

CANADA / JUDGMENT

Inca One Gold Corp. (Re)

2024 BCSC 1478

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1478 Inca One Gold Corp. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Inca One Gold Corp. (Re),

2024 BCSC 1478

Date: 20240814

Docket: S243645

Registry: Vancouver

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

- and -

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57

- and -

In the Matter of the Plan of Compromise and Arrangement of Inca One Gold Corp.

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

July 22 and 25, 2024

Place and Date of Ruling with Written Reasons to Follow:

Vancouver, B.C.

July 25, 2024

Place and Date of Judgment:

Vancouver, B.C.

August 14, 2024

INTRODUCTION

- [1] On June 3, 2024, I granted an initial order in favour of the petitioner, Inca One Gold Corp. ("Inca One"), pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [CCAA]. FTI Consulting Canada Inc. was appointed as the monitor (the "Monitor").
- [2] After successfully continuing these proceedings at the comeback hearing, Inca One now seeks an extension of the stay to continue its restructuring efforts and approval of interim financing to allow that to continue.
- [3] Inca One's senior secured creditor, OCIM Metals and Mining SA ("OCIM") has other plans. OCIM agrees that the stay should continue, but with interim financing to be provided by it, under strict conditions that would result in OCIM having significant control in these proceedings. In addition, OCIM seeks an order to approve a sales and investment solicitation process ("SISP") immediately, which is opposed by Inca One.

- [4] After hearing considerable arguments by both sides, other interested stakeholders, and the Monitor, I opted for a middle course. This course would allow Inca One more time and the interim financing that it sought. However, I also only granted Inca One a short extension - to August 26, 2024 - to provide Inca One with a further opportunity to establish to the Court and the stakeholders a more credible and realistic basis upon which to delay the implementation of a SISP.
- [5] These are the reasons for my order.

BACKGROUND FACTS

- [6] Inca One is a public company, based in Vancouver. It provides industrial, manufacturing and trading services through Peruvian subsidiaries in relation to gold milling facilities in Peru.
- [7] Essentially, the Peruvian operations are divided into two separate holdings:
- a) the "Chala One Plant", over which OCIM has security. OCIM is owed approximately USD\$10 million (over CAD\$13 million); and
 - b) the "Kori One Plant" which is a majority interest over which Equinox Gold Corp. ("Equinox") has security. Equinox is owed just over CAD\$7.1 million.
- [8] The CCAA filing was precipitated by Inca One's lack of working capital, which led to a wind-down of operations such that the mines in Peru were being placed in care and maintenance.
- [9] In addition, on April 8, 2024, OCIM issued a notice of default and on May 23, 2024, demanded payment and delivered a notice of intention to enforce its security.
- [10] At the initial hearing (June 3, 2024), Inca One advised that it was in discussions with potential lenders to replace the OMIC facility and that it was close to finalizing a term sheet for that purpose. Given OCIM's lack of support, replacement of the OCIM funding remains a high priority for Inca One, which Inca One considers will allow it to present a plan of arrangement to its creditors. Inca One indicated that, if replacement security was not available, it would engage in a sales process for one or both Peruvian operations.
- [11] At the comeback hearing (June 13, 2024), I granted an amended and restated initial order ("ARIO"). At that time, Inca One was continuing its discussions with both OCIM and replacement lenders for OCIM's security, if necessary. OCIM did not oppose any extension of the stay, but wanted a shorter time frame, such as two weeks. In the Monitor's First Report dated June 12, 2024, the Monitor supported an extension of the stay to allow Inca One's discussions with OCIM to continue on a fairly expedited basis.
- [12] In the ARIO, I extended the stay by about five weeks to July 22, 2024. By this time, the post-ARIO discussions between Inca One and OCIM had not been successful and no deal could be reached.

DISCUSSION

[13] Inca One seeks the following relief:

- a) An extension of the stay to October 5, 2024; and
- b) Approval of interim financing from 401601 B.C. Ltd. ("401"), a shareholder of Inca One, in the amount of USD\$1 million. Inca One seeks an accompanying interim lender's charge for 401.

[14] In substance, Inca One's initial argument that these proceedings should continue (i.e. their "germ of a plan") was to arrange a refinancing of OCIM's debt. On July 9, 2024, Inca One indicated it had secured a term sheet from Westmount Capital ("Westmount") for USD\$25 million, which would allow them to repay OCIM via a closing no later than September 30, 2024. Therefore, by early October 2024, Inca One planned to have repaid OCIM through the Westmount refinancing and developed a plan of arrangement for its other creditors.

[15] However, on July 17, 2024, only days before this hearing, the viability of Inca One's "plan" was put in doubt when Westmount revealed that it did not have USD\$25 million at the ready to use for the funding. Rather, Westmount intended to source funds from its network of potential investors "in the near future". Westmount did intend to allocate 40% of its commission toward the financing.

[16] As such, the Westmount funding became substantially more uncertain than was originally thought. This was an added level of uncertainty beyond the pre-existing conditions imposed by Westmount that the refinancing was subject to due diligence (likely in Peru) and execution of legal documentation acceptable to Westmount.

[17] This more recent news from Westmount has caused some consternation among the stakeholders. Equinox expressed concern. The Monitor also expressed concern as to the amount, timing and terms of the Westmount refinancing.

[18] The most concern arose in OCIM's corner. In response, OCIM presented its own views as to the outcome of this application, along with forcefully asserting to Inca One that it wished to be repaid as soon as possible. OCIM seeks approval of its own interim financing on terms, which I will discuss below. In addition, as a condition of the interim financing, OCIM requires approval of a SISP to commence immediately, which is to be conducted by the Monitor under certain expanded powers in the ARIO. OCIM also seeks an extension of the stay to October 31, 2024.

[19] The issues to be addressed are fundamentally around how these CCAA proceedings should progress:

- a) which interim financing should be approved?
- b) should the SISP be approved and if so, when? and
- c) what length of stay is appropriate?

Interim Financing / SISP

- [20] All parties and the Monitor agree that interim financing is necessary for Inca One to continue funding its operations and restructuring efforts, in both the short and long term. In that sense, a detailed analysis of the s. 11.2 factors in the CCAA is not necessary.
- [21] The question is - who should be the interim lender?
- [22] 401's financial proposal would provide USD\$1 million at an interest rate of 20% per annum. Drawdown fees (5%) and standby charge (2%) fees apply. The effective annualized rate is 36%, which the Monitor notes is higher than the normal range, but driven by the short term loan and nature of the collateral.
- [23] Warrants are due to 401 if there is a re-listing of Inca One on the TSX Venture Exchange, although there is likely little, if any value in such warrants. The 401 financing is due upon the earlier of a demand, implementation of a plan, termination of the CCAA proceedings, or November 30, 2024.
- [24] OCIM's financial proposal would provide CAD\$2 million to fund ordinary course expenditures and administration costs in the CCAA proceedings in minimum draw amounts. The effective annualized rate is 22%, which the Monitor notes is within the normal range of other interim financings of a similar nature and scale. The OCIM financing is due upon certain events, such as the earlier of a demand, implementation of a plan, termination of the CCAA proceedings by the lifting or setting aside of the stay or ARIIO, or October 31, 2024.
- [25] No significant difference in the financial terms as between the two proposals was apparent. Inca One's counsel has calculated that the OCIM financing is slightly cheaper, by approximately \$35,000 into fall 2024.
- [26] However, the "package deal" presented by OCIM - which includes the SISP and the Monitor's expanded powers - requires a consideration of the terms upon which the interim financing is to be provided and the proposed Monitor powers, as I will discuss in more detail below.
- [27] OCIM also argues that the SISP should start now since the Westmount refinancing is uncertain.
- [28] Equinox, the secured creditor of the Kori One Plant, is supportive of OCIM, including the OCIM interim financing and the immediate implementation of the SISP to be run by the Monitor. Having said that, my sense is that Equinox is also generally supportive of these proceedings, as a major investor and creditor of Inca One. Overall, Equinox supports a "dual track" approach in terms of the SISP that hedges the Westmount "bet" (my word) if it does not succeed.
- [29] OCIM suggests that Inca One can continue its restructuring efforts, including the Westmount refraining, within the SISP.

- [30] The Monitor indicates that it is prepared to accept the expanded role proposed by OCIM should the Court grant that order.
- [31] There is no dispute that SISPs are regularly approved by this Court pursuant to the court's general statutory jurisdiction in s. 11 of the CCAA to grant orders that are appropriate.
- [32] SISPs are granted in a variety of circumstances which will inevitably dictate whether they are appropriate and if so, when. In *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169 (S.C.), Justice Morawetz, as he then was, discussed that SISPs can be approved in the absence of a plan of arrangement. He set out factors that may be considered:
- [49] I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:
- (a) is a sale transaction warranted at this time?
 - (b) will the sale benefit the whole "economic community"?
 - (c) do any of the debtors' creditors have a bona fide reason to object to a sale of the business?
 - (d) is there a better viable alternative?
- [33] SISPs are commonly granted in CCAA proceedings when a "true" reorganization of a debtor's existing assets is not feasible and a sale or sales of a debtor's assets is warranted to maximize value for the benefit of the entire stakeholder group: *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 [*Walter Energy #1*] at paras. 20-23; 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 42-46; *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.*, 2021 BCCA 382 at paras. 63-67.
- [34] Often, implementation of a SISP is not controversial. If a SISP is to be granted, various considerations arise in relation to the proposed SISP, as I discussed in *Walter Energy #1* at para. 20:
- (i) the fairness, transparency and integrity of the proposed process;
 - (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
 - (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.
- [35] In respect of any proposed SISP, the factors discussed in s. 36(3) of the CCAA are also commonly considered.

- [36] Similarly, courts in CCAA proceedings can and have granted a monitor expanded powers that go well beyond simply providing oversight of the debtor's activities: 8640025 Canada Inc. (Re), 2018 BCCA 93 at para. 49. Such powers can be granted by the court pursuant to s. 23(1)(k) of the CCAA or pursuant to s. 11 of the CCAA. Again, any such orders must be appropriate in light of what is needed in the circumstances, when considering the objectives of the CCAA.
- [37] Those powers may include running a SISP, particularly when the monitor (or another court officer) has expertise in that respect that the debtor's management does not, or even perhaps when the debtor's management is no longer in place.
- [38] OCIM cites various decisions of this Court where a monitor (or other court officer) has been granted expanded powers, including to run a SISP: Walter Energy #1; Walter Energy Canada Holdings, Inc. (Re), 2016 BCSC 1746 [Walter Energy #2]; North American Tungsten Corporation Ltd. (Re), 2016 BCSC 12; and Mountain Equipment Co-Operative (Re), 2020 BCSC 2037 [MEC].
- [39] However, each of the above cases presented significantly different facts than those before me. In Walter Energy #1, all of the directors had resigned or were about to resign (paras. 27-30). Similarly, in Walter Energy #2, the monitor was needed to run a claims process and take control of the debtor's affairs after a sale (para. 95). In North American Tungsten, the officers and directors had resigned (paras. 4-5). Finally, in MEC, management had resigned after a sale (para. 9).
- [40] At a certain theoretical level, I have no difficulty with OCIM's submissions in that the proposed SISP process could be approved as appropriate. It appears to be a reasonable, fair and transparent process, designed to maximize value for the benefit of the stakeholders, consistent with the s. 36(3) factors in the CCAA. The process would involve a start of sales efforts on July 22, 2024, potentially leading to a closing date no later than October 31, 2024.
- [41] The contentious issue is whether the SISP should be implemented now and before Inca One has an opportunity to develop the Westmount opportunity and determine if the refinancing can be achieved.
- [42] As OCIM readily acknowledges, a full repayment of its debt would be welcomed, as envisioned through the Westmount transaction. This would obviate the need for OCIM's further involvement in these proceedings or any plan. Inca One seemingly accepts that further negotiations with OCIM would not be fruitful, even with the benefit of the stay in these CCAA proceedings, and that it is imperative that OCIM be repaid as soon as possible by a refinancing with a more supportive lender.
- [43] However, OCIM does not propose a termination of these proceedings. OCIM is content to allow them to continue, on certain terms and conditions. As the saying goes, the devil is in the details. That leads me to a consideration of OCIM's terms or conditions under which it will provide the interim financing in the context of its further support of these proceedings.

[44] The conditions in the OCIM interim financing commitment letter include:

- a) any order extending the ARIO must be on terms satisfactory to OCIM, acting reasonably;
- b) Inca One cannot bring any motion to amend, vary or stay the ARIO or the stay extension or the order to enhance the Monitor's powers which may materially adversely affect OCIM, as determined by OCIM in its sole discretion;
- c) one "maturity date" is when a plan of compromise or arrangement, acceptable to OCIM, and approved by the creditors and the Court, has been implemented;
- d) during the term of the interim financing, Inca One must consult with OCIM in connection with any plan of compromise or arrangement to be advanced, and any plan must be satisfactory to and subject to the approval of OCIM; and
- e) an "event of default" includes the filing by Inca One of any motion or proceedings in the CCAA proceedings or otherwise (presumably without OCIM's consent) unless any order granted provides for full repayment of OCIM's debt.

[45] The conditions in OCIM's proposed order for the Monitor's expanded powers include the Monitor essentially assuming full control of Inca One's assets, operations and overall decision-making. This would include the Monitor:

- a) assuming full control of Inca One's assets;
- b) engaging the services of persons to assist in the restructuring or causing Inca One to engage, retain or terminate the services of any officer, employee, consultant, agent, representative or advisor;
- c) directing Inca One's receipts and disbursements and implementing controls as is deemed necessary;
- d) executing agreements in respect of Inca One's property, including exercising shareholder rights of Inca One (i.e. in relation to the subsidiaries who own the Peruvian assets);
- e) engaging with, negotiating, agreeing or even settling any creditor or other claim against Inca One; and
- f) prohibiting Inca One's directors and officers from having any further communications with any of Inca One's creditors or other stakeholders, except as approved by the Monitor.

[46] OCIM argues that these measures are appropriate because Inca One's management is doing a "poor job" and OCIM has lost faith in management's ability to proceed in the restructuring. This submission seemingly comes from the interim financing factors set out in s. 11.2(4)(b) and (c) of the CCAA which require that the Court consider how the debtor is to be managed during the proceeding and whether the debtor's management has the confidence of its major creditors.

- [47] The difficulty with OCIM's submission is that there is no evidence before me to support its contention as to Inca One's lacking management capabilities. The Monitor makes no mention in its Second Report dated July 19, 2024 of any concerns regarding Inca One's management being able to continue appropriately in the event of either interim financing being granted and the stay extended into fall 2024.
- [48] Further, the Monitor expressly states that Inca One, through its existing management, is acting in good faith and with due diligence. No evidence exists to suggest otherwise.
- [49] In its Second Report, the Monitor emphasizes the uncertainty of the Westmount refinancing and notes that the OCIM interim financing is supported by both OCIM and Equinox, the major secured creditors.
- [50] The Monitor, somewhat tentatively in my view, recommends that the Court accept OCIM's proposal, including the enhancement of its powers and commencement of the SISP. However, the Monitor then immediately comments that, if OCIM is prepared to advance the interim financing on terms that allow Inca One's management to retain certain governance and restructuring powers over the stay extension, the Monitor is supportive of that scenario. As with OCIM, the Monitor is of the view that, even with this shift in the proceedings, Inca One could continue its efforts regarding the Westmount refinancing under the "dual track" approach.
- [51] Over the course of this hearing, Westmount's position in relation to the competing interim financing proposals, the SISP and OCIM's proposal to invest the Monitor with enhanced powers has been somewhat elusive.
- [52] On the first day, Westmount's counsel indicated that he did not have instructions to respond to OCIM's proposal. He did confirm that Westmount's funding efforts were still underway. Counsel also indicated that Westmount could decide to proceed with the refinancing only if no SISP was being undertaken at the same time, since a sale of the assets would eliminate the need for such refinancing.
- [53] On the second day of this application, Westmount's counsel came armed with instructions. Counsel indicated that Westmount would prefer that no SISP be implemented but, if that was required, Westmount would "live with it".
- [54] In that event, both secured creditors - OCIM and Equinox - continued to support a parallel course that would involve the commencement of the SISP, while Inca One pursued the Westmount transaction. This position was largely based on their conclusion that, without the SISP, there was little hope of repayment and that the Westmount deal was, at this point, only a "hail Mary" not sufficiently credible to stand as the only option being pursued.
- [55] My first observation is that this Court, and others across Canada, have been generally unreceptive to efforts by major creditors to insert controls into the proceeding that are not appropriate. This is particularly true of interim financing proposals which have been rejected for that reason: *Quest University Canada (Re)*, 2020 BCSC 318 at paras. 97-100;

Tacora Resources Inc. (Re), 2023 ONSC 6126 at paras. 123-125; Essar Steel Algoma Inc. et al Re, 2017 ONSC 3331 at paras 19-21; and Essar Steel Algoma Inc. (Re), 2017 ONSC 4652 at para. 9(e). SISPs are another source of such attempts by creditors to indirectly and inappropriately seek a benefit through the proceedings.

- [56] Inca One argues, I think correctly, that OCIM's conditions of financing, as above, would result in the course and control of these proceedings being wrested away from it and would effectively turn this proceeding into a receivership.
- [57] I would add another concern. My interpretation of OCIM's conditions are that they are designed, to a degree, to remove the discretion of the Court in terms of what orders may be granted in this proceeding, including in relation to its own court officer, the Monitor. In my view, such controls cannot stand as appropriate in the sense that they would denude or hamstring this Court of the means by which it exercises its statutory mandate under the CCAA.
- [58] In my view, OCIM's conditions are also contrary to the overall policy objectives of the CCAA. The oft-quoted words from *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 are apt here:
- [70] The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.
- [71] It is well established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 1992 CanLII 2174 (BC CA), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court.
- [Emphasis added.]
- [59] OCIM and Equinox do not advance any "doomed to fail" argument in terms of Inca One's prospects.

- [60] OCIM's proposal though does have the real prospect of lessening Inca One's chance to achieve a successful restructuring. Having said that, I agree with the caution expressed by both OCIM and Equinox, supported by the Monitor, that the Westmount transaction at present is tentative at best and may not result in any transaction at all, while time is wasting.
- [61] Both OCIM and Equinox refer to potential prejudice they may face arising from any further delay in implementing the SISP, although the extent of and nature of that prejudice is, as yet, unclear.
- [62] I take Inca One's counsel's submissions at this application as essentially acknowledging that Inca One's options to restructure are narrowing as time marches on and that the Westmount deal, such as it is, stands as the only result that may avoid a sale of the assets, either as a going concern, or by a liquidation.
- [63] In the circumstance, I have concluded that the implementation of a SISP is not warranted at this time. Inca One continues to pursue the Westmount transaction and, in my view, should be given more time to do so, while avoiding any negative repercussions that may be visited upon those funding efforts arising from a parallel SISP.
- [64] I also conclude that the 401 interim financing should also be approved rather than OCIM's proposal. Since I have rejected a SISP at this time, the OCIM proposal falls away in any event. However, even without that consequence, I would have rejected OCIM's onerous and inappropriate conditions. They effectively strangle Inca One's management in terms of pursuing its restructuring options, without any justification. They also tie the Court's hands in terms of its duty to supervise these proceedings, which is wholly objectionable.

Length of Stay

- [65] Having granted the above relief, the question then becomes what length of time should Inca One be granted?
- [66] The "breathing room" that is normally afforded in a CCAA proceeding is intended to allow a debtor the time and flexibility to carry out a supervised restructuring of an organized sales process: *North American Tungsten Corporation Ltd.*, 2015 BCSC 1376 at para. 25; 1057863 B.C. Ltd. (Re), 2020 BCSC 1359 at paras. 35 and 118, citing *Timminco Limited (Re)*, 2012 ONSC 2515 at para. 15.
- [67] However, such "breathing room" is not unlimited and the length of the stay must be considered in the context of the facts of each case, with a view to the statutory objectives of the CCAA, in terms of what is appropriate.
- [68] Again, the tentative nature of the Westmount opportunity must be balanced against the real and present interests of the entire stakeholder group. A SISP remains a viable option to maximize value for that group.

[69] I conclude that a relatively short stay should be granted to allow Inca One an opportunity of advancing the Westmount transaction and to give Inca One some further, albeit limited, time to provide the Court and the stakeholders with more substance about the progress of the funding and the feasibility of that transaction succeeding at the end of the day. Without that further evidence, lending further credence to Inca One's suggestion that it should be afforded more time to pursue the refinancing, it may be that the option of implementing a parallel SISP will be a more reasonable path to be followed.

CONCLUSION

[70] The 401 interim financing is approved with a corresponding interim lender's charge to secure any amounts advanced. The stay is extended to August 26, 2024, when the next hearing is to take place.

"Fitzpatrick J."

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