THE COURT OF QUEEN'S BENCH
OF NEW BRUNSWICK

LA COUR DU BANC DE LA REINE
DU NOUVEAU-BRUNSWICK

P.O. Box 5001
Bathurst, N.B.
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Trial Division

March 12, 2010

Via fax

STEWART MCKELVEY
Brunswick House
44 Chipman Hill,Suite 1000
Saint John, NB
E2L 2A9
ATTENTION: Stephen J. Hutchison

Sir:

RE: Blue Note Caribou Mines Inc.
Court File Number: B-M-06-09

Please find enclosed copy of the decision of of Mr. Justice J.A. Réginald Léger, J.C.Q.B. dated March 11, 2010 with regards to the above-noted matter.

Yours very truly,

Donna Lagacé
Client Services

/dl
Enclosure
cc: John B.D. Logan, Esq. via fax: (506) 453-3275
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COURT OF QUEEN'S BENCH OF NEW BRUNSWICK B/M/06/09

JUDICIAL DISTRICT OF BATHURST

TRIAL DIVISION

BETWEEN:

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

- and –

IN THE MATTER OF THE APPLICATION OF BLUE NOTE CARIBOU MINES INC., a body corporate

RECEIVED AND FILED
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COURT SERVICES
SERVICE AUX TRIBUNAUX
BATHURST, NB

-and –

IN THE MATTER OF THE APPLICATION OF PRICEWATERHOUSECOOPERS INC., Trustee in Bankruptcy of BLUE NOTE CARIBOU MINES INC.

- and –

IN THE MATTER OF AN APPLICATION BY BREAKWATER RESOURCES LTD. and CANZINCO LTD. FOR VARIOUS ORDERS RELATING TO THE STAY OF PROCEEDINGS AGAINST BLUE NOTE CARIBOU MINES INC.

- and –

IN THE MATTER OF the Application by J.S. REDPARTH LIMITED (Court File No. N/C/68/08) and LONGYEAR CANADA, ULC and BOART LONGYEAR ALBERTA LIMITED, doing business under the name and style of BOART LONGYEAR CANADA (Court File No. N/C/68/08), Lien Claimants, for an Order lifting the Stay Order and continuing the said Lien Claimants' Action

BEFORE: The Honourable Mr. Justice J. A. Réginald Léger

HELD AT: Bathurst, NB

DATES OF HEARING: January 12, 13, 14, 15 & 16, 2010

DATE OF DECISION: March 11th, 2010

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APPEARANCES:

Stephen J. Hutchison, Jeffrey Parker and Alana Waberski, for CanZinco Ltd. and Breakwater Resources Ltd.

Steven L. Graff and Aaron T. Collins for Senior Secured Noteholders

John B.D. Logan and Natalie LeBlanc, for the Office of the Attorney General for the Province of New Brunswick

Howard Gorman, for Maple Minerals Corporation

Gerald F. Smith, for J.S. Redpath Ltd., Longyear Canada, ULC and Boart Longyear Alberta Ltd

George L. Cooper, Joshua J.B. McElman and Rebecca Atkinson, for PricewaterhouseCoopers

Matthew Gottlieb, Jeffrey Lem, Thomas O'Neil and Melissa Young, for the Fern Trust

Robert C. Smith, for PricewaterhouseCoopers as Court appointed monitor

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DECISION

[1] Blue Note Caribou Mines Inc. (BNC) operated an underground mining and mineral processing property and related assets located approximately 50 km west of Bathurst, New Brunswick, as well as an open-pit mining property located in the County of Restigouche, New Brunswick. In February 2009, BNC sought protection pursuant to the *Companies' Creditors Arrangement Act* (CCAA). On February 20th, 2009, an initial order was granted and pursuant to Section 11 of the CCAA, any and all proceedings commenced, taken or continued against or in respect to BNC were stayed until March 22nd, 2009. PricewaterhouseCoopers Inc. (PWC) was appointed as monitor of the business and affairs of BNC. Further orders have since extended the Stay of Proceedings until the 21st day of May 2010. Beginning with the May 20th, 2009 order, each of the extension orders contained a clause which stated:

> Nothing in this order shall give the Monitor, the Applicant or any liquidator the right to sell any real property including mining rights, leases and licences in connection with the Caribou Mine without further order of the Court (on reasonable notice to the Fern Trust, CanZinco Ltd. and Breakwater Resources Ltd.) or without the written consent of the Fern Trust, CanZinco Ltd. and Breakwater Resources Ltd.

[2] On July 14th, 2009, BNC concurrently with the CCAA proceedings, made an assignment into bankruptcy. PWC was also appointed as trustee under the *Bankruptcy and Insolvency Act* (BIA).

[3] By order dated July 27, 2009, PWC was authorized to carry out the plan of liquidation as described in the Monitor's third report. Consequently, a public auction of the

assets of BNC was scheduled for September 30, 2009. Only the tangible personal property of BNC was to be sold at the public auction. In an affidavit sworn September 28, 2009, Robert C. Smith of PWC confirmed that the intention of PWC was not to sell the assets of BNC but to liquidate the assets on a piecemeal basis. More particularly, Mr. Smith stated:

> As will more fully appear by reference to the three Monitor's reports before the Court, substantial efforts were undertaken in the months since the granting of the initial order of February 20, 2009, with a view to selling all of BNC's assets as a going concern. Those efforts did not result in a sale.
>
> Accordingly, as an alternative to selling the assets *en bloc*, it was determined that efforts would be made to liquidate the assets on a piecemeal basis.

[4] Just hours before the public auction was to take place and after several hours of negotiations, PWC in its capacity as monitor and as trustee of BNC, entered into an agreement with an Ontario numbered company, later to be Maple Minerals Corporation, for the purchase and sale of the assets of BNC, including the real property. The sale agreement provided that PWC would apply to the court and seek an order that the purchaser obtain title in the assets free and clear from any and all interest or encumbrances. The agreement provided in part as follows:

> The Monitor does not currently have the authority of the Court to sell the lands, however the Monitor agrees it will sell the lands to no other party until this matter is dispensed with and a final Order issued by the Court, and the Monitor (and the Purchaser if appropriate) shall apply to the Court and make good faith efforts to obtain for the purchaser good and marketable title to, and a 100% interest in the Assets free and clear of all liens, mortgages, charges, security interests, pledges, encumbrances, restrictions, royalties, claims and demands (including, without limitation, any claims and demands by or on behalf of any and all current or former employees) whatsoever (collectively, "Liens") including, without limitation, any Liens by or in favour of CanZinco Ltd., Breakwater Resources Ltd., The Fern Trust, any creditors, secured or otherwise, of Blue Note and any environmental or reclamation obligations respecting the Properties or any current or prior operations thereon except for the current agreement pertaining to the

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Deposit. The Monitor shall file the initial application and thereafter all costs of such application(s) and related activities shall be paid by The Purchaser.

[5] The Sale Agreement contemplates the sale of assets in two stages: Stage I of the transaction being for the personal assets of BNC in the amount of three (3) million dollars. Stage II of the Sale Agreement provides for the conveyance of the lands, mining leases and mineral claims for another 1.25 million dollars. As a condition precedent to the completion of the second stage of the Sale Agreement, PWC is required to seek court approval to extinguish any liens on the property.

[6] The first stage of the transaction was completed on October 7th, 2009 with the payment by Maple Minerals of 3 million dollars. The second stage of the transaction is the principle reason for the motion filed by PWC on November 19, 2009 whereby PWC is seeking the approval of the transfer of the lands, mining leases and mineral claims to Maple Minerals Corporation free and clear from all interest, liens and encumbrances, such as they are defined in the Sale Agreement. More particularly, PWC is seeking the following order:

> ii) approving the transaction (the "Transaction") contemplated by an agreement dated as of September 30, 2009, as amended by extension agreement dated October 7, 2009 (the "Sale Agreement") between the Applicant and Maple Minerals Corporation (formerly known as 647078 N.B. Inc.) (the "Purchaser"), a (redacted) copy of which is attached to the Applicant's affidavit in support of the within motion…
>
> iii) authorizing and approving the execution by the Applicant of the Sale Agreement and the Applicant executing such other documents of the taking of such additional actions as may be necessary or desirable to

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complete the Transaction and to convey the assets more particularly set out in Exhibit "O" to the Report (the "Sale Assets") to the Purchaser;

iv) declaring that upon the delivery of a certificate or certificates to the Purchaser substantially in the form attached as Schedule "A" to the Draft Order (the "Applicant's Certificate"), all right, title and interest in and to the Sale Assets shall vest absolutely in the Purchaser free and clear of and from any and all other interests, claims or encumbrances of any nature or kind including, without limitation, the interests, if any, of Fern Trust, CanZinco Ltd. and Breakwater Resources Ltd.; and

v) to the extent necessary, declaring that for the purposes of determining the nature and priority of claims, the net proceeds from the sale of the Sale Assets (the "Proceeds") shall stand in the place and stead of the Sale Assets, and that from and after the delivery of the Applicant's Certificate all claims and encumbrances shall attach to the Proceeds with the same priority as they had with respect to the Sale Assets immediately prior to the sale;

[7] In simple terms, PWC is seeking an order enabling Maple Minerals Corporation as purchaser, to acquire the real property of BNC, including the mining leases and mineral rights free and clear from any interest, thereby extinguishing any liens against or interest in the property. On December 31, 2009, PWC filed an amended Notice of Motion seeking substantially the same relief with some amendments to the grounds on which it relied upon.

[8] The motion is strongly opposed. Diorite Securities Limited as trustee for the Fern Trust (the Fern Trust), asserts that it has a 10% net profit interest (NPI) in the Caribou Mine which runs with the mine. The Fern Trust claims that it owns a 10% property interest in the Caribou Mine, an interest it claims they have held since the early 1990's. The Fern Trust does not oppose the sale of the mine as such, but wishes to assert and protect what it calls its valuable

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property interest which it has owned for almost twenty years. The Fern Trust is simply requesting that the NPI in the Caribou Mine not be vested out or extinguished by this Court. If the Monitor's motion is granted, the NPI in the Caribou Mine would in effect, be extinguished.

[9] Breakwater Resources Ltd. (BWR) also opposes the motion filed by PWC. BWR also claims a property interest in the Caribou Mine, an interest which it argues was acquired by virtue of a previous agreement entered into with Blue Note Mining Inc., the parent company of BNC. In fact, BWR filed a separate motion seeking an order declaring its property interest in the mine. I reproduce the relief sought by BWR in its motion filed on January 7th, 2010, which reads as follows:

> b) an order setting aside the Notice of Disallowance issued by PricewaterhouseCoopers Inc. ("PwC") on December 28, 2009, pursuant to which the Proof of Claim (for the Reclamation of Property) filed on behalf of Breakwater on December 23, 2009 was disallowed;
>
> c) an order declaring that, pursuant to Article 3 of the Unsecured Subordinated Convertible Debenture in issue in this matter (the "Debenture") and the Joint Venture Agreement in issue in this matter (the "Joint Venture Agreement"), Breakwater is entitled to a 20% ownership interest in the mineral properties and mine facilities comprising the Caribou and Restigouche Mines (the "Real Property") as described in Schedule 1.1(6) to the Asset Purchase Agreement in issue in this matter (the "Asset Purchase Agreement");
>
> d) an order declaring that, pursuant to Article 3 of the Joint Venture Agreement, Breakwater is entitled to a 20% undivided beneficial interest in all property used in connection with the Mines and including a 20% ownership interest in the Real Property;
>
> e) an order declaring that PricewaterhouseCoppers Inc. ("PwC") did not possess the authority to enter into an agreement dated as of September 30, 2009, as amended by an extension agreement dated October 7, 2009, (the "Sale Agreement") for the sale of the property of Blue Note Caribou

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Mines Inc. ("Blue Note Caribou") to Maple Minerals Corporation (formerly 647078 N.B. Inc., the "nominee" of 2190776 Ontario Inc.);

f) an order declaring that Breakwater possesses and is entitled to exercise its rights of first refusal contained in Articles 14 and 15 of the Joint Venture Agreement (the "Rights of First Refusal") so as to acquire all of the property and interest of Blue Note Caribou which was offered for sale under the Sale Agreement on the same terms and conditions as contained therein;

g) an order directing PwC, Blue Note Mining Inc. ("Blue Note") and/or Blue Note Caribou to execute and deliver, and/or request that Computershare Trust Company of Canada execute and deliver, such deeds or other instruments as may be necessary to release the 20% interest of Breakwater from the security interests of Computershare Trust Company of Canada and to cause such interest to be recorded in the name of Breakwater of its nominee;

h) An order lifting or setting aside the stay imposed in the within matter by virtue of section 11 of the *Companies' Creditors Arrangement Act,* R.S.C. 1973, c. C-36, as amended (the "CCAA") for the purpose of enabling Breakwater to enforce its rights under the Debenture and the Joint Venture Agreement;

i) in the alternative, an order declaring that, if the claims of Breakwater to an interest in the Mines under the Debenture and/or Joint Venture Agreement are disallowed, then Breakwater is entitled to the Net Smelter Return Royalty which is a right which runs with the Mines and binds any successive operators thereof;

[10] During the hearing, counsel for BWR indicated that paragraphs (e) and (g) were withdrawn. BWR's motion is opposed by PWC and not surprisingly, Maple Minerals Corporation.

[11] During the course of the lengthy hearing on the motions, counsel for BWR also advised that BWR was not raising any issues with respect to Stage I of the Sale Agreement.

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BWR is only claiming an interest with respect to the second stage of the transaction between PWC and Maple Minerals Corporation. In other words, the motions before this court deal only with the interest in real property, with the sale of the personal assets of BNC not being challenged. Consequently, stage I of the Sale Agreement is now completed with Maple Minerals having title in the personal assets of BNC by virtue of the September 30th, 2009 agreement which was completed on October 7th, 2009.

[12] At the end of the hearing, counsel for the Attorney-General for the Province of New Brunswick who, among others, was representing Provincial Holdings Ltd., advised that the Province supports the transaction. Basically, the provincial government simply wishes that the transaction proceeds as planned, so that the Caribou Mine can return to production. The Attorney General however, took no position on the issues raised by BWR and the Fern Trust. Counsel for the Provincial Holdings Ltd. was not in a position to advise the Court what Provincial Holdings would do in regards to the exercise of its security in the event it would be required to do so. Counsel acting for Provincial Holdings Ltd. simply advised that he had received no instructions on this issue.

[13] It must also be noted that several liens have been filed pursuant to the *Mechanics Lien Act* of New Brunswick. The total amount claimed by the Lien Claimants is approximately twelve (12) million dollars. The liens are at various stages of proceedings and all have been stayed by virtue of the CCAA and the BIA proceedings. On the whole of the evidence, I am

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satisfied that Computershare Trust Company of Canada (Computershare) and Provincial Holdings Ltd. hold charges on the property that rank ahead of the Lien Claimants. However, I wish to point out that no written independent legal opinion was provided with respect to the various security interests in the instant case.

[14] In order to correctly understand and determine the issues raised by the two motions before this court, it is necessary to relate the background behind the claims put forward on behalf of the Fern Trust and Breakwater Resources Ltd.

THE FERN TRUST

[15] The claim by the Fern Trust to the NPI arises by virtue of an agreement dated August 9th, 1990 (the NPI Agreement), by which East West Caribou Mining Limited (Caribou) granted to East West Minerals N.L. (East West) a 10% net profit interest in the Caribou Mine. The Fern Trust is now the owner of the NPI and has owned the NPI since 1991.

[16] Howard Miller, a resident of the United Kingdom, filed a lengthy affidavit on behalf of the Fern Trust. Mr. Miller has been closely involved in the Caribou Mines over many years. In his detailed affidavit, Mr. Miller related the history of his involvement with the Caribou Mine including the many transactions that have led to the NPI Agreement as well as the context in which the NPI was granted. In August 1990, a series of agreements were negotiated

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and executed culminating in a refinancing of the Caribou Mine of which the NPI was one of the agreements. The NPI Agreement reads as follow:

> <u>EAST WEST CARIBOU MINING LIMITED</u>
>
> For valuable consideration, the sufficiency of which is hereby acknowledged, East West Caribou Mining Limited ("Caribou") hereby grants to East West Minerals N.L. ("East West") a freely assignable 10% net profits interest in the mine known as the Caribou Mine located near Bathurst, New Brunswick as in operation from time to time.
>
> The 10% net profits interest shall be calculated and payable as follows:
>
> (a) subject to paragraph (b), the term "net profits" shall mean the excess of gross revenue of the Caribou Mine from the sale of minerals, metals, concentrates and material mined therefrom over all expenses (other than those of a capital nature) properly incurred, determined for each accounting period in accordance with generally accepted accounting principles and good mining practice applied on a consistent basis; the said expenses shall, not include income taxes paid or payable on the income of the Caribou Mine under any provincial or federal income tax statute or any management fee paid or payable to Bathurst or any affiliate or associate thereof but shall, without limitation, include:
>
> (i) all operating expenses (including transportation, smelting and refining) and such administrative and overhead expenses as are reasonable and necessary to produce the said gross revenues, such administrative and overhead expenses not to exceed 10% of all operating expenses properly incurred, apart from such administrative and overhead expenses;
>
> (ii) all taxes (other than income taxes aforementioned) and royalties imposed, charged or levied upon the Caribou Mine and the minerals, metals, concentrates and material mined therefrom whether federal, provincial or otherwise;
>
> (iii) all interest in respect of money advanced to and borrowed by Caribou for the purpose of placing the Caribou Mine into production or the resumption of production; and
>
> (iv) depreciation and amortization of the cost of all equipment, facilities, improvements and deferred expenditures required to develop, mine and process the ore, at such rates as will write off such expenditures and costs pro-rated over the estimated life of the Caribou Mine;
>
> (b) if, in any fiscal year, the expenses referred to in subparagraph (a) hereof exceed the gross revenue for any such year, the excess shall be

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carried forward and be deducted as an expense from the gross revenue of the subsequent year or years, as the case may be;

(c) within thirty (30) days following the end of each calendar quarter, commencing with the calendar quarter in which the Caribou Mine resumes production, Caribou shall deliver to East West a statement of the net profits, if any, for that quarter, together (subject to paragraph (d) with a cheque in payment thereof (less the amount of any tax required to be withheld) determined as aforesaid. Caribou shall deliver an audited statement of net profits within 120 days of the end of each fiscal year;

(d) notwithstanding the foregoing, payment of all amounts to East West, or any assignees thereof pursuant hereto shall be subordinate to the obligations of Caribou to the National Australia Bank Limited and Westpac Banking Corporation pursuant to the provisions of the Royalty Interest Postponement and Subordination Agreement to be dated in August, 1990, the terms of which shall be deemed part of this instrument with the intent that they set out the provisions of subordination in detail and to the Province of New Brunswick (collectively the "Lenders");

(e) Bathurst covenants and agrees that it shall manage the Caribou Mine, or cause the Caribou Mine to be managed, in a proper and professional manner and shall use its best efforts to cause the Caribou Mine to resume full production and thereafter to operate efficiently;

(f) the net profits interest shall terminate and be of no further force or effect and all obligations hereunder, present or future, accrued or not, upon (i) any dissolution, bankruptcy, receivership, winding-up, liquidation, or other similar proceedings in respect of Caribou (whether voluntary or involuntary), (ii) any proposal made by Caribou under the Bankruptcy Act, (iii) any proposed compromise or arrangement in respect of Caribou under the Companies Creditors Arrangement Act or any applicable provincial legislation, (iv) any distribution of the assets of Caribou or proceeds thereof among its lenders in any matter whatsoever, or, (v) any sale or other disposition or any foreclosure by the Lenders pursuant to any security now or hereafter held by them over any of the assets of Caribou or over any of the shares in the capital of Caribou, whether or not occasioned by any of the foregoing;

(g) without limiting paragraphs (d) and (f) hereof, prior to the date upon which Westpac Banking Corporation and National Australia Bank Limited have been paid in full all amounts payable to them pursuant to the Loan Agreement dated 9 August, 1990, East West or its assigns shall have no right to receive or demand any payment under this instrument; and

(h) any dispute regarding the calculation or payment of net profits shall be settled pursuant to the terms of the Arbitrations Act (Ontario) and the

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parties hereto agree to be bound by any decision reached pursuant to such arbitration.

[17] At the time the NPI Agreement was entered into, East West Caribou, East West Minerals and the lenders of East West Caribou, the National Australia Bank Limited and the Province of New Brunswick, entered into two separate subordination agreements. By virtue of section (d) of the NPI Agreement, the Subordination Agreements are incorporated by reference into the NPI Agreement. The Subordination Agreement provides that East West Minerals interest (the 10% NPI) is subordinate to the interests of National and the Province.

[18] For ease of reference, I reproduce Section 7 and 17 of the Subordination Agreement which state as follows:

> Section 7. Termination of Royalty Interest. Each of the Subordinating Parties agree in favour of the Borrower and the Banks that the Royalty Interest shall terminate and all rights of the Subordinating Parties thereof, present or future, accrued or not, including all rights of the Subordinating Parties in respect of arrears shall be extinguished upon (i) the institution or commencement of any dissolution, bankruptcy, receivership, winding-up, liquidation or other similar proceedings in respect of the Borrower (whether voluntary or involuntary), (ii) any proposal made by the Borrower under the Bankruptcy Act, (iii) any proposed compromise or arrangement in respect of the Borrower under the Companies' Creditor Arrangement Act or any applicable provincial legislation, (iv) any distribution of assets of the Borrower or proceeds thereof among its lenders in any manner whatsoever, or (v) any sale or other disposition or any foreclosure by the Banks pursuant to any security now or hereafter held by them over any of the assets of the Borrower or over any of the shares in the capital of the Borrower, whether or not occasioned by any of the foregoing. The subordinating Parties will execute any discharges or termination agreements reasonably required by the Borrower or the Banks in order to evidence such termination. [emphasis added].

Section 17. Successors and Assigns. This Agreement shall enure to the benefit of and shall be binding upon the Banks, the Subordinating Parties and the Borrower and their respective heirs, executors, administrators, successors and permitted assigns, [emphasis added]

[19] BNC is a successor to East West Caribou and is both bankrupt and subject to the CCAA proceedings. The Fern Trust is a successor to East West Minerals and as such, is the holder of rights by virtue of the NPI Agreement.

[20] On July 26, 2006, an Asset Purchase Agreement was concluded whereby BWR, through its wholly-owned subsidiary CanZinco, sold the Caribou Mine to Blue Note Mining Inc. which in turn shortly thereafter, conveyed the Caribou Mine to its wholly-owned subsidiary Blue Note Caribou Mine. Howard Miller, in his affidavit, described the Fern Trust's reaction upon hearing of the transaction:

> Commencing on hearing the news about potential sale of the Caribou Mine by Breakwater in 2006, the Fern Trust's counsel corresponded with George Cooper, counsel to Blue Note Mining and its affiliates (collectively, the "Blue Note Companies"), reminding him about the existence of the NPI and the fact that the NPI constituted an interest in the Caribou Mine. The Blue Note Companies denied that the NPI was a proprietary interest in favour of the Fern Trust. Moreover, the Blue Note Companies took the position that they never had "actual notice" of the NPI and since it was not registered on title, the NPI did not continue to constitute a proprietary interest in the Caribou Mine.

[21] Litigation ensued between the Fern Trust and Blue Note Mine and Blue Note Caribou. At issue in the litigation was whether the NPI constituted an interest over the mine and

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whether Blue Note was bound by the terms of the NPI as a successor in title. The result of the litigation is relevant to the issues raised in the present motion.

[22] Justice Rideout of the Court of Queen's Bench of New Brunswick, in a decision reported at [2008] N.B.J. No. 360, which was subsequently affirmed by the New Brunswick Court of Appeal, decided that the NPI Agreement runs with the land and that BNC must abide by the NPI Agreement. In his decision Justice Rideout states the following at paragraph 18:

> The NPI was reproduced in its entirety at paragraph 7 of these reasons. It contains the following wording:
>
> In the opening paragraph are the words,
>
> - ... hereby grants to East West Minerals N.L. ("East West") a freely assignable 10% net profit interest in the mine known as the Caribou Mine ...
> - (d) notwithstanding the foregoing, payment of all amounts to East West, or any assignees thereof pursuant hereto shall be subordinate ...
> - (g) deals with paying off lenders and states that until the lenders are paid in full; ... East West or its assigns shall have no right to receive or demand any payment under this instrument ...
>
> [underlining added]
>
> There are provisions which also deal with the situation where the Mine becomes insolvent and the effects on the NPI.

[23] Justice Rideout writes the following at paragraphs 34, 35, 40 and 44:

> 34. The authorities indicate that there are no special words or incantations which create an interest in a mine. In the NPI are the words "grant" and "in the mine" but there are no other words that are typically found in a conveyance of an interest in land, such as; bargain, sell, assign, transfer, set over and the like. The words "freely assignable" do not establish any intention to create an interest in land as they can relate to either situation.

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However, I believe the words "grant" and "in the mine" do establish an interest in land for the reasons outlined later.

35. I am satisfied that the interest over which the NPI is applicable is an interest in land. It is dealing with a net profit arising from the mine itself; consequently, the NPI is carved out of an interest in land. This satisfies the second test in Dynex.

[…]

40. …I, therefore, have no doubt on this issue, as to what the judgment of the Court would be if the matter proceeds to trial. I believe a Court would conclude the NPI runs with the mine, based solely on the wording in the instrument.

[…]

44. I declare that the Merlin Group Securities Limited has a 10% net profits interest which runs with the Caribou Mine.

Consequently, the issues that were raised before Justice Rideout are now settled law.

[24] In his affidavit in support of the present application, Robert C. Smith states that as monitor he requires direction as to the effect of paragraph (f) of the NPI. At paragraphs 18 and 19 of his November 19, 2009 affidavit, Mr. Smith described the principle issues raised by the Fern Trust in regards to the NPI Agreement:

> The defined term "Caribou" in paragraph (f) of the NPI referred to above means East West Caribou Mining Limited, now known as CanZinco Ltd., and was the predecessor in title to the Sale Assets, which have since passed to BNC along with, as the Decision of Justice Rideout confirmed, the NPI. CanZinco Ltd.'s transfer of the NPI resulted from an Asset Purchase Agreement dated July 26, 2006, a copy of which is attached and marked Exhibit "Z", without schedules or exhibits thereto, and a General Conveyance and Assumption of Liabilities

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> Agreement dated July 26, 2009, a copy of which is attached and marked as Exhibit "AA".
>
> In my capacity as Monitor and Trustee and in order to complete the Transaction contemplated by Sale Agreement, I respectfully seek direction from this Honourable Court as to whether the NPI shall continue to bind any of the Sale Assets.
>
> The issue raised by the present motion is whether or not the NPI Agreement is extinguished by virtue of the insolvency of BNC.

[25] The NPI Agreement and the Subordination Agreement provide that the NPI will terminate with the bankruptcy of "Caribou" and the "Borrower" respectively. These terms refer to East West Caribou Mining Limited who is the predecessor in title to BNC. As previously mentioned, BNC is now bankrupt. As early as in his April 21st, 2009 memorandum, the monitor stated his understanding of the positions taken by the parties involved in the BNC proceedings under the CCAA where he states:

> Without making comment on the positions, the Monitor hereafter provides a short form view of the positions taken by the various parties involved in BNMC. It is fully anticipated that the legal arguments will be far more extensive than set out below. Should there be a proposed sale of the mine, these matters will be brought to the Court for consideration and decision.
>
> The Fern Trust takes the position that the NPI takes priority over any sale of the assets and will constitute an obligation of the subsequent owner of the property.
>
> The Company takes the position that at Paragraph f of the NPI, it is clearly stated that the NPI shall terminate on the insolvency of Caribou. The Company takes the position that the Court has interpreted "Caribou" as the mine, and that as a result of the insolvency of Blue Note Caribou Mines Inc. the NPI is at an end.
>
> The Secured Lenders of BNCM take the position that the NPI is subordinate to the interest of the lenders and can be foreclosed by action of the Lenders or by declaration of the Court in the CCAA proceeding.

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[26] The main issue raised in this Application in regards to the NPI is whether the NPI Agreement is terminated as a matter of contractual interpretation. Is "Blue Note" to be substituted for "Caribou" in paragraph f) of the NPI or put in another way is paragraph (f) of the NPI Agreement triggered by the insolvency of BNC?

[27] The Applicant takes the position that on a plain reading of paragraph (f) of the NPI Agreement, it is clear that the NPI Agreement is extinguished because BNC is subject to proceedings under the BIA and the CCAA. It is argued that as a result, Fern Trust's interest, if any, in the Sale Assets or to any profits to be derived as a result therefrom or as a result of being a party to the NPI Agreement has been terminated and/or are of no further force and effect.

[28] In its written submission, the Applicant states its position in the following terms:

> The NPI Agreement, including paragraph (f), contemplates that from time to time the Caribou Mine will go in and out of operation, under the control and ownership of various parties, and may, from time to time, be insolvent or subject to insolvency proceedings.
>
> BNC, as the current owner subject to the NPI Agreement is entitled to rely on paragraph (f) of the NPI Agreement. To hold otherwise permits the Fern Trust to take advantage of all benefits of the NPI Agreement without accepting any obligations or burdens of the NPI Agreement.
>
> Both the NPI Agreement and the Subordination Agreements contemplate the termination of the NPI Agreement upon, inter alia, the bankruptcy or insolvency of East West Caribou or it's successors in title.
>
> On a plain reading of paragraph (f) of the NPI Agreement, it is clear that the NPI Agreement is extinguished because, inter alia, BNC is subject to proceedings under the BIA and the CCAA. Fern Trust's interest, if any, in the Sale Assets or

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to any profits to be derived as a result therefrom as a result of being a party to the NPI Agreement have been terminated and/or are of no further force and effect.

[29] Maple Minerals takes much the same position. It states that because the NPI runs with the lands, Blue Note (as a successor in title to the Caribou Mine) has stepped into the shoes of the original grantor of the NPI and is subject to the terms of the NPI Agreement, which is the originating document in relation to the NPI. The Fern Trust, they argue, cannot now plausibly assert that the clauses which benefit it run with the lands whereas other clauses of the NPI Agreement do not run with the lands. It is further submitted by Maple Minerals that the entire NPI Agreement and Subordination Agreement run with the lands, not just the clauses that benefit the Fern Trust.

[30] In its written submission, Maple Minerals further argues at paragraphs 37 to 40:

> 37. Fern Trust alleges that the termination clause within paragraph (f) of the NPI Agreement applies only to East West Caribou Mining Limited, and not to the current owner of the Caribou Mine. This argument contradicts the findings by the New Brunswick Court of Appeal that the NPI is an interest that runs with the Caribou Mine. The Fern Trust cannot on the one hand assert that the NPI runs with the land, and on the other hand assert that it is a contractual right that is limited to the signatory of the NPI Agreement. If paragraph (f) of the NPI Agreement is to have any effect, it is that the current owner of the Caribou Mine now subject to the NPI is the party bound by the clauses in that agreement, and therefore, paragraph (f) is triggered by the bankruptcy of insolvency of Blue Note.
>
> 38. In addition to paragraph (f) of the NPI Agreement, section 7 of the Subordination Agreement provides that the Subordinating Parties (which includes the grantee of the NPI, presently the Fern Trust) agree that the

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> Royalty Interest (which includes the NPI) terminates upon the bankruptcy of the Borrower (East West Caribou Mining Limited). In addition, sections 2(2) and 17 of the Subordination Agreement contemplate assignment of the agreement by the Borrower. That the terms of the Subordination Agreement are incorporated into the NPI Agreement indicates that the terminating sections are not limited to the insolvency of East West Caribou Mining Limited and apply to the bankruptcy or insolvency of Blue Note.
>
> *Smith Affidavit, Exh. "Y"*
>
> 39. Further, Rideout J. noted that the NPI Agreement contains *"provisions which also deal with the situation where the Mine becomes insolvent and the effects on the NPI."* This comment suggests that it is the financial situation of the current owner of the Caribou Mine which is targeted by the termination provisions.
>
> *Smith Affidavit, Exh. "U" at para. 17*
>
> 40. Blue Note, as the current owner of the Caribou Mine, is obligated to pay the NPI, which obligation runs with the Caribou Mine. Because the NPI Agreement runs with the lands, so do its termination provisions.

[31] In short, it is argued that the insolvency of BNC triggers paragraph 7 of the NPI Agreement and consequently the NPI Agreement is terminated and of no further force or effect.

[32] The Fern Trust, for its part, takes the position that when the NPI Agreement is properly interpreted, it is clear that the insolvency of BNC does not trigger the termination clause found in paragraph (f) of the NPI Agreement. The Fern Trust submits that by using the plain and ordinary meaning of the words used in the NPI as well as considering all of the surrounding circumstances, no other interpretation of the NPI would be appropriate, nor would it respect the true intention of the parties to the agreement. It is further submitted that there is no ambiguity in paragraph (f), that "Caribou" simply means "Caribou", not its successors and assigns and

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consequently the termination clause found in paragraph (f) is not triggered by the insolvency of BNC.

[33] The Fern Trust also submits that as a matter of real property law, it would be incorrect to substitute "Blue Note" for "Caribou" in paragraph (f) of the NPI.

ANALYSIS

THE LAW – CONTRACTUAL INTERPRETATION

[34] The law regarding contractual interpretation is well settled in Canada. As recently stated by the New Brunswick Court of Appeal in **Robichaud et. Al. v. Pharmacie Acadienne de Beresford Ltée et. al.** [2008] N.B.J. No. 45 :

> The objective of contractual interpretation is the identification of the true intent of the parties at the time they entered into the contract. That intention must be ascertained by reference to the meaning of the words as used by the contracting parties … More often than not, the context plays an influential role in shaping that meaning.

In **Robichaud**, the Court of Appeal adopted its previous decision in **Irving Pulp and Paper** wherein it was stated:

> 22. It is accepted that the task of interpreting a collective agreement is no different than that faced by other adjudicators in construing statutes or private contracts… In the contractual context, you begin with the proposition that the fundamental object of the interpretative exercise is to ascertain the intention of the parties. In turn the presumption is that the parties are assumed to have intended

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what they have said and that the meaning of a provision of a collective agreement is to be first sought in the express provisions. In searching for the parties' intention, text writers indicate that arbitrators have generally assumed that **the provision in question should be construed in its normal or ordinary sense unless the interpretation would lead to an absurdity or inconsistency** with other provisions of the collective agreement... In short, the words of a collective agreement are to be given their ordinary and plain meaning unless there is a valid reason for adopting another. At the same time, words must be read in their immediate context and in the context of the agreement as a whole. Otherwise, the plain meaning interpretation may conflict with another provision.

[35] In **Orbus Pharma Inc. v. Kung Man Lee Properties Inc.**, [2008] A.J. No. 1430, the Court of Queen's Bench of Alberta described the principles of contractual interpretation as follows:

> The numerous principles of contractual interpretation have a common aim – to assist the court in finding an interpretation that reflects and promotes the intention of the parties at the time they entered into the contract: *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, 1979 CanLII 10 (S.C.C.), [1980] 1 S.C.R. 888.
>
> The "cardinal interpretive rule" of contracts is that "the court should give effect to the intentions of parties as expressed in their written document:" *Manulife Bank of Canada v. Conlin*, 1996 CanLII 182 (S.C.C.), [1996] 3 S.C.R. 415 at para. 79. The intent of the parties is to be determined by reference to the words they used in drafting the contract: *Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CanLII 791 (S.C.C.), [1998] 2 S.C.R. 129 at para. 54. Therefore, the contract itself and the words it contains are what are to be considered. As Iacobucci, J. went on to state in *Eli Lilly* at para. 55, "Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face." The interpretation of the contract is to be conducted on an objective basis, that is, through a determination of what a reasonable person would infer from the words used.

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[36] The case law is consistent in providing that words of a contract must be given their plain and ordinary meaning unless, to do so, would result in an absurdity. As stated in **Manulife Bank of Canada v. Conlin** (supra), "the Court will deviate from the plain meaning of the words only if a literal interpretation of the contractual language would lead either to an absurd result or a result which is 'plainly repugnant to the intention of the parties'".

[37] The Applicant seeks direction from this Court as to whether the NPI continues to bind any of the sale assets. Is the NPI Agreement extinguished by virtue of the insolvency of BNC? The Applicant is also seeking that this Court exercise its inherent jurisdiction under the CCAA and terminate the NPI or render the NPI is of no further force or effect. The issue raised by the present motion whether or not the NPI is extinguished by the insolvency of BNC, or otherwise stated, does the insolvency of BNC the successor in title to East West Caribou trigger paragraph (f) of the NPI Agreement.

[38] I have read carefully the NPI Agreement as well as the Subordination Agreement which as mentioned is incorporated by reference in the NPI Agreement. From my reading of the NPI Agreement, I have to conclude that paragraph f) of the NPI Agreement is not ambiguous and must be interpreted by using the plain and ordinary meaning of the words used by the parties to the Agreement. My reading of the NPI Agreement leads me to conclude that in fact, "Caribou" means "Caribou". Caribou is a defined term which means East West Caribou Mining Ltd. It is clear in my view that when the parties wanted to refer to "Caribou", they did so and when they

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intended to refer to the Caribou Mine, they also clearly did so. Any reasonable interpretation of the NPI Agreement and the Subordination Agreement cannot somehow be interpreted to now mean Blue Note Caribou. In my opinion, "Caribou" clearly means East West Caribou as defined. The parties to the Agreement did not state that it should include its successors and assigns as suggested by those who hold the contrary view. Had the parties to the NPI Agreement wanted paragraph (f) to apply to any entity other than East West Caribou Mining Ltd., the agreement could have said so and in my view, would have said so. It does not. In my opinion, it would be contrary to the rules of contractual interpretation to read in terms that were not intended by the parties. The provisions of the NPI must also be read in considering the provisions of the Subordination Agreement which are expressly incorporated by reference to the NPI Agreement. Nowhere in the Agreement does the NPI refer to "Caribou", its successors or assigns. It is clear that the parties to the NPI Agreement chose where and where not to refer to assignees in drafting the Agreement.

[39] Furthermore, I am of the view that Section 7 of the Subordination Agreements applies only to the insolvency of the "Borrower" which is defined as East West Caribou Mining Limited. Section 7 of the Subordination Agreements does not provide that it applies to the Borrower's successors and assigns. I agree with the submission made by counsel for the Fern Trust that "when the termination provision of the NPI Agreement is interpreted in light of the similar provisions in the Subordination Agreements, it is clear that in the same way that "Borrower" means only East West Caribou Mining Limited, "Caribou" means only East West Caribou Mining Limited."

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[40] Simply put, I am in agreement with the position taken by the Fern Trust that the insolvency of Blue Note did not trigger paragraph (f) of the NPI, that the insolvency of BNC did not terminate the NPI. As a matter of contractual interpretation, I conclude that the term "Caribou", for purposes of paragraph f) of the NPI, means East West Caribou Mining Ltd. (now CanZinco Ltd.) and does not mean Blue Note, the successor in title to the Caribou Mine. In my view, when considered in accordance with its plain and ordinary meaning, the proper interpretation of paragraph (f) of the NPI Agreement leads to the conclusion that "Caribou" means only East West Caribou Mining Limited. I would add that there is no need to consider the extrinsic evidence in the instant case, given my finding that the NPI Agreement is not ambiguous.

[41] On the whole, I conclude that the NPI Agreement is not terminated by the operation of paragraph (f) of the NPI Agreement. The Applicant contends that the NPI Agreement was held in prior judicial decisions to be binding on its successors in title to the original grantor including BNC. PWC further states that it is clear from Justice Rideout and the decisions of the Court of Appeal that the NPI Agreement runs with the lands and forms an interest in the Caribou mine itself. I have reviewed the decision of Justice Rideout as well as the decision of the Court of Appeal and with respect, it is clear that Justice Rideout, in rendering his decision, was not required to determine the effect of paragraph (f) contained in the NPI and in my view, did not do so. It was simply not an issue that Justice Rideout was asked to determine

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and it cannot be read from his decision that he addressed the issue of paragraph (f) of the NPI. For those reasons, the previous litigation and decision cannot be relied upon to conclude that paragraph (f) was in fact triggered by the insolvency of BNC. As a result, the Applicant cannot rely on the principle of *res judicata* in the present circumstances. Finally, I wish to add that I am not prepared to "vest out" the interest of the Fern Trust as requested by the Applicant. I have not been persuaded that I should exercise my inherent jurisdiction under the CCAA and conclude that the NPI Agreement should be terminated or of no further force or effect.

DISPOSITION

[42] As a result, I conclude that the Fern Trust's interest in the Mine was not terminated by the insolvency of BNC Mine. Furthermore, I am not prepared to expunge the interest of the Fern Trust by virtue of any inherent jurisdiction which I may have under the CCAA in order to grant a clear title to the purchaser as requested by the applicant to this motion.

BREAKWATER RESOURCES

[43] As mentioned, BWR opposes the motion. By way of a motion of its own BWR claims a 20% property interest in the Caribou Mine. BWR also seeks an order that it be allowed to exercise a Right of First Refusal obtained by virtue of a Joint Venture Agreement which BWR was deemed to have entered into with Blue Note upon the exercise of their option to convert pursuant to a convertible debenture issued to BWR by Blue Note Mining.

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THE BACKGROUND

[44] CanZinco is a wholly owned subsidiary of BWR and is the previous owner of the Caribou Mine. On July 26, 2006, CanZinco sold the Mines to Blue Note Metals Inc. (now Blue Note Mining Inc. "Blue Note"). As part of the consideration for acquiring the Mines and at the direction of CanZinco, Blue Note issued to Breakwater an Unsecured Subordinated Convertible Debenture dated August 1, 2006 in an amount of $15,000,000.00 CDN (the "Debenture") and entered into, with Breakwater, a Marketing Agency Agreement and a Net Smelter Royalty Agreement (the NSR Agreement).

[45] David Langille, Vice-president, Financial and Chief Finance Officer of BWR, swore an affidavit on behalf of BWR on January 5th, 2010. In its written submission, BWR relates the relevant portions of Mr. Langille's affidavit and discusses the terms of the debenture, the Rights of First Refusal and the Trust Indenture between Blue Note, Blue Note Caribou and Computershare. The written submissions of BWR provides in part as follows:

> By virtue of Article 3.1(a) of the Debenture, Breakwater was granted an option (Conversion Option) to convert the Debenture into a twenty (20%) interest in the mineral properties and mine facilities which comprise the Caribou and Restigouche Mines in New Brunswick (the "Real Property").
>
> Article 3.2(b) of the Debenture provided that upon Breakwater exercising its Conversion Option, the parties were deemed to have entered into, and their rights governed by, a joint venture agreement substantially in the form attached to the Debenture (the "Joint Venture Agreement").

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On May 4, 2007 Blue Note and Blue Note Caribou entered into a trust indenture (Trust Indenture) with Computershare Trust Company of Canada (Computershare). The Trust Indenture provided for the issuance by Blue Note and Blue Note Caribou of the senior secured notes and provided for the granting of a debenture in favour of Computershare as security (the "Blue Note Debenture"). The terms Trust Indentures governs the rights under the Blue Note Debenture. Section 4.16 of the Blue Note Debenture stated in part as follows:

> This Debenture is entered into pursuant to a note indenture made between the Obligor, as borrower, the Lender as lender and Blue Note Caribou Mines, Inc. as guarantor dated on or about May 2, 2007 (as the same may be amended, supplemented, or replaced from time to time (the "Note Indenture")... Where a conflict exists between the provisions of this Debenture and the Note Indenture, the Note Indenture shall govern...

The Note Indenture which is referred to is the Trust Indenture.

The Trust Indenture expressly contemplated the existence of the prior rights of Breakwater with respect to the Conversion Option. In particular, in the Trust Indenture, the Debenture is defined as the "Breakwater Note" and the definition of "Permitted Encumbrance" contained in the Trust Indenture includes at clause (k):

> (k) the rights contained in Article 3 of the Breakwater Note...

The intention of the parties to the Trust Indenture as stated in section 14.6 of the Trust Indenture was stated as follows:

> It is the intention of the parties that the Trustee will, among other things, have a first priority Security Interests, subject to Permitted Encumbrances, over all the Secured Assets.

Paragraph 8.2(b) of the Trust Indenture prohibits Blue Note Caribou from conveying or transferring any part of the assets of Blue Note Caribou including the Mines other than:

> ...(ii) in accordance with Article 3 of the Breakwater Note

Paragraph 8.2(i) of the Trust Indenture similarly prohibits any sale or disposition of the business of Blue Note Caribou or any of its subsidiaries other than as provided under Article 3 of the Breakwater Note.

The Trust Indenture expressly permitted the transfer to Breakwater pursuant to the Conversion Option as contemplated under Article 3 of the Debenture. Section 14.5 of the Trust Indenture further provides that upon a sale or transfer of any assets permitted under the Trust Indenture, Computershare is expressly required to release such assets from its security interest. Section 14.5 states:

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Upon the sale or transfer of any assets permitted under this Indenture, the Trustee shall, at the request and expense of the Corporation, execute and deliver to the Corporation or BNC such deeds or other instruments as may be necessary to release such asset from the Security Interests created by the Security Documents provided that such deeds or other instruments are in form and substance satisfactory to the Trustee Counsel, both acting reasonably.

Based on the terms of the Trust Indenture, Computershare was clearly aware of, and acknowledged the existence of, the Conversion Option and agreed to it constituting an encumbrance on the assets of Blue Note Caribou. Furthermore, the Trust Indenture permitted the transfer to Breakwater on exercise of the Conversion Option and provided that, upon the same occurring, the relevant assets were to be released from the security interest.

By an agreement dated June 29, 2007 (the "Transfer Agreement"), Blue Note transferred its interest in the Mines to its subsidiary corporation, Blue Note Caribou Inc. ("Blue Note Caribou"). Breakwater was not given notice of the transfer until February 28, 2008.

In the Transfer Agreement, Blue Note Caribou specifically acknowledged Breakwater's Conversion Option and covenanted to provide Breakwater with their appropriate interests in the event that Breakwater exercised it. Further, in the event that Breakwater exercised its Conversion Option, Blue Note Caribou agreed with Blue Note to enter into the Joint Venture Agreement. The Transfer Agreement states, in part:

> ...WHEREAS pursuant to the Debenture, Breakwater has the right to convert the Debenture into a 20% interest in the Mines which, if exercised, would be governed by a joint venture agreement, the form of which is appended to the Debenture (the JV Agreement);
>
> AND WHEREAS the Mines were purchased by Blue Note on August 1, 2006 and Blue Note has transferred the Mines to Blue Note Caribou Mines Inc. ("BN Caribou"), a wholly-owned subsidiary of Blue Note;
>
> AND WHEREAS this agreement is entered into pursuant to Article 11 of the Debenture;
>
> NOW THEREFORE THIS AGREEMENT WITNESSES that for good and valuable consideration, the receipt and sufficiency of which is acknowledged by the undersigned and, by acceptance of this Agreement, by Breakwater, it is agreed by the undersigned and Breakwater as follows:
>
> ...

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2. Acknowledgement and Covenant. BN Caribou hereby acknowledges Breakwater's Property Interest Conversion Option rights under the Debenture and hereby covenants to provide Breakwater with the Holder's Interest in the Properties in the event that Breakwater exercises it Property Interest Conversion Option pursuant to Subsection 3.11(a) of the Debenture.

3. JV Agreement. BN Caribou and Blue Note hereby agree that in the event that Breakwater exercises its Property Interest Conversion Option, the JV Agreement will be entered into between BN Caribou and Breakwater and all references in the JV Agreement to Blue Note shall be reverences to BN Caribou.

Breakwater exercised its Conversion Option on August 29, 2008 requiring Blue Note to transfer to it a 20% interest in the Mines, obligating Computershare to provide a discharge with respect to such transferred interest and deeming the parties to have entered into the Joint Venture Agreement.

[46] Following the exercise of the conversion option by BWR on August 29, 2008, there were differences of opinion among BNC, BNM and BWR as to who should execute the Joint Venture Agreement. As such, an action was commenced on the 9th of December, 2008 by BWR against Blue Note Mining, Blue Note Caribou. On January 30th, 2009, BWR in its amended Statement of Claim, made the following assertions:

By an Amended Notice of Action with Statement of Claim Attached dated January 30, 2009, Breakwater amended its Statement of Claim to seek relief based on, *inter alia*, the following allegations:

- Blue Note failed to cause title to the Mines to be recorded in Breakwater's name in proportion to Breakwater's interest as practicable after the Date of Property Interest Conversion, constituting a violation of Article 3.2(d) of the Debenture;
- Blue Note failed to act in accordance with the terms of the Joint Venture Agreement subsequent to the establishment of the Joint Venture Agreement on August 29, 2008 and delayed executing the Joint Venture Agreement until October 17, 2008;

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- Blue Note failed to play all Costs (as defined in the Joint Venture Agreement) incurred promptly as and when due, and to keep the Mines free of all liens and indebtedness (except Permitted Liens and Permitted Indebtedness, as defined in the Debenture);

- Blue Note failed to proceed with diligence to contest or discharge the mechanics' liens contrary to Article 6.4(c) of the Joint Venture Agreement; and

- Blue Note breached its obligation as operator of the Mines pursuant to Article 16 of the Joint Venture Agreement by unilaterally initiating a care and maintenance program at the Mines which constituted the suspension or termination of Mining Operations (as defined in the Joint Venture Agreement) under the Joint Venture Agreement without notice to and consultation with Breakwater.

[47] The evidence indicates that Blue Note has acknowledged Breakwater's 20% interest in the Mines on numerous occasions. On September 3, 2008, Blue Note issued a press release entitled "Blue Note's Caribou has a new partner". In the press release, Blue Note stated:

> Montreal, QC- September 3, 2008 – Blue Note Mining is pleased to report that Breakwater Resources has exercised its right pursuant to the terms of the Unsecured Subordinated Convertible Debenture issued by Blue Note dated August 1st, 2006 to convert the Debenture in exchange for a twenty percent (20%) interest in the mineral properties and mine facilities which comprise the Caribou and Restigouche mines in New Brunswick now owned by Blue Note's subsidiary, Blue Note Caribou Mines Inc.
>
> Having the Debenture surrendered by Breakwater, Blue Note Caribou Mines and Breakwater are now contractually obligated to enter into a joint venture agreement which releases Blue Note and Blue Note Caribou Mines from all liability under the Debenture.
>
> "We feel that this decision validates everything we always have believed about the Caribou mines," Said Michael Judson, President and Chief Executive Officer of Blue Note Mining, "it is a high quality asset, and Breakwater understands its value."

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[48] At paragraph 44 of his affidavit, David Langille further explains how BNC acknowledged BWR's 20% interest in the following terms:

> In its annual audited financial statements for the years ending December 31, 2007 and December 31, 2008 and the report of its auditor, Ernst & Young dated March 31, 2009 as filed on the System for Electronic Document Analysis and Retrieval of the Canadian Securities Administrators, Blue Note refers to, and accounts for, Breakwater's 20% interest in the property used in connection with the Mines. At Note 12 to such financial statements Blue Note states:
>
>> 44. As at August 29, 2008, Breakwater Resources Ltd. exercised the conversion option to obtain a 20% interest in the Caribou Mines. This conversion resulted in a loss on conversion of $14,949,161, which represents the difference between 20% of the carrying value of the Caribou Mines as of August 29, 2008 and $11,229,285, the carrying value of the Debenture at that date... The Corporation has accounted for this conversion as a sale of a portion of their mining properties, constituting a business and therefore has accounted for the investment in the Caribou Mines by Breakwater Resources Ltd. as a non controlling interest.
>>
>> 45. Furthermore, in the same financial statements Blue Note accounted for property costs on a 20%/80% basis and reduced its actual costs incurred by creating a "non-controlling interest" account representing Breakwater's interest. Blue Note also consistently accounted for and disclosed this "non-controlling interest" account in each of the interim financial statements for the quarters ended March 31, 2009, June 30, 2009 and September 30, 2009, confirming Blue Note's acknowledgment that the Joint Venture Agreement continued in force and effect.

[49] In his affidavit, Mr. Langille also discusses the issue surrounding the Rights of First Refusal as follows:

> Articles 14 and 15 of the Joint Venture Agreement provide for rights of first refusal in favour of Breakwater (the "Right of First Refusal") in connection with any proposed sale of the Mines. Articles 14 and 15 of the Joint Venture Agreement provide for rights of first refusal in favour of Breakwater (the "Right of First Refusal") in connection with any proposed sale of the Mines. Specifically, Articles 14.1 and 15.1(b) of the Joint Venture provide as follows:

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14.1 If a party (hereafter in this subparagraph 14.1 called the "Vendor") shall wish or seek to sell, assign, transfer, convey or otherwise dispose of all or part of its Interest at any time during the currency of this Agreement, the other parties then having an Interest (hereafter in this subparagraph 14.1) called the "Purchasers") shall be entitled to a right of first refusal in respect thereof...

...

15.1 (b) Within 45 days after receipt of the Sale Notice, Breakwater shall have the right (the "Right of First Refusal") to purchase the Property from Blue Note on payment by Breakwater to Blue Note of the same Sale Price that Blue Note specified in its Sale Notice. Where Breakwater determines to exercise its Right of First Refusal, then, on the Sale Date, Breakwater shall deliver or cause to be delivered to Blue Note payment of the total Sale Price for the Property.

...

Pursuant to Articles 14 and 15 of the Joint Venture Agreement, Breakwater possesses Rights of First Refusal in connection with any proposed sale of Blue Note Caribou's Interest, including any sale of its interest in the Mines.

[50] On July 17, 2009, PWC acting as Monitor, advised BWR that it could not claim to be a creditor of Blue Note Mining as it had converted its interest into a proprietary interest. On that issue, at paragraph 82 of his affidavit, David Langille states:

82. By e-mail dated July 10, 2009, a copy of which is attached hereto as Exhibit "UU", Breakwater, through its solicitors, filed a Proof of Claim with PwC based in Montreal, Quebec in the matter of the Plan of Arrangement of Blue Note in separate proceedings under the CCAA. As part of its claim, Breakwater included a claim for monies owing in relation to the Debenture in the amount of $15,000,000.00. PwC, acting in its capacity as Monitor in the matter of the Plan or Arrangement of Blue Note, disallowed this claim, finding that Breakwater had surrendered its position as a creditor, having converted the indebtedness owed to it into a proprietary interest in the Mines. By notice dated July 17, 2009, Christian Bourque of PwC advised that "Breakwater Resources Ltd. cannot claim

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> to be a creditor of Blue Note Mining Inc…as it can no longer claim the principal amount of the Debenture…". The effect of PwC's disallowance of the Breakwater Proof of Claim in the Blue Note CCAA proceedings was to disallow Breakwater's claim to the amount owing pursuant to the Debenture of the basis that Breakwater had exercised its Property Conversion Option. Breakwater did not appeal this disallowance. By denying its status as a creditor under the Debenture, PwC acknowledged Breakwater's status as a 20% owner and Joint Venture Partner pursuant to the Debenture and the Joint Venture Agreement. PwC must not be permitted to take a different approach in the current proceedings, the effect of which would be to deprive Breakwater of all of its rights under both the Debenture and the Joint Venture Agreement.

[51] Subsequently BWR filed another Proof of Claim, this time in the amount of approximately $63, 000.00, which was also disallowed.

[52] Finally, there is the issue of the security taken by Computershare on May 4, 2007 with Blue Note and Blue Note Caribou on the assets of Blue Note Caribou. In his affidavit, David Langille explains in part BWR's position as follows:

> Based on the terms of the Trust Indenture, Computershare was clearly aware of, and acknowledged the existence of, the Property Interest Conversion Option and agreed to it constituting an encumbrance on the assets of Blue Note Caribou. Furthermore, the Trust Indenture permitted the transfer to Breakwater on exercise of the Property Interest Conversion Option and provided that, upon the same occurring, the relevant assets were to be released from the security interest. The parties to the Trust Indenture and in particular PwC, as agent for Computershare, cannot deny Breakwater's prior interest and, in light of section 14.5, cannot rely on the failure to release the security interest of the Trust Indenture in order to defeat Breakwater's prior interest.
>
> The intention of the parties to the Trust Indenture is most clearly enunciated in section 14.6 of the Trust Indenture where it is stated:

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> > It is the intention of the parties that the Trustee will, among other things, have a first priority Security Interests, subject to Permitted Encumbrances, over all the Secured Assets.
>
> The Property Interest Conversion Option, as a Permitted Encumbrance (as defined in the Trust Indenture), was thus clearly intended to have priority over the interests arising under the Trust Indenture and PwC is estopped from denying such intent.

[53] The issues raised by BWR's motion are whether or not BWR has a valid 20% interest in the mine and whether BWR has a Right of First Refusal by virtue of the operation of the Joint Venture Agreement and which they argue, they should be entitled to now exercise in relation to the Stage II part of the Sale Agreement reached between the PWC and Maple Minerals.

THE 20% PROPERTY INTEREST ISSUE

[54] I will now deal with the issue of the 20% property interest claimed by BWR in the stage II part of the transaction. PWC argues that BWR is not entitled to a 20% interest in the property in the Caribou Mine.

[55] While I agree that BWR has no right to claim any interest in the Stage I portion of the sale to Maple Minerals, I cannot agree with the Applicant and Maple Minerals that BWR has no proprietary interest in the Caribou Mine.

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[56] With respect to the real property, I am unable to agree with the Applicant and Maple Minerals that BWR has no property rights in the Caribou Mine or that its interest should be "vested out". In my view, by converting the debenture on August 29th, 2008, BWR transformed its interest as an unsecured creditor to that of a property interest holder in the mines. PWC disallowed the claim filed by BWR stating that it was no longer a creditor on the basis that BWR had exercised its property conversion option pursuant to the debenture. It is undisputed that BWR exercised its option in order to convert from whatever interest it had to become a property interest holder. Clearly the effect of the exercise of the Property Interest Conversion by BWR was that BWR became the holder of a 20% interest in the real property and the date of conversion is effective August 29, 2008. Breakwater's 20% interest in the mines was acknowledged by Blue Note on several occasions. First, there was the September 3rd press release confirming that BWR had exercised its right to convert the debenture in a 20% interest in the mineral properties and mine facilities of the Caribou and Restigouche Mines. Blue Note reflected the 20% proprietary interest in the mine in their subsequent audited financial statements and acknowledged that BWR had a 20% proprietary interest in the mines. There is no doubt in my view that BWR as of August 29, 2008 was no longer a creditor, but had become a 20% holder of a proprietary interest in the mines. As a result, I conclude that BWR has a valid 20% proprietary interest in the Caribou Mines.

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RIGHT OF FIRST REFUSAL ISSUE

[57] BWR also seeks an order declaring that it possesses a Right of First Refusal pursuant to articles 14.1 and 15(1)a of the Joint Venture Agreement. It is argued that as a result of the provisions contained in the Joint Venture Agreement, this court should issue an order declaring the BWR has the right to purchase the real property on the same terms and conditions as those specified in the agreement of September 30, between BNC and Maple Minerals.

[58] While it is clear that BWR did commence an action in December 2008 seeking inter alia to enforce its rights by virtue of the Joint Venture Agreement, including the Rights of First Refusal contemplated by the Joint Venture Agreement, it is equally clear that the action was stayed by the Initial order of February 20, 2009. It is one thing to find on the evidence before this Court that BWR has 20% property interest in the mines, it is quite another to conclude on the record as it is constituted that the Joint Venture Agreement is valid and enforceable in accordance with its terms. I am not prepared to conclude that Joint Venture Agreement is valid and enforceable based on the record before me. That question cannot and should not be answered by these motions as the record does not allow for a determination of this issue and as result the relief sought by BWR as to the exercise of its Right of First Refusal cannot and should not be granted.

[59] I will now discuss the issues raised by the Note indenture of May 4th, 2007 signed by Computershare, Blue Notes Mining Inc. and Blue Note Caribou Mines Inc. Upon review of

the record as a whole, I conclude that Computershare's security is subject to the interest of BWR which on August 29, 2008 exercised its conversion option pursuant to the terms of the debenture. This was clearly a permitted encumbrance which Computershare had agreed to. The intention of the parties was clearly stated in the Note Indenture, namely "That the Trustee (Computershare) will, among other things, have a first priority Security Interest, subject to permitted encumbrances, over all secured assets". In my view, Computershare cannot extinguish the rights by virtue of power of sale proceedings pursuant to the *Property Act.* I recognize that this finding is contrary to the assertion made by the Monitor in his December 10th affidavit where at paragraphs 29 and 30, he stated:

> It is common ground amongst all parties that any interest that BWR might have in and to the assets of BNC is subordinate to the interests of the Noteholders. The Noteholders have concurred in the proposed sale transaction and concurred in the sale of personal property.
>
> I am advised by counsel to the Noteholders and believe that the Noteholders will delegate or otherwise assign to me, in my capacity as Monitor, the full authority that the Noteholders hold under their security and, by virtue of the *Property Act* (New Brunswick), the authority to exercise such powers of sale or foreclosure powers as exists to fully extinguish any claim that BWR has in and to any of the BNC's assets. As such, BWR's pursuit of this purported right of first refusal is not only meritless but pointless.

[60] It is well established that a mortgagee can only sell what interest is subject to the mortgage. Computershare can still proceed with the exercise of the power of sale under its security instrument, however the security is subject to the 20% property interest in the mine held by BWR. BWR is not arguing and has never taken the position that it was a secured creditor. BWR simply has asserted, certainly since December 9, 2009, that it is entitled to a 20%

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proprietary interest which they acquired when they converted their unsecured debenture to a 20% property interest holder. It cannot reasonably be argued on the whole of the evidence that BWR waived its proprietary rights by its actions and somehow abandoned its interest in the mine. Its 20% interest in the mine was the subject of litigation which was stayed by virtue of the CCAA, but never abandoned. That litigation has never been discontinued. I would also add that I do not agree with the position taken by PWC that BWR cannot be considered as having a property interest in the mine simply because it has not completed certain steps to the proposed transaction, namely to register its interest in the Registry Office or to comply with the *Mining Act*. It is also of interest to note that Blue Note required and obtained BWR's consent before entering into the agreement with Computershare.

[61] On the face of the Note Indenture, it appears clear that Computershare in fact acknowledged that BWR had a right to exercise its conversion into a property interest which BWR did on August 29, 2008.

[62] I conclude that Computershare cannot extinguish BWR's proprietary right by the exercise of its power of sale under the Property Act. Furthermore, Breakwater's interest is not subordinate to the Senior Secured Noteholders' interest as the Conversion Option was a permitted encumbrance under the note indenture.

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[63] In his Application, the Monitor is seeking that all rights, title and interest to the sale assets vest absolutely in the Purchaser free and clear from any interest, claims and encumbrances of any nature, including any interest of the Fern Trust as well as CanZinco Ltd. and Breakwater Resources Ltd. In fact, the monitor is seeking that the title in the property be cleared. Clearly the monitor cannot be in a better position than BNC and as such, any transaction is subject to any interest or rights which are found to exist in respect to the property.

[64] In light of the findings made in these motions, the relief sought by the Applicant cannot be granted. I am not prepared to divest the Fern Trust and BWR of their interest in the Caribou Mine.

[65] BWR at the hearing suggested that the Stay of Proceedings be permanently lifted as the stage II part of the Sale Agreement involves only the real property, the personal assets having been dealt with in the first stage and will remain unchallenged. BWR argues that there is no real reason to continue proceedings under the CCAA. On this issue, I agree with counsel for Computershare that the proceedings under the CCAA have been useful to date and on the whole, I am not prepared at this point to permanently lift the Stay of Proceedings. I am also unable to agree with counsel for some of the Lien Claimants' who was requesting that the Stay order be lifted so that the Lien Claimants' could continue with their action.

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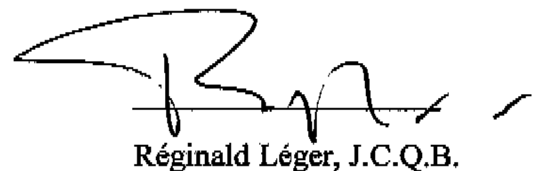
[66] As to the Appeal on the disallowance of the Proof of Claim filed by BWR on January 8, 2010, pursuant to subsection 81(1) of the BIA, I believe that these reasons provides the answer to the Appeal filed by BWR.

<u>CONCLUSION</u>

[67] In summary, I conclude that the NPI Agreement is not terminated and that paragraph f) in the NPI Agreement is not triggered by BNC's insolvency. I also conclude that BWR has a 20% proprietary right in the real property of the Caribou Mine. The record is insufficient to allow BWR's request that it be allowed to exercise its Right of First Refusal pursuant to the terms of the Joint Venture Agreement. Also, I find that the note indenture held by Computershare is subject to the proprietary interest of BWR. Finally, the request by BWR and some of the Lien Claimants' that the Stay of Proceedings order be lifted is denied.

[68] As to the issue of costs, under the circumstances, each party will bear their own costs.



March 11, 2010

Bathurst, NB

Réginald Léger, J.C.Q.B.

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