairview those amounts. We're in
4 discussions with Cadillac how to satisfy those
5 obligations.

6 MR. NEMERS: I see. And is
7 there in the company's view a contractual basis
8 for Cadillac Fairview to at this point refuse to
9 honour the existing amendments or suspend the
10 existing amendments and go back to the original
11 agreement?

12 MR. CHADWICK: Yes, they're
13 different from your client. The agreement with
14 First Capital is ongoing, which is the evidence I
15 think of your client and the company. The
16 arrangements with Cadillac Fairview had a
17 termination date to them, so those amendments that
18 were in force terminated over time, and so we're
19 back to a situation where their contractual rent
20 was due and payable unless they provide us that
21 accommodation.

22 MR. NEMERS: Right. I believe
23 that's actually the exact situation with respect
24 to First Capital, and I believe it says that right
25 on the face of the two-page document, but

1 nonetheless I appreciate the clarification.

2 MR. CHADWICK: That's not the
3 evidence.

4 MR. NEMERS: Actually that is
5 the evidence, but we can argue about that later.
6 I nonetheless appreciate the clarification
7 regarding First Capital.

8 MR. CHADWICK: Sure.

9 MR. NEMERS: I've asked for an
10 undertaking, and I believe you took it under
11 advisement, to produce the First Capital -- I'll
12 call -- excuse me, to produce the Cadillac
13 Fairview leasing package, being the lease and any
14 amendments. I would ask you also to undertake to
15 identify the specific provision or provisions in
16 the leases in question with Cadillac Fairview that
17 would allow it to require the company at this
18 juncture to pay full rent?

19 REF MR. RUBY: No, that's refused.

20 MR. NEMERS: I see.

21 MR. RUBY: You can do that
22 analysis too.

23 MR. NEMERS: I can do that
24 analysis if you provide the document to me, yes.

25 MR. RUBY: I understand, but

1 me pointing the provisions of the document we
2 don't give you won't help you either.

3 MR. NEMERS: No, it won't,
4 will it? Okay. Can you please undertake to
5 produce all written communications --

6 MR. RUBY: Mr. Nemers, as I
7 understand it, those documents you want, your
8 preference is on the public record?

9 MR. NEMERS: Correct.

10 MR. RUBY: More than a little
11 concerned about it, given your client wants to buy
12 McEwan Enterprises too, but we'll take it under
13 advisement.

14 MR. NEMERS: Well, your client
15 has access to those documents, does it not? The
16 lease?

17 MR. RUBY: I'm not arguing
18 about it. It's putting it on the public record is
19 the issue. But that's what you want is on the
20 public record.

21 MR. CHADWICK: We have the
22 under advisement. Let's keep going.

23 MR. NEMERS: Can you please
24 undertake to produce all written communications
25 with Cadillac Fairview, including its counsel and

1 advisors, to the extent that they touch upon the
2 reduced rent arrangement referenced at paragraph
3 21 of your affidavit?

4 U/A MR. RUBY: Under advisement.

5 MR. NEMERS: Thank you.

6 BY MR. NEMERS:

7 113 Q. Touching on a point you
8 raised a minute ago at paragraph 20, Mr. McEwan,
9 of your affidavit, you say:
10 "The following
11 commencement of these
12 CCAA proceedings by the
13 company, the Yonge an
14 Bloor landlord has taken
15 the position that the
16 company should now be
17 paying the full previous
18 contractual rent amounts,
19 notwithstanding the
20 amending agreements the
21 company believes remain
22 in place among the
23 parties."
24 So that there is no dispute as
25 to what amendments you're referring to, are we

1 referring to this unsigned lease Amending
2 Agreement I believe is dated April 20, '21? Is
3 that what you're referring to?

4 A. I believe that's the
5 case, yes.

6 114 Q. Can I ask -- I certainly
7 have an understanding of what the agreement says
8 and what the applicable provisions are. But just
9 so I can confirm whether in fact we are on the
10 same page and looking at the same provisions, can
11 I ask you or your counsel to undertake to identify
12 the specific provisions upon which the company is
13 relying?

14 MR. CHADWICK: I don't
15 understand the question.

16 MR. RUBY: Me either.

17 BY MR. NEMERS:

18 115 Q. So the affiant swears at
19 paragraph 20 that:

20 "Our client has taken the
21 position that the company
22 should now be paying the
23 full previous contractual
24 rent amounts..."

25 And then adds in the comment:

1 "...notwithstanding the
2 amending agreements the
3 company believes remain
4 in place among the
5 parties."

6 So I'm asking for an
7 undertaking for you to identify what is it
8 specifically in the Amending Agreement that the
9 company believes would allow it to continue to pay
10 a reduced rent amount?

11 MR. RUBY: Well, I think
12 you're asking for a legal analysis, but I --

13 MR. NEMERS: No, I'm just
14 asking you to point me to the paragraph or the
15 sections, whatever it may be.

16 MR. CHADWICK: To assist you,
17 we believe that we have an ongoing agreement with
18 First Capital to continue to pay percentage rent
19 that is ongoing based on what Mr. McEwan said the
20 April arrangements, and that is ongoing and the
21 only time that we heard that it wasn't ongoing was
22 post filing.

23 So our understanding is that
24 that is the ongoing arrangements between the
25 parties, and that's why we paid the exact amount

1 of what we thought was the agreement between the
2 parties. And First Capital after the filing
3 raised an issue, and we said we would pay that
4 disputed amount into court until the matter is
5 resolved.

6 MR. NEMERS: What I'm
7 understanding from you, and again this is just to
8 confirm there isn't some surprise amendment
9 somewhere or other document someone is relying on
10 that we don't know about, what I think I'm hearing
11 from you is the document says something and you're
12 taking or your client is taking the position that
13 notwithstanding what it says, that it has a
14 termination date to it. You're saying that you're
15 taking the position it doesn't have a
16 determination date on it.

17 MR. CHADWICK: I think we're
18 taking the position that there was a lot of
19 dialogue, discussions between the parties and
20 those discussions and dialogue led to an agreement
21 and those -- that agreement while COVID and the
22 store was underperforming, that there was
23 percentage rents still in place, and that's our
24 understanding. I understand that First Capital
25 now has a different view, and then we will have

1 that issue determined over time.

2 MR. NEMERS: But there is no
3 other written amendment in place when you're
4 referring to --

5 MR. CHADWICK: Not that we are
6 aware of.

7 MR. NEMERS: Okay. Thank you.

8 BY MR. NEMERS:

9 116 Q. In paragraph 23, Mr.
10 McEwan, of your affidavit, you say in arriving at
11 the decision to proceed with the two alternative
12 transactions that MEI has now put before the
13 Court, you refer to MEI having had:

14 "...discussions with key
15 stakeholders including
16 RBC, the Cadillac
17 Fairview entities, and
18 numerous suppliers,
19 customers and employees."

20 And you go on to say you also
21 had discussions with the monitor and its legal
22 counsel. I couldn't help but notice that
23 practically every single stakeholder is on this
24 consultation list other than First Capital. Is
25 there any reason why First Capital was omitted

1 from this paragraph?

2 A. No, I don't.

3 117 Q. Thank you. And just to
4 close the loop on that, you consulted with RBC,
5 Cadillac Fairview, numerous suppliers, customers
6 and employees, in discussions with the monitor and
7 its legal counsel. Is it fair to say that you
8 also consulted with them about MEI's motion to
9 approve the original version of the related party
10 transaction? In other words, the version that the
11 Court refused to approve at the last motion?

12 A. I'm not really clear on
13 what you're asking.

14 118 Q. You consulted with these
15 stakeholders this time around the current
16 transaction. Did you consult with them on the
17 earlier iteration of the transaction that ended up
18 being rejected by the Court?

19 MR. CHADWICK: Well, again
20 maybe I can assist because that's a -- the
21 transaction that was brought before the Court was
22 advanced prior to the CCAA filing, so it's much
23 more limited scenario to be able to discuss with
24 parties. It was discussed with Cadillac Fairview
25 as a significant landlord, but it would not have

1 been discussed in advance of it becoming filed
2 with suppliers or employees. The company would
3 have discussed the nature of the transaction once
4 the filing was completed because it does speak in
5 our initial affidavit of the transaction and the
6 benefit of those transactions.

7 So I think the question is --
8 that's the facts and the circumstances, and the
9 transaction -- the amended transaction that is
10 before the courts is based on input and views of
11 various discussion of stakeholders because it's
12 much more of a public process. There is a Court
13 decision. There is obviously First Capital
14 objecting that's been widely reported.

15 So in the context of talking
16 with stakeholders, we tried to gather that
17 information and put the best transaction before
18 the Court. And First Capital obviously has a
19 different perspective and a different potential
20 agenda, so that's why those conversations may have
21 been much more limited with a party that is in
22 opposition to the company.

23 MR. NEMERS: Right. And I
24 understood Mr. McEwan to say that it wasn't a
25 typo. There weren't discussions with First

1 Capital.

2 MR. CHADWICK: Well, Mr.

3 McEwan should not speak to any without prejudice
4 discussions that have been ongoing which we both
5 know about.

6 MR. NEMERS: Right. But I'm
7 referring here to the fact that the affidavit is
8 drafted without -- it references everyone else.
9 Basically doesn't refer to First Capital.

10 MR. RUBY: Sorry. No, no, no,
11 that's not right. You're correct, Mr. Nemers, but
12 after the word "including" in the first sentence
13 of paragraph 23, it doesn't mention First Capital,
14 but before "including" are the words "key
15 stakeholders".

16 MR. NEMERS: Any particular
17 reason why RBC is identified, Cadillac Fairview
18 entities are identified, the monitor is
19 identified, all the players that come to mind as
20 being the obvious ones are identified except for
21 First Capital? That's my point. That's all.

22 MR. RUBY: No, no, when you
23 asked your question originally, it was one way.
24 You're right it's not listed, but it does say "key
25 stakeholders".

1 MR. CHADWICK: I mean, there
2 is no debate. There is no debate that we have a
3 number of parties that do support the transaction,
4 that support the business, and that First Capital
5 does not support the transaction and in our view,
6 as you know, has taken steps, we think, to
7 potentially harm the business.

8 So there is a difference
9 between First Capital and some of the other
10 stakeholders, and we are trying to be balanced in
11 our evidence before the Court.

12 MR. NEMERS: Right. We're not
13 friendly to you. The other parties are.

14 MR. CHADWICK: I think -- I
15 don't think -- you can ask Mr. McEwan the
16 question. I don't think the word "friendly" is
17 the proper characterization. I think that First
18 Capital is taking steps that doesn't benefit the
19 overall business.

20 MR. NEMERS: Well, let's
21 explore that for a second.

22 BY MR. NEMERS:

23 119 Q. I would like to ask Mr.
24 McEwan about paragraph 24 of his affidavit. You
25 state:

1 "The company strongly
2 believes that any
3 additional process that
4 takes additional time
5 will result in additional
6 costs and risks to the
7 business that the company
8 cannot bear."

9 I'm curious, why didn't the
10 company mitigate these costs and risks by agreeing
11 to a sale process months ago?

12 A. Because we have always
13 been of the mind that a sales process is not the
14 best process for the company. With the
15 environment on the street, the challenges, going
16 into the holiday season. As I've stated before,
17 there's many, many things that can destabilize and
18 a sales process is certainly one of them.

19 120 Q. Just to be clear, the
20 holiday season wasn't upon us in September of
21 2021, right? I'm asking about why didn't the
22 company go for a sale process when it had the
23 opportunity to do so several months ago before all
24 of these costs accrued, additional time pressures,
25 risks, et cetera. Could have been over by now, or

1 at least a lot closer to being over by now, had a
2 sales process been initiated several months ago,
3 right?

4 A. I guess you could
5 determine that if you believe in that. We at the
6 time did not believe that was the proper route for
7 the company, and we had a consensus agreement on
8 that, so we proceeded as we proceeded.

9 121 Q. Okay. When you consulted
10 with RBC, Cadillac Fairview, the monitor and the
11 monitor's counsel about MEI's motion to approve
12 the original version of the transaction -- and I
13 appreciate that some of those consultations, at
14 least in a material form, would have happened
15 after the motion or at least the CCAA proceedings
16 were commenced -- but when you were having those
17 discussions, did any of those parties warn you
18 that there was a very real risk that the Court
19 would not approve the transaction without a sale
20 process?

21 A. There had been discussion
22 that that could be possible.

23 122 Q. Was that concern raised
24 by just one of them or was it several of them or
25 were they all raising that concern with you?

1 What's your recollection?

2 A. I don't recall how many
3 in the original conversation. It had been
4 discussed. We analyzed all sides of it, but we
5 came to the determination that we came to.

6 123 Q. Right.

7 MR. CHADWICK: To assist you,
8 because some of those discussions were with
9 counsel, right, to assist you again, part of the
10 company turned its mind to running a sales process
11 and determined that it wasn't in the best
12 interests of the stakeholders, and so those kind
13 of discussions would have been happening with a
14 variety of people. We talked to Cadillac
15 Fairview. We talk about why they -- why it made
16 some sense to do it the way the company did. Same
17 discussion with RBC.

18 As you know, Mr. Nemers, both
19 RBC and Cadillac Fairview did support the process
20 of approving the transaction. So I think it is
21 natural -- our evidence is very clear that we did
22 turn our minds to a sale process. We did turn our
23 minds to whether it was beneficial to the
24 stakeholders, and we came to the conclusion that a
25 sales process has a greater risk and harm than the

1 benefits of it based on the nature of the
2 transaction that is before the Court.

3 MR. NEMERS: Right. Obviously
4 the original transaction was supported by Cadillac
5 Fairview, by RBC, but my question is whether they
6 said, yeah, we'll support this, it sounds like a
7 great idea, but I'm not sure you're really going
8 to be able to pull this off.

9 MR. CHADWICK: They never had
10 any of those conversations. Those would have been
11 legal discussions. No one ever raised that issue
12 on that basis.

13 MR. NEMERS: Really? The
14 monitor never said to you --

15 MR. CHADWICK: You just asked
16 about the other stakeholders.

17 MR. NEMERS: Right.

18 MR. CHADWICK: The monitor
19 is -- the monitor -- like we did with other
20 stakeholders, we talked about a sales process. We
21 turned our minds to a sales process. Whether a
22 court would approve our transaction on the basis
23 of the terms was really subject to what the Court
24 would do. So we all talked about whether there
25 needed to be a sales process. No one ever said to

1 us, there is no ability for you to approve this
2 transaction with a sales process. No one ever
3 said that to us.

4 MR. NEMERS: That's not what I
5 asked though. What I want to know is did someone
6 not say to you, and in fact I would put it to you
7 most of the feedback would have been, yeah, this
8 is great if you can do it --

9 MR. CHADWICK: No, that's
10 not --

11 MR. NEMERS: -- but I think
12 you have a real risk that you're not going to be
13 able do it?

14 MR. CHADWICK: No one had that
15 conversation with us on that basis.

16 MR. NEMERS: No one? So
17 not --

18 MR. CHADWICK: To answer your
19 words -- to answer your question in the way you
20 described it, no one said that to us.

21 MR. NEMERS: Did anyone say
22 that to you substantively --

23 MR. CHADWICK: No.

24 MR. NEMERS: -- getting at the
25 same theme, putting apart the exact words that I

1 used?

2 MR. CHADWICK: No.

3 MR. NEMERS: No. So the
4 monitor never said to you, are you really -- the
5 monitor never said to you, you stand a material
6 risk of failing on that motion?

7 MR. CHADWICK: I don't believe
8 so, no. I don't believe so, no. I think that's
9 also reflected in the monitor's report. They say
10 this is a legal issue before the Court on section
11 36.

12 MR. NEMERS: Right. They say
13 that they're -- I'm paraphrasing obviously, but
14 they say something to the effect of the two sides
15 are represented by sophisticated counsel. They
16 will go to court, they will fight it out. We're
17 not really taking a view on the issue of section
18 36(4). That's what they say, so if that's what
19 they're saying, doesn't that then send a strong
20 signal that they're concerned that while you
21 perhaps may succeed, that there is also a very
22 material chance you may not succeed?

23 MR. CHADWICK: No, I don't
24 think so, but on the same basis you can flip your
25 question around and just say simply say don't they

1 believe that we would succeed and that they don't
2 want to make that legal determination that is
3 before the Chief Justice.

4 MR. NEMERS: I could. The
5 only reason I ask is because of the issue of risk.
6 This question is meant to -- I go back to the
7 initial comment here and the paragraph that an
8 additional process that takes additional time
9 results in additional costs and risks. And so if
10 there is a concern about costs and risks, I'm
11 curious as to the risk assessment that took place
12 at the time and whether other participants
13 expressed to you the risk that it may not succeed
14 in front of the Court.

15 MR. CHADWICK: I think we've
16 answered that --

17 MR. NEMERS: I think you have,
18 so let's move on.

19 MR. CHADWICK: -- you're
20 asking the witness some questions.

21 MR. NEMERS: Let's move on.

22 BY MR. NEMERS:

23 124 Q. Specifically, did any of
24 RBC, Cadillac Fairview, the monitor, monitor's
25 counsel, did any of them express concern about the

1 costs and the risks of the company's strategy to
2 have -- try and have its original related party
3 transaction approved by the Court?

4 MR. CHADWICK: I would say no,
5 that's not the case. If we would have had the
6 transaction approved, there would have been
7 benefits in the costs, so it goes both ways. The
8 company is trying to protect its business. They
9 felt that they had a strong legal position in
10 connection with that, and they believed that was
11 the best way to approve a transaction that had a
12 broad range of benefits, and the stakeholders did
13 support that.

14 BY MR. NEMERS:

15 125 Q. Did any of RBC, Cadillac
16 Fairview, the monitor and the monitor's counsel at
17 any time ask the company to run a sale process?

18 MR. CHADWICK: Let me assist
19 you again because it's a broad question. RBC and
20 Cadillac Fairview, I think the answer from our
21 understanding and being -- most of the discussions
22 with counsel and with the business people is no.
23 We had lots of discussions with the monitor
24 whether it was beneficial to run the sales process
25 or not, and those conversations were never in a

1 situation where it says, you must run a sales
2 process or you should run a sales process. It was
3 always talking about the business and the risks
4 and the benefits of the business, and a number of
5 those conversations happened naturally. That's
6 just a natural conversation.

7 We said we turned our mind to
8 it, so if you turn your mind to it, you consider
9 the benefits and the burdens of a sales process.

10 MR. NEMERS: After chief
11 Justice Morawetz issued his decision on
12 November 1st, none of RBC, Cadillac Fairview, the
13 monitor, the monitor's counsel, said to the
14 company, look guys, why don't you just run a sale
15 process to get this over with?

16 MR. CHADWICK: Again, to help
17 you, I don't believe RBC said that. We had most
18 of the conversations with RBC. Cadillac Fairview
19 has not said that. And we've had active
20 discussions with the monitor whether there is a
21 benefit to run a sales process or not, both before
22 the Chief Justice's decision and after the fact of
23 the Chief Justice's decision. We have considered
24 all of those things on an ongoing basis in
25 connection with the sales process.

1 BY MR. NEMERS:

2 126 Q. Mr. McEwan, has any of
3 those stakeholders said anything to you about why
4 don't you just run a sale process?

5 A. No, we've never had a
6 direct conversation that way.

7 127 Q. Thank you. If you had a
8 chance to go back in time to the beginning of
9 let's call it September of 2021, would you have
10 done things differently?

11 REF MR. RUBY: That's not a
12 relevant question.

13 MR. NEMERS: I think it's a
14 highly relevant question.

15 MR. RUBY: You have my
16 refusal.

17 BY MR. NEMERS:

18 128 Q. Paragraph 24 of your
19 affidavit, Mr. McEwan, you state that a further
20 process will also increase the professional fees
21 and expenses being incurred by the company. And
22 then you make a similar comment at paragraph 41 of
23 your affidavit. You say:

24 "The company and the
25 business are relatively

1 small, particularly
2 compared to the ongoing
3 costs being incurred as
4 part of these
5 proceedings."

6 Do you know what the
7 professional fees are to date for which the
8 company is responsible?

9 A. I know in the ballpark.
10 It's a moving target right now.

11 129 Q. Can you give us the
12 ballpark figure?

13 A. I'd have to speak to my
14 accountants to get a specific number for you.

15 130 Q. I'd appreciate the
16 undertaking on the specific number, but I'm also
17 curious if you're able to give us a ballpark
18 number right now?

19 A. I would say it's north of
20 a million dollars.

21 131 Q. Thank you.

22 MR. CHADWICK: To assist you,
23 Mr. Nemers, the information that we provided to
24 you under the confidentiality agreement has some
25 very detailed information in connection with the

1 costs.

2 MR. NEMERS: I know. Thank
3 you, counsel. I've seen that. I was looking
4 to -- considering the comment that's made on the
5 record about the concern about costs, I wanted to
6 get on the record a ballpark estimation of what
7 those costs are. So thank you.

8 MR. CHADWICK: I think what
9 Mr. McEwan has answered is consistent with that
10 document as well.

11 MR. NEMERS: I believe that to
12 be the case, yes.

13 BY MR. NEMERS:

14 132 Q. Those professional fees
15 or costs would generally be divided into, is it
16 fair to say, the fees of Goodmans and then also
17 the fees of the monitor and its counsel?

18 A. That would be correct.

19 MR. NEMERS: Can you please
20 undertake to advise what the fees and expenses of
21 Goodmans have been in connection with this
22 proceeding, both from the time it was first
23 consulted in June 2021 to the filing of the CCAA
24 proceedings in late September and then again from
25 late September until now?

1 MR. RUBY: Can you help me,
2 Mr. Nemers, with the relevance of that question?

3 MR. NEMERS: Yes, it's going
4 to come in my next question.

5 MR. RUBY: Well, then I'll
6 reserve my objection until I hear the next
7 question.

8 BY MR. NEMERS:

9 133 Q. That is I can't help but
10 recall the quantum of the administration charge.
11 I believe it's 350,000 dollars.

12 MR. CHADWICK: I believe that
13 is correct.

14 MR. NEMERS: In light of the
15 fact that the professional fees are -- and I
16 understand that the monitor and monitor's counsel,
17 you correct me if I'm wrong, are more or less
18 being paid as things are going. Is that --

19 MR. CHADWICK: That is
20 correct, yes.

21 MR. NEMERS: But Goodmans has
22 not been is my understanding.

23 MR. CHADWICK: That is
24 correct.

25 MR. NEMERS: I would like to

1 know what the fees and expenses of Goodmans has
2 been because of that figure that I believe Mr.
3 McEwan said was about north of a million dollars
4 totally for the professional fees. To the extent
5 that the Goodmans fees are in excess of 350,000
6 dollars and have not been paid, they are over the
7 admin charge. I'm curious how that's proposed to
8 play out with respect to the future of these
9 proceedings and the various transactions that are
10 or may come before the Court.

11 MR. CHADWICK: I can certainly
12 help from you a high level because I'm a Goodmans
13 partner. The company engaged us. We provided
14 services to them, and we expect that the company
15 will pay us in full. And once the transaction is
16 completed or there is interim financing available
17 that's sufficient for the company to operate, then
18 they will pay those obligations. That's in the
19 monitor's report as relates to our fees.

20 The fact is that we -- there
21 is not enough dollars that have been advanced to
22 the company to meet all its obligations, and so
23 that's why Goodmans has not been paid currently.

24 MR. NEMERS: Right, but if
25 something were to happen to the company, the

1 Goodmans fees would be at risk then.

2 MR. CHADWICK: I don't see the
3 Goodmans fees at risk. They are an obligation of
4 the company. The transaction that is on the table
5 says that all those obligations will be paid
6 prefiling and post filing. If the transaction is
7 successful, then those fees will be paid. It's
8 not related to the charge solely. You look like
9 you didn't follow that.

10 MR. NEMERS: Well, the reason
11 I may have that look on my face, and perhaps you
12 can help me out, is if we go to the actual
13 agreement. And of course there are now several
14 different iterations of the agreement, but I
15 believe that the language in this respect is
16 similar in all of them. In Section 3.2 of the --
17 both the original transaction and also the amended
18 transaction, there is a listing of excluded
19 obligations, and that includes item C:

20 "Any liability with
21 respect to any legal
22 accounting, audit,
23 financial advisory, and
24 investment banking fees
25 and any other expenses

1 incurred by the seller
2 including with respect to
3 the transactions
4 contemplated by this
5 agreement or the CCAA
6 proceedings."

7 MR. CHADWICK: I think those
8 are just related to unknown fees that the company
9 is not aware of. I believe that clause, Mr.
10 Nemers, references amounts that the company would
11 not be aware of. So anything that they're not
12 aware of, they're not aware of anything in that
13 bucket, and that the obligations of the company
14 post filing would be paid as part of the
15 transaction in all circumstances.

16 MR. NEMERS: Who else is
17 liable to pay Goodmans' fees and expenses if the
18 company is unable to do so?

19 MR. CHADWICK: No one.

20 MR. NEMERS: You don't have an
21 indemnity from Fairfax?

22 MR. CHADWICK: No.

23 MR. NEMERS: Take a short
24 break.

25 --- OFF THE RECORD DISCUSSION.

1 MR. NEMERS: Thank you, Mr.
2 McEwan. Subject to any questions that arise from
3 the answers to your undertakings, those are my
4 questions for today.
5 --- Whereupon proceedings adjourned at 3:35 p.m.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

TAB B

Eunice Baltkois

From: Jeremy Nemers
Sent: November 24, 2021 1:52 PM
To: Eunice Baltkois
Subject: FW: Chart and Documents
Attachments: GOODMAN-#7220816-v4-Answers_re__Cross-Examinations_of_D_M_McEwan.DOCX

Jeremy Nemers
Aird & Berlis LLP

T 416.865.7724
 E jnemers@airdberlis.com

This email is intended only for the individual or entity named in the message. Please let us know if you have received this email in error.
 If you did receive this email in error, the information in this email may be confidential and must not be disclosed to anyone.

From: Ruby, Peter <pruby@goodmans.ca>
Sent: November 23, 2021 5:41 PM
To: Jeremy Nemers <jnemers@airdberlis.com>
Cc: Descours, Caroline <cdescours@goodmans.ca>; Chadwick, Robert <rchadwick@goodmans.ca>; Steve Graff <sgraff@airdberlis.com>
Subject: RE: Chart and Documents

CAUTION -- EXTERNAL E-MAIL - Do not click links or open attachments unless you recognize the sender.

Although I do not see how this exercise is useful since the listed documents and information were provided to you and Steve, so you already know the dates these materials were provided, attached is a revised version of the chart with the dates included as I undertook to provide. Notwithstanding our discussion this afternoon, we decided to just answer your question as asked on the record.

From: Jeremy Nemers <jnemers@airdberlis.com>
Sent: Tuesday, November 23, 2021 3:51 PM
To: Ruby, Peter <pruby@goodmans.ca>
Cc: Descours, Caroline <cdescours@goodmans.ca>; Chadwick, Robert <rchadwick@goodmans.ca>; Steve Graff <sgraff@airdberlis.com>
Subject: RE: Chart and Documents

Peter, I do not agree. Without limiting the foregoing, the undertaking at question 110 (page 61) specifically includes advising the dates on which such items were produced. I don't see that in yesterday's response from you (attached again here).

Jeremy Nemers
Aird & Berlis LLP

T 416.865.7724
 E jnemers@airdberlis.com

This email is intended only for the individual or entity named in the message. Please let us know if you have received this email in error.
 If you did receive this email in error, the information in this email may be confidential and must not be disclosed to anyone.

From: Ruby, Peter <pruby@goodmans.ca>
Sent: November 23, 2021 3:27 PM

To: Jeremy Nemers <jnemers@airdberlis.com>

Cc: Descours, Caroline <cdescours@goodmans.ca>; Chadwick, Robert <rchadwick@goodmans.ca>; Steve Graff <sgraff@airdberlis.com>

Subject: RE: Chart and Documents

CAUTION -- EXTERNAL E-MAIL - Do not click links or open attachments unless you recognize the sender.

Jeremy, our responses are set out below to the numbered questions you mention in your email. The bottom line is that we have already provided answers to the questions we committed to address when Mr. McEwan was cross-examined last week.

<u>No.</u>	<u>Question No.</u>	<u>Page No.</u>	<u>Undertakings</u>	<u>Response</u>
	110	61	To provide an updated chart of the undertakings, under advisements and refusals from the previous cross-examinations to reflect whether such items have now been produced under the non-disclosure agreement and the dates on which such items were produced	Provided in yesterday's response (attached again here).
	115	73	To identify the paragraphs or the sections in the Amending Agreement that the company believes would allow it to continue to pay a reduced rent amount	This undertaking was not given at the cross-examination.
	130	90	To provide a specific number as to the professional fees for which the company is responsible to date	This undertaking was not given at the cross-examination.
	132	91	To advise what the fees and expenses of Goodmans have been in connection with this proceeding, both from the time it was first consulted in June 2021 to the filing of the CCAA proceedings in late September, and again from late September until now	This undertaking was not given at the cross-examination.

<u>No.</u>	<u>Question No.</u>	<u>Page No.</u>	<u>Under Advisements</u>	<u>Response</u>
	112	69	To produce the Cadillac Fairview leasing package, being the lease and any amendments	Please see response #16 in chart provided yesterday.

From: Jeremy Nemers <jnemers@airdberlis.com>

Sent: Tuesday, November 23, 2021 10:39 AM

To: Ruby, Peter <pruby@goodmans.ca>

Cc: Descours, Caroline <cdescours@goodmans.ca>; Chadwick, Robert <rchadwick@goodmans.ca>; Steve Graff <sgraff@airdberlis.com>

Subject: Re: Chart and Documents

Thank you counsel.

On a preliminary review, it appears that you omitted responses to the following from Mr. McEwan's cross-examination of Friday, November 19:

<u>No.</u>	<u>Question No.</u>	<u>Page No.</u>	<u>Undertakings</u>	<u>Response</u>
	110	61	To provide an updated chart of the undertakings, under advisements and refusals from the previous cross-examinations to reflect whether such items have now been produced under the non-disclosure agreement and the dates on which such items were produced	
	115	73	To identify the paragraphs or the sections in the Amending Agreement that the company believes would allow it to continue to pay a reduced rent amount	
	130	90	To provide a specific number as to the professional fees for which the company is responsible to date	
	132	91	To advise what the fees and expenses of Goodmans have been in connection with this proceeding, both from the time it was first consulted in June 2021 to the filing of the CCAA proceedings in late September, and again from late September until now	

<u>No.</u>	<u>Question No.</u>	<u>Page No.</u>	<u>Under Advisements</u>	<u>Response</u>
	112	69	To produce the Cadillac Fairview leasing package, being the lease and any amendments	

We look forward to receiving your responses to the above items as soon as possible.

Thanks,

Jeremy

Get [Outlook for iOS](#)

From: Ruby, Peter <pruby@goodmans.ca>
Sent: Monday, November 22, 2021 6:46 PM
To: Jeremy Nemers; Steve Graff
Cc: Descours, Caroline; Chadwick, Robert
Subject: Chart and Documents

CAUTION -- EXTERNAL E-MAIL - Do not click links or open attachments unless you recognize the sender.

Jeremy and Steve, attached is a chart dealing with the undertakings, under advisements and refusals given on Mr. McEwan's three cross-examinations.

In addition, we attached four sets of documents, provided on behalf of McEwan Enterprises Inc. to First Capital Holdings (Ontario) Corporation pursuant to the Confidentiality and Non-Disclosure Agreement dated November 11, 2021 between MEI and First Capital (the "NDA"), which are Confidential Information within the scope of the NDA.

Best,

Peter

Peter Ruby [Bio](#)

He/Him

Goodmans LLP

T: +1.416.597.4184

Toronto, Canada

***** Attention *****

This communication is intended solely for the named addressee(s) and may contain information that is privileged, confidential, protected or otherwise exempt from disclosure. No waiver of confidence, privilege, protection or otherwise is made. If you are not the intended recipient of this communication, or wish to unsubscribe, please advise us immediately at privacyofficer@goodmans.ca and delete this email without reading, copying or forwarding it to anyone. Goodmans LLP, 333 Bay Street, Suite 3400, Toronto, ON, M5H 2S7, www.goodmans.ca. You may unsubscribe to certain communications by clicking [here](#).

November 23, 2021
(Supplement to Responses dated November 22, 2021)

ANSWERS TO QUESTIONS TAKEN UNDER ADVISEMENT ON THE CROSS-EXAMINATIONS OF DENNIS MARK MCEWAN HELD ON:

- (1) OCTOBER 4, 2021 IN RESPECT OF THE RELIEF BEING ADJUDICATED ON OCTOBER 7, 2021**
- (2) OCTOBER 12, 2021 IN RESPECT OF THE RELIEF BEING ADJUDICATED ON OCTOBER 15, 2021**
- (3) NOVEMBER 19, 2021 IN RESPECT OF THE RELIEF BEING ADJUDICATED ON NOVEMBER 26, 2021**

No.	Transcript Date	Page No.	Ques. No.	Question	Answer
Undertakings					
1.	October 4	17	34	Who's the principal behind the Goodfood organization?	The contract counter-party is Goodfood Market Corp. The principal is Patrick Braley. <u>Answered on or about October 5, 2021.</u>
2.	October 4	67-68	167-168	Do cash flows or business plans for the latter half of 2021 or for the year 2022 exist?	FY 2022 forecasts have been provided to First Capital pursuant under the confidentiality and non-disclosure agreement entered into by the parties (the "NDA"). MEI not aware of any business plans. <u>Provided on November 17, 2021.</u>
Under Advise ment					
3.	October 4	18	38	Request last year's contract for the Food Network.	Considered and now refused. Not relevant and confidential information of the Company.
4.	October 4	18	38	Request written contract relating to the Good Food relationship.	Considered and now refused. Not relevant and confidential information of the Company.

No.	Transcript Date	Page No.	Ques. No.	Question	Answer
	October 12	18	23	Request contract relating to the Good Food arrangement.	Refused.
5.	October 4	26	65	Request all arrangements under which Mr. McEwan or any party related to him (including Eric, Roxanne or Taylor) receives compensation from any one or more of the operations of the business and the business itself. For greater certainty, that would include whatever contract he has with -- whether by management contract, employment, or consulting contract, whether in his name or a corporation that he controls, with the one restaurant and the joint venture partnership associated with the operation of that restaurant and that catering operation.	M. McEwan's employment agreement provided to First Capital under NDA. <u>Provided on November 15, 2021.</u>
	October 12	18	24	Request a copy of the employment agreement that was originally part of the shareholders' agreement from August 12th, 2015?	M. McEwan's employment agreement provided to First Capital under NDA. <u>Provided on November 15, 2021.</u>
	October 12	19	26-28	Request any management, employment, or other compensation arrangements for Mr. McEwan, any holding company of which he is the controller, or any party	M. McEwan's employment agreement provided to First Capital under NDA. <u>Provided on November 15, 2021.</u>

No.	Transcript Date	Page No.	Ques. No.	Question	Answer
				related to Mr. McEwan, including his son, Eric, or his wife, Roxanne.	
6.	October 4	32-33	93	Request the schedules to the McEwan Enterprises Shareholders' Agreement.	Shareholders' Agreement with Schedules A to E provided to First Capital under NDA. <u>Provided on November 15, 2021.</u>
	October 12	23	33	Request exhibits or attachments to the shareholders' agreement	Shareholders' Agreement with Schedules A to E provided to First Capital under NDA. <u>Provided on November 15, 2021.</u>
7.	October 4	33-34	93	Request any amendments to the employment agreement that Mr. McEwan entered into with McEwan Enterprises or its predecessor.	M. McEwan's employment agreement provided to First Capital under NDA. <u>Provided on November 15, 2021.</u>
8.	October 4	35	96	Request annual business plan that was produced in every year since the 2015 year that the shareholders agreement was entered into.	The Company is not aware of any such annual business plans being prepared or provided under the shareholders agreement.

No.	Transcript Date	Page No.	Ques. No.	Question	Answer
9.	October 4	35-36	97	To the extent that the initial employment agreement Mr. McEwan entered into in 2015 has not been physically amended, and to the extent that the compensation, whether by way of direct pay or benefits or other attributes, have changed since 2015, even if not reflected in a formal written amendment, request to be advised of that.	M. McEwan's employment agreement provided to First Capital under NDA. <u>Provided on November 15, 2021.</u>
10.	October 4	38-39	99	Request whatever agreement exists as between that newly created company and the joint venture partners.	Partnership Agreement re: ONE Restaurant provided to First Capital under NDA. <u>Provided on November 15, 2021.</u>
	October 12	22	32	Request a copy of the partnership agreement re: ONE Restaurant and any amendments.	Partnership Agreement re: ONE Restaurant provided to First Capital under NDA. <u>Provided on November 15, 2021.</u>
11.	October 4	39	99	Request any agreements that exist in favour of either Mr. McEwan or any of his family members with the partnership or either one of the partnership parties in the way of management, consulting, or employment arrangements.	Partnership Agreement re: ONE Restaurant provided to First Capital under NDA. <u>Provided on November 15, 2021.</u>

No.	Transcript Date	Page No.	Ques. No.	Question	Answer
12.	October 4	40	101	Request confirmation of whether Mr. McEwan is the beneficiary or any other party related to Mr. McEwan is the beneficiary of an indemnity from either McEwan Enterprises or from the joint venture or any of the joint venture partners in connection with the operation of the ONE restaurant.	Indemnity agreements provided to First Capital under NDA. <u>Provided on October 4, 2021.</u>
13.	October 4	41	101	Request the directors and officers policy that the company has taken out.	Considered and now refused. Not relevant and confidential information of the Company.
	October 12	27	40	Request a copy of the directors and officers insurance policy.	Considered and now refused. Not relevant and confidential information of the Company.
14.	October 4	41-42	101	Request the documents that support the Fairfax indebtedness and, more specifically, whatever notes or other documentation exists to substantiate the loans from Fairfax into McEwan Enterprises or into the separate joint venture entity.	Debentures and, where applicable, amendments provided to First Capital under NDA. <u>Provided on October 4, 2021.</u>

No.	Transcript Date	Page No.	Ques. No.	Question	Answer
15.	October 4	44-45	112	Request the nonconsolidated financial results for each individual separate operation that was part of the McEwan Enterprises for the years 2019, 2020, and 2021.	Nonconsolidated financial information provided to First Capital under NDA. <u>Nonconsolidated information for Yonge & Bloor location provided on October 5, 2021.</u> <u>Nonconsolidated information for 2020 and 2021 for all locations provided on November 17, 2021.</u> <u>Nonconsolidated information for 2019 for all locations provided on November 21, 2021.</u>
	October 12	26-27	39	Request nonconsolidated financial statements for each individual separate operation that forms part of McEwan Enterprises for the years 2019, 2020 and 2021.	Nonconsolidated financial information provided to First Capital under NDA. <u>Nonconsolidated information for Yonge & Bloor location provided on October 5, 2021.</u> <u>Nonconsolidated information for 2020 and 2021 for all locations provided on November 17, 2021.</u> <u>Nonconsolidated information for 2019 for all locations provided on November 21, 2021.</u>
16.	October 4	54	139	Request all of the lease agreements that exist right now with respect to Fabbri Don Mills, McEwan Don Mills, Bymark, Fabbri TD, McEwan TD.	Existing lease agreements provided to First Capital under NDA. <u>Provided on November 17, 2021.</u>

No.	Transcript Date	Page No.	Ques. No.	Question	Answer
	October 12	28-29	44	Request copies of the lease agreement for Cadillac Fairview.	Existing lease agreements provided to First Capital under NDA. <u>Provided on November 17, 2021.</u>
	November 19	62	111	Request copies of leases and lease amending agreements with the Cadillac Fairview entities.	Copies of amending agreements considered and refused. Amending agreements have expired, are not relevant and are subject to confidentiality obligations to Cadillac Fairview.
17.	October 4	54	139	Request the lease with respect to the Thornbury location.	Existing lease agreement provided to First Capital under NDA. <u>Provided on November 17, 2021.</u>
18.	October 4	60 -61	147-148	Request copies of communications that were exchanged back and forth between First Capital and McEwan Enterprises.	Considered and now refused. Not relevant and confidential information of the Company. First Capital would also have these exchanges and none were put before Mr. McEwan as Exhibits to the cross-examination. In addition, these exchanges involved settlement discussions conducted on a without prejudice basis based on an email between the parties dated March 23, 2021. All related discussions and e-mail exchanges continued on this without prejudice basis.

No.	Transcript Date	Page No.	Ques. No.	Question	Answer
19.	October 4	66	165	Request the valuation RBC would have obtained with respect to the mortgage over Mr. McEwan's cottage in Thornbury.	Considered and now refused. Not relevant and confidential information.
20.	October 4	66	166	Has Fairfax guaranteed any of the obligations to Royal Bank?	No it has not.
21.	October 4	67	166	Request the business plan for McEwan Enterprises, including any pro forma financial statements in respect of the second half of the year 2021, and pro forma business plan and cash flow for the years 2022 and beyond.	Newly prepared financial information for 2021 and 2022 provided to First Capital under NDA. The Company is not aware of any business plans. <u>Provided on November 17, 2021.</u>
22.	October 4	70	177	Clarify what the shares that were issued to Fairfax or any predecessor, were issued for by way of dollar value when they were issued?	Considered and now refused. Not relevant and confidential information of the Company.
	October 12	25	37-38	Request the amounts of payments made by Fairfax for the shares of McEwan Enterprises that they currently hold.	Refused.
23.	October 12	12	8	Confirm when Mr. McEwan or his counsel had first communications with the Monitor.	August 18, 2021. <u>Answered on November 22, 2021.</u>

No.	Transcript Date	Page No.	Ques. No.	Question	Answer
24.	November 19	38	67	Request a copy of the company's records reflecting the original cost of the Yonge and Bloor equipment in August to December 2018.	Such records provided to First Capital under NDA. <u>Provided on November 22, 2021.</u>
25.	November 19	47	82	Request a copy of appraisal for the Yonge and Bloor equipment.	Appraisal obtained by the Company provided to First Capital under NDA. <u>Provided on November 22, 2021.</u>
26.	November 19	71	112	Request copies of all written communications with Cadillac Fairview, including its counsel and advisors, to the extent that they touch upon the reduced rent arrangement referenced at paragraph 21 of Mr. McEwan's affidavit.	Considered and now refused. Not relevant and confidential information of the Company.
Refusals					
27.	October 4	22	64	Provide the address of the second McEwan property (i.e. M. McEwan's property in Thornbury).	Refused.
28.	October 4	53-54	138	Request a copy of the written communications that have taken place between McEwan Enterprises and Cadillac.	Refused.

No.	Transcript Date	Page No.	Ques. No.	Question	Answer
29.	October 4	72-73	180	Request shareholders agreement in place in connection with Newco and any employment, compensation, management agreements be provided as part of that transaction, again, should it proceed.	Such documents do not exist.
30.	November 19	32-33	59	Mr. McEwan to advise if he believes MEI has the support of the monitor in respect of the company's motion that is scheduled for November 26?	Refused.
31.	November 19	69	112	Request MEI identify specific provision or provisions in the leases with Cadillac Fairview that would allow it to require the company at this juncture to pay full rent.	Refused.
32.	November 19	89	127	Mr. McEwan to advise if he had a chance to go back in time to the beginning of September of 2021, would he have done things differently?	Refused.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MCEWAN ENTERPRISES INC.

Applicant

Court File No. CV-21-00669445-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceedings commenced at Toronto

TRANSCRIPT BRIEF

AIRD & BERLIS LLP
Barristers and Solicitors
181 Bay Street, Suite 1800
Toronto, Ontario M5J 2T9

Steven L. Graff (LSO # 31871V)
Tel: 416.865.7726 / Fax: 416.863.1515
Email: sgraff@airdberlis.com

Jeremy Nemers (LSO # 66410Q)
Tel: 416.865.7724 / Fax: 416.863.1515
Email: jnemers@airdberlis.com

Lawyers for First Capital Holdings (Ontario)
Corporation