

CANADA / JUDGMENT

Quest University Canada (Re)

2020 BCSC 1845

COURT

Supreme Court of British Columbia

DECIDED

26 November 2020

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2020 BCSC 1845 Quest University Canada (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Quest University Canada (Re),

2020 BCSC 1845

Date: 20201126

Docket: S200586

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 SEA TO SKY UNIVERSITY ACT, S.B.C. 2002, c. 54

- and -

In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

(Claims Process / Meeting Orders / Break Up Fee)

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Place and Date of Hearing:

Vancouver, B.C.

November 3, 2020

Place and Date of Decision with Written Reasons to Follow:

Vancouver, B.C.

November 3, 2020

Place and Date of Written Reasons:

Vancouver, B.C.

November 26, 2020

INTRODUCTION

- [1] The petitioner, Quest University Canada ("Quest"), seeks a number of orders on this application, all steps toward what it considers will be a successful restructuring of its affairs under the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36 (the "CCAA").
- [2] Quest seeks: a Claims Process Order, to identify and determine claims against it; a Meeting Order, to allow Quest to present a plan of arrangement to its creditors; and, a Transaction Approval and Vesting Order ("TAVO") to approve the proposed purchase and sale transaction between it and Primacorp Ventures Inc. ("Primacorp").
- [3] There is minor opposition to the granting of the Claims Process Order and Meeting Order.
- [4] There is substantial opposition to the granting of the TAVO. To allow the opposing parties further time to develop their materials, the Court adjourned that aspect of the application to November 12-13, 2020. In the meantime, however, Quest seeks approval of its agreement to pay Primacorp a Break Up Fee and that the Court grant a Break Up Fee Charge to secure those amounts. Various parties oppose this relief.
- [5] At the conclusion of this hearing, I granted the Claims Process Order and the Meeting Order. I also approved Quest's agreement to pay the Break Up Fee and granted the Break Up Fee Charge. These are my reasons for those orders.

BACKGROUND FACTS

- [6] On January 16, 2020, these proceedings began with the granting of the Initial Order.

- [7] Quest's restructuring has been unique in many respects. Quest is a not-for-profit post-secondary educational institution, a status that bears on its options in this proceeding. Quest has never really been self-sustaining financially; rather, it has historically relied on donations, secured loans and land sales to supplement its revenue.
- [8] Quest's asset holdings are complex. The campus, which includes the main buildings and residences, is located in Squamish, BC. Initially, Quest held substantial development lands that surrounded the campus lands; however, over the years, Quest sold some of those lands to generate revenue. Even so, a significant amount of development land remains.
- [9] Given Quest's history, its debt structure is also complex. There are many secured creditors, including Vanchorverve Foundation and Capilano University ("CapU"), with the latter holding a right of first refusal over certain lands. In addition, I approved Quest obtaining secured interim financing to assist its refinancing efforts in these CCAA proceedings: Quest University Canada (Re), 2020 BCSC 318 and Quest University Canada (Re), 2020 BCSC 860.
- [10] Quest also has complex financial agreements concerning four residence buildings on the campus, as discussed in Quest University Canada (Re), 2020 BCSC 921 (the "Rent Deferral Reasons"). Other agreements entered into by Quest, such as leases and naming rights agreements, potentially affect any disposition of its assets.
- [11] Quest has faced numerous challenges in these proceedings in continuing its educational endeavours, particularly arising from the impact of the COVID-19 pandemic beginning in March 2020. Nevertheless, Quest has continued throughout these proceedings to pursue some form of partnership, including an academic partnership that would see a continuation of its education services. Quest has also engaged with various development partners to determine if that option would resolve its financial difficulties, either alone or in conjunction with a transaction with an academic partner.
- [12] Quest has been disappointed along the way. In March 2020, a development partner withdrew from the process after submitting a bid. On May 28, 2020, I granted an order extending the stay until August 10, 2020, to allow Quest to pursue an agreement with the party identified as "Academic Partner". Unfortunately, a transaction with the Academic Partner did not materialize by June 2020: Rent Deferral Reasons at paras. 20-22.
- [13] On August 7, 2020, I granted an order extending the stay to December 24, 2020 to allow Quest to pursue another transaction over that time, while also offering an uninterrupted fall term to its students. Over this last extension period, Quest has chosen to enter into a transaction with Primacorp.
- [14] It is a condition precedent of the Primacorp transaction that the Court grant the TAVO and that Quest obtain creditor and this Court's approval of a plan of arrangement. Other conditions precedent also arise. Quest is required to disclaim subleases held by Southern Star Developments Ltd. ("Southern Star"). Quest has already delivered those disclaimers. As a result, Southern Star is opposing the granting of the TAVO and challenging the disclaimers,

with both matters to be addressed at the later hearing. Other conditions precedent relate to various agreements and charges and litigation claims relating to Quest's assets, including its lands.

- [15] Having reached this stage in the sales process, Quest now seeks the Claims Process Order and the Meeting Order, and will shortly seek the TAVO, as the first steps toward a conclusion to these proceedings. Quest takes the position that the Primacorp transaction maximizes the value of its assets and offers the greatest benefit to its stakeholders.
- [16] It is not necessary at this stage to consider the sales process in detail, since that will be relevant to Quest's later application for the TAVO. Having said that, it is of note that the Monitor, in its Fourth Report dated November 2, 2020, describes that process as "thorough". In that Report, the Monitor also supports the Primacorp transaction as the one most beneficial to Quest's creditors.
- [17] Writ large, the Primacorp transaction, or more accurately described as a series of transactions, provides for:
- a) Sufficient funds to pay all Quest's secured creditors' claims, including claims secured by the CCAA charges;
 - b) Funding for a plan of arrangement to be voted on by Quest's unsecured creditors;
 - c) Funds for these insolvency proceedings; and
 - d) A working capital facility, and marketing and recruiting support to permit Quest to become self-sustaining as a post-secondary institution.
- [18] The main and subsidiary agreements executed between Quest and Primacorp in September/October 2020 are complex. They include, as defined in the Monitor's Fourth Report, the Primacorp Purchase and Sale Agreement (the "Primacorp PSA"), the Campus Lease, an Operating Loan Agreement and an Operating Agreement. Significant terms include that Primacorp will:
- a) Purchase substantially all of Quest's lands and related assets, including the Campus Lands, the Development Lands, the Residence Lands, chattels and vehicles;
 - b) Lease specific Campus Lands back to Quest under a long-term lease arrangement;
 - c) Provide marketing and recruiting expertise and sufficient working capital to allow Quest to continue as a university;
 - d) Fund sufficient monies to pay the lesser of the Unsecured Creditor Claims and \$1.35 million under a plan of arrangement. In addition, the Purchase Price will satisfy all of Quest's secured lenders and any commissions on sales; and
 - e) Provide Quest with a \$20 million secured credit facility.

- [19] All of the transaction documents are in settled form and the signed documents are in escrow. Primacorp and Quest are working towards a closing date in late December 2020.

CLAIMS PROCESS

- [20] The remedial objective of the CCAA is to facilitate a restructuring of a debtor company. Section 11 of the CCAA imbues the supervising judge with a broad statutory authority to make such orders as are appropriate toward achieving that objective: *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732 at para. 29 ("Bul River #2").
- [21] Establishing a claims process toward determining claims to be advanced under the CCAA is a recognized step in proceedings across Canada: *ScoZinc Ltd. (Re)*, 2009 NSSC 136 at para. 23; and *Bul River #2* at paras. 31-32.
- [22] In *Timminco Limited (Re)*, 2014 ONSC 3393 at paras. 41-44, Regional Senior Justice Morawetz (as he then was) discussed "first principles" from the CCAA in relation to claims process orders and the establishment of a claims bar date. He stated:
- [41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.
- [23] Quest submits that a claims process is necessary to enable it to implement a plan and close the Primacorp transaction.
- [24] Quest indicates that there are five secured creditors holding approximately \$30.7 million in debt. Quest estimates that there are 446 unsecured creditors holding approximately \$2 million in debt. If the Court upholds the Southern Star disclaimers, Southern Star will also be entitled to advance a claim against Quest as an unsecured creditor.
- [25] Quest developed the proposed claims process with input and support from the Monitor. The features of the proposed claims process are:
- The claims process will not address claims arising post-filing, save for a Restructuring Claim and amounts secured by CCAA Charges;
 - The claims process addresses claims against Governors and Officers in relation to a pre-filing claim or Restructuring Claims;
 - The claims process requires that secured creditors prove their claims;

- d) The claims bar date for claims is November 24, 2020; the claims bar date for Restructuring Claims is the later of November 24, 2020 and ten days after the date on which a Creditor receives a Notice of Disclaimer or Resiliation;
 - e) To facilitate creditor participation in the Claims Process, Quest designed a negative claims process for almost all vendors, students and employees. As such, after receipt of a claims package indicating Quest's determination of the claim, that creditor need only respond if there is disagreement as to the amount of its claim set out in the notice; and
 - f) Disputes will be handled in the usual fashion, but by the Monitor. After consultation with Quest, the Monitor will deliver any Notices of Revision or Disallowance. Creditors may then deliver a Notice of Dispute to the Monitor. Failing settlement of a dispute, the Monitor may refer the matter to the Court for a determination after a hearing de novo.
- [26] I agree that the timeline set for the claims process is ambitious. As noted by the Monitor, it is relatively short. However, in my view, the negative claims process in relation to many of the unsecured creditors ameliorates any concerns. In addition, the secured creditors have been aware of these proceedings since the outset; those secured creditors who might have more complicated claims have been actively involved. I can only presume that the secured creditors are well aware of their own claims. The requirement that secured creditors file proof of claims will flush out any issues well ahead of the intended closing of the Primacorp transaction later this year, if approved.
- [27] The Quest University Faculty Union (the "Union") was the only party who objected to the granting of the Claims Process Order. In October 2019, the Union was certified as the bargaining agent of Quest employees although no bargaining has yet occurred. The Union indicates that the employees are entitled to compensation in relation to accrued credits. The Union is uncertain as to whether this is a pre- or post-filing claim, with only the former giving rise to the need to file a proof of claim.
- [28] I agree with Quest that this uncertainty is not an appropriate basis upon which to delay this relief. Clearly, the Union can engage with Quest toward clarifying this issue as to whether or not the Union needs to file a proof of claim. Under the Primacorp transaction, Quest intends to continue to operate as an entity and will, presumably, retain most, if not all, current employees.
- [29] I agree that approval of a claims process is an important step forward allowing Quest to identify and quantify claims against it and members of its Board of Governors and Officers. Whether or not this Court ultimately approves the TAVO, this process will assist in the implementation of any later plan and any distributions to creditors.

THE MEETING ORDER

- [30] Quest has developed a plan of compromise and arrangement dated November 1, 2020 (the "Plan"). It is a requirement of the Primacorp transaction that Quest do so and that Quest seek and obtain approval of the Plan by its creditors and this Court.
- [31] The CCAA expressly allows the court to order a meeting of the secured and unsecured creditors to consider a plan of arrangement:

Compromise with unsecured creditors

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Compromise with secured creditors

5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company, or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
- [32] It is not the role of the Court at this stage to consider or rule on the fairness or reasonableness of the Plan. Rather, I adopt the discussion in *ScoZinc Ltd. (Re)*, 2009 NSSC 163 at para. 7; namely, that I should only exercise my discretion to refuse to refer the Plan to the creditors if the plan is doomed to fail at either the creditor or court approval stage.
- [33] The Plan provides for one class of creditors for the purposes of voting, namely the Affected Creditor Class. The Plan provides for payment in full of Convenience Creditors (Creditors with Affected Claims that are less than or equal to \$1,000). The Plan also allows Affected Creditors with a Proven Claim greater than \$1,000 to make a Cash Election to receive \$1,000 in satisfaction of their Claim. These latter provisions will significantly affect approximately 250 students who have claims within these limits.
- [34] All Convenience Creditors and Cash Election Creditors are deemed to vote in favour of the Plan.
- [35] Affected Creditors who are not Convenience Creditors or Cash Election Creditors (the "Remaining Creditors") shall receive fifty cents (\$0.50) for every dollar of their Affected Claim, up to a maximum total disbursement of \$1.35 million for Convenience Claims, Cash Election Claims and the Affected Claims of Remaining Creditors (the "Maximum Claim

Pool"). In the event the Affected Claims exceed the Maximum Claim Pool, Convenience Creditors will receive the lesser of their Affected Claim and \$1,000; Cash Election Creditors will receive the sum of \$1,000; and, the Remaining Creditors will receive their pro rata share of the Maximum Claim Pool after deduction of the amounts payable to Convenience Creditors and Cash Election Creditors.

- [36] The Plan is premised on payment in full of all secured creditors to the extent of their claims, upon closing of the Primacorp transaction. The Plan provides for the payment of such amounts owed to Her Majesty in Right of Canada and employees, as required by the CCAA.
- [37] The Plan will not compromise Unaffected Claims that include: post-filing claims (other than certain Restructuring and Governor/Officer Claims); secured claims; claims secured by CCAA Charges; claims against any Governor and Officer that cannot be compromised pursuant to the CCAA; and, claims in respect of payments referred to in s. 6 of the CCAA.
- [38] The Monitor assisted in the development of the Plan and it supports the Plan. The Monitor's Fourth Report indicates that the Monitor considers the Plan fair and reasonable.
- [39] The Meeting Order authorizes Quest to convene a meeting on December 2, 2020. Due to the COVID-19 pandemic, the Monitor has arranged to hold the Creditors' Meeting virtually in accordance with the Electronic Meeting Protocol.
- [40] Another matter for consideration is whether the Plan has properly established the classes of creditors for voting at the proposed meeting. The Plan provides that all Affected Creditors will be placed into one creditor class at the meeting.

[41] Section 22(1) of the CCAA provides:

A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

[42] Section 22(2) of the CCAA lists the factors to be considered when taking into account placing all the creditors in the same class:

22(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

- a) the nature of the debts, liabilities or obligations giving rise to their claims;
- b) the nature and rank of any security in respect of their claims;
- c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
- d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are

prescribed.

- [43] The test to determine the classification of creditors is known as the "commonality of interests" test: *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 1693 (Q.B) at paras. 17-19.
- [44] No stakeholder objects to the classification of the creditors under the Plan.
- [45] I agree that the Plan properly classifies the creditors--namely, the Affected Creditors--in one class for voting purposes. They all hold unsecured claims against Quest and they all rank the same in priority. While the Convenience and Cash Election Creditors will be treated slightly differently, practical reasons justify this approach, and they are common in CCAA plans: *Nelson Financial Group Ltd. (Re)*, 2011 ONSC 2750 at para. 14 and *Angiotech Pharmaceuticals Inc. (Re)*, 2011 BCSC 450 at para. 6.
- [46] The classification of the creditors under the Plan is appropriate in the circumstances. I concur with the Monitor that Quest has a reasonable chance of obtaining approval of the Plan from the creditors and the Court. Quest's Plan meets the low threshold at this stage. The Plan should be put before the creditors, and if approved, before the Court.

THE BREAK UP FEE / CHARGE

- [47] The Primacorp PSA executed by Quest requires, as a condition precedent, that Quest obtain court approval of its agreement to pay Primacorp what is defined as a "Break Up Fee". In addition, the Primacorp PSA requires that Quest obtain a court ordered charge (the "Break Up Fee Charge" or "Charge") against Quest's assets to secure the Break Up Fee, ranking only behind the Administration Charge, the Interim Lender's Charge and Directors and Officers Charge ("D&O") (as defined in the Amended and Restated Initial Order ("ARIO")).

- [48] The Primacorp PSA provides:

10.13 Expense Reimbursement. In consideration of [Primacorp] having expended considerable time and expense in connection with this Agreement and the negotiation thereof, and the identification and quantification of assets to be included in the Purchased Assets, if the transactions do not close . . . [Quest] shall pay to [Primacorp] . . . an amount equal to [Primacorp's] actual out of pocket fees incurred in connection with the transactions contemplated by this Agreement together with the preparation, negotiation and execution of deliver of this Agreement . . . (the "Break Up Fee"). . . .

[Emphasis added.]

- [49] The agreed upon Break Up Fee was initially limited to \$500,000 to a certain stage of the negotiations. At this point, that limit no longer applies.

- [50] Quest's obligation to pay the Break Up Fee is engaged where the Primacorp transaction fails to close as a result of (i) Quest materially breaching the Primacorp PSA; (ii) Quest refusing to work in good faith towards negotiating, execution or delivery of the required closing documents; or (iii) Quest executing and delivering a letter of intent or purchase agreement with another person that is inconsistent with and prevents the completion of the Primacorp transaction.
- [51] Quest is not be obligated to pay the Break Up Fee if this Court does not approve the Primacorp transaction in accordance with the application for the TAVO to be heard next week.
- [52] Quest submits that the Break Up Fee is commercially reasonable in the circumstances, consistent with other transactions that have been approved in CCAA proceedings. Quest's request for approval of the Break Up Fee and Charge is supported by the Monitor.
- [53] Section 11 of the CCAA allows this Court to exercise its discretion to grant orders as are appropriate toward achieving the broad statutory and policy objectives under the CCAA. In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, the Court stated:
- [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.

[Emphasis added.]

- [54] Quest has also referred to s. 11.2 of the CCAA that provides the court with specific authority to grant a charge in favour of a person who is lending money to the debtor company. That provision does not apply since Primacorp is not lending Quest any monies; however, I have found the s. 11.2(4) factors to be useful in my analysis.
- [55] In "Rights of First Refusal and Options to Purchase in Insolvency Proceedings" (2019) 8 J.I.I.C. 103, the authors Virginie Gauthier, David Sieradzki and Hugo Margoc discussed the rationale for break fees at 125-126:

It is well established convention in both Canadian and U.S. insolvency proceedings that a party willing to incur the time and expense to perform the level of diligence required to submit an unconditional "stalking horse" offer prior to the commencement of a sale process should be entitled to bid protections. Those bid protections typically include a "break fee" and "expense

reimbursement" mechanism. The overriding rationale for these types of bid protections is to compensate the stalking horse bidder for its substantial time and expense to the extent it is ultimately not the successful bidder at the conclusion of the sale process.

- [56] As noted by the authors of the above article, numerous Canadian courts have considered break fees or break up fees with or without an accompanying charge. These can arise in CCAA proceedings, proposal proceedings, receiverships and foreclosures.
- [57] In the CCAA context, cases include *Mosaic Group Inc. (Re)*, [2004] O.J. No. 2323 (Ont. Sup. Ct. J.) at para. 16; *Tiger Brand Knitting Co. (Re)*, [2005] O.J. No. 1259 (Ont. Sup. Ct. J.) at paras. 13 and 37 (described as a "stay fee"); *Stelco Inc. (Re)*, [2005] O.J. No. 4733 (Ont. C.A.) at para. 20; *Boutique Euphoria inc. (Re)*, 2007 QCCS 7129 at paras. 63-72; *Nortel Networks Corp. (Re)*, [2009] O.J. No. 3169 (Ont. Sup. Ct. J.) at para. 56 and [2009] O.J. No. 4487 (Ont. Sup. Ct. J.) at para. 10; *Brainhunter Inc. (Re)* (2009), 62 C.B.R. (5th) 41 at para. 10 (Ont. Sup. Ct. J.); *Bul River Mineral Corporation (Re)*, 2014 BCSC 645 at paras. 110-111; and, *Green Growth Brands Inc. (Re)*, 2020 ONSC 3565 at para. 52.
- [58] There is no doubt that some break fees and related charges may be seen as unfairly and unreasonably extracting value from the estate with little or no benefit to the stakeholders. As in many exercises of its discretion under the CCAA, the court must be mindful of such concerns. Each situation must be considered in the context of its own unique circumstances, including the present state of affairs faced by the debtor company and its stakeholders.
- [59] If a break fee is fair and reasonable in all of the circumstances in the sense that it provides a corresponding or greater benefit to the estate, court approval of such a fee and a related charge may be warranted. Relevant factors that may be considered by the court when asked to approve a break fee and grant a charge include:
- a) Was the agreement reached as a result of arm's length negotiations?;
 - b) Has the agreement been approved by the debtor company's board or specifically constituted committees who are conducting the sales process?;
 - c) Is the relief supported by the major creditors?;
 - d) What may be the effect of such a fee/charge? Will it have a chilling effect on the market, or will it facilitate the sales process?;
 - e) Is the amount of the fee reasonable? In relation to expenses anticipated to be covered, is the amount reasonable given the bidder's time, resources and risk in the process?;
 - f) Will the fee and charge enhance the realization of the debtor's assets?;
 - g) Will the fee and charge enhance the prospects of a viable compromise or arrangement being made in respect of the company?; and

h) Does the monitor support the relief?

[60] The Primacorp transaction is not a true stalking horse bid in the sense that Quest seeks approval of the transaction with the Break Up Fee and with the expectation that Quest will then use that bid to entice other proposals. Quest is seeking approval of the Primacorp transaction now; however, it remains the case that other persons remain interested in Quest's assets and they may later seek approval of another bid.

[61] Quest is pursuing the Primacorp transaction at this time on a tight timeline given Quest's need to achieve a speedy resolution in order to provide assurances to its students and other stakeholders for the 2021 academic school calendar. In addition, Quest has been facing increasing pressure from its secured creditors to move to a resolution of the matter after almost ten months in this proceeding.

[62] All of the relevant circumstances were considered by the Monitor who has indicated its support of the Break Up Fee and Break Up Fee Charge (the s. 11.2(4)(g) factor). In its Fourth Report, the Monitor states:

5.17 . . . Quest's agreement to the Break Up Fee was instrumental in encouraging Primacorp to expend time and expense engaging in extensive discussions with Quest to reach a definitive agreement at a time when no other proposals were forthcoming. Quest benefited from this commitment as it resulted in the Primacorp Agreement as well as the advancement of other potential proposals thereby giving Quest the confidence that Primacorp was the superior partner. The quantum of the Break Fee is calculated on an expense recovery basis and the Monitor considered it to be reasonable in light of the value of the transaction.

[63] I agree with Quest and the Monitor that the Break Up Fee and Charge is appropriate in these circumstances, particularly given the following factors:

- a) The Break Up Fee has been approved by Quest's board of directors and Quest's Restructuring Committee, both having integral knowledge of Quest's options at this stage of the proceedings;
- b) The Break Up Fee is not akin to a "fee" that one sees in many stalking horse bids, including those approved by Canadian courts, that is driven by the purchase price. Rather, the Break Up Fee is limited to Primacorp's actual out-of-pocket fees incurred in connection with the transaction. It is evident from the materials before the Court that the negotiations leading to the transaction were extensive and that Primacorp has already expended significant resources engaging in that process and doing its necessary due diligence;
- c) The Break Up Fee and Break Up Fee Charge is only expected to be material for a short period of time. It will become irrelevant if the Primacorp transaction is approved under the TAVO;
- d) The Break Up Fee is only payable if the Transaction does not close due to Quest's breach of its obligations in respect of the transaction or Quest takes steps to pursue a transaction that makes it impossible to close the Primacorp transaction;

- e) Quest's management has remained intact throughout the proceedings and the Monitor continues to be of the view that Quest is acting with good faith and due diligence;
 - f) The major secured creditors Vanchorverve Foundation, and the Interim Lender have been kept apprised of Quest's consideration of its options and, in particular, the Primacorp transaction, which includes the requirement for the Break Up Fee and Charge. They remain supportive of this relief;
 - g) The Break Up Fee and Charge will enhance Quest's ability to put forward the Plan and obtain creditor approval of the Plan, which will provide for the funds to satisfy Quest's creditors' claims and allow Quest to continue as a viable post-secondary institution;
 - h) The value of Quest's assets and property is substantial and there is every indication that there is sufficient value to repay all the secured creditor's claims and the Break Up Fee; and
 - i) No creditor will be materially prejudiced by the Break Up Fee and Charge. The only creditor who registered an objection to this relief was CapU, a secured creditor. CapU submitted that the Court should adjourn this relief and address it at the later application for the TAVO. However, CapU stands to recover its secured loan under this transaction or any alternate transaction. CapU also holds a right of first refusal but has failed to identify any prejudice in that respect arising from this relief referring only vaguely to the possibility of its rights being affected.
- [64] The only other person objecting to the approval of the Break Up Fee and Charge was Development Partner #1, who asserted that it was premature to grant that relief. I decline to address these submissions as they come from a potential competing bidder whose future involvement is unclear and who presently has no standing in this proceeding.

CONCLUSION

- [65] I grant the relief sought by Quest at this preliminary stage, including granting the Claims Process Order and the Meeting Order. I also approve the Break Up Fee and grant the Break Up Fee Charge.

"Fitzpatrick J."

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