

**CITATION:** Torstar Corporation and NordStar Capital LP Plan of Arrangement, 2020 ONSC  
4574

**COURT FILE NO.:** CV-20-00642403-00CL

**DATE:** 20200727

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
**IN THE MATTER OF AN** )  
APPLICATION UNDER SECTION 182 ) *Ryan A. Morris, Jeff Lloyd and Shlomi*  
OF THE *BUSINESS CORPORATIONS ACT* ) *Feiner* for the Applicant  
(ONTARIO), R.S.O. 1990, CHAP. B.16, )  
AS AMENDED )  
)  
**AND IN THE MATTER OF RULES** ) *Orestes Pasparakis and Andrew McCoomb*  
14.05(2) AND 14.05(3) OF THE *RULES* ) for NordStar Capital LP  
*OF CIVIL PROCEDURE* )  
) *Joe Groia* for the Minority Shareholder  
) Respondent Patrick Collins  
)  
**AND IN THE MATTER OF A** )  
PROPOSED PLAN OF ARRANGEMENT ) *Alistair Crawley, Melissa MacKewn, Clarke*  
INVOLVING TORSTAR CORPORATION ) *Tedesco and Michael Byers* for the  
AND NORDSTAR CAPITAL LP ) Respondents CMMH and Matthew Proud.  
)  
) *Andrew Gray* for Fairfax Financial  
) Corporation  
)  
)  
)  
) **HEARD:** July 23, 2020

**REASONS ON APPLICATION**

**JUDGE: C. GILMORE, J.**

**OVERVIEW**

[1] This Application is brought by Torstar Corporation (“Torstar”) pursuant to section 182(5) of the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended (“the OBCA”) for an Order approving the proposed Plan of Arrangement (“the Arrangement”) involving NordStar Capital LP (“NordStar”). The Arrangement proposes that NordStar will acquire all of the Class A Voting Shares and Class B Non-Voting Shares in the capital of Torstar for \$0.74 per Share in cash.

[2] At a Special Meeting held on July 21, 2020 the Arrangement was approved by 99.7% of the votes cast by Class A Voting Shares and 98.1% of Class B Non-Voting Shares. Torstar asks that the Arrangement be approved by the Court.

[3] The Respondent Patrick Collins (“Mr. Collins”) is a minority shareholder of Torstar. He requests that the Court carefully review the Arrangement because it will result in the shareholders not receiving the maximum value for their shares.

[4] Further, Mr. Collins’ position is that Torstar has not disclosed to its shareholders matters relating to the negotiation of the Arrangement, and relevant competitor bids which exceeded the value offered by NordStar. He submits that if this arrangement is approved it will result in future arrangements being carried out without an auction and with limited disclosure. The Court should, therefore, set a timetable to enquire into the circumstances surrounding the Arrangement before approving it.

[5] The Respondent Mr. Matthew Proud (“Mr. Proud”) owns 3,860,000 Class B shares of Torstar. The Respondent Canadian Modern Media Holdings Inc. (“CMMH”) is a holding company under the *OBCA* and established for the purpose of bidding to acquire Torstar. The principals of CMMH are Mr. Proud, his brother Tyler and Neil Selfe.

[6] CMMH submits that Torstar prematurely closed the bidding process thereby preventing a competitive process that would have benefitted its shareholders. Specifically, CMMH alleges that Torstar terminated discussions with CMMH and supported NordStar in hard lock-up arrangements with major shareholder groups to prevent consideration of a more valuable offer.

[7] CMMH alleges that because it was required to enter into strict confidentiality terms in order to make a proposal, the shareholders were deprived of information about CMMH’s first proposal. CMMH further alleges that Torstar provided its shareholders with misleading disclosure the result of which is that the shareholder vote on July 21, 2020 is of no value.

[8] CMMH requests that this Court deny approval of the Arrangement because it is not fair or reasonable. It requests that the Board of Torstar be directed to present a transaction to its shareholders that offers the best value with complete disclosure.

## **BACKGROUND FACTS**

[9] Torstar is a media company whose businesses include the Toronto Star, Canada’s largest daily newspaper. Approximately 99% of Torstar’s Class A Voting Shares and 18% of its Class B Non-Voting Shares are owned by members of a Voting Trust (“the Trust”). The members of that Trust are seven family groups that have controlled Torstar for more than 60 years. Approximately 40% of the Class B Non-Voting Shares are held by Hamblin Watsa Investment Counsel Inc. (“HWIC”), an affiliate of Fairfax Holding Ltd. (“Fairfax”).

[10] NordStar is a limited partnership. Jordan Bitove is the principal of NordStar.

[11] In the fall of 2019 and January 2020, Torstar began to consider strategic alternatives to create shareholder value including the sale of its business. Between February 25 and March 27, 2020 Torstar received proposals from 26 potential buyers.

[12] On February 10, 2020 Torstar received an unsolicited proposal (“the Initial Proposal”) from Jordan Bitove to acquire 100% of the shares for \$0.566 per share in cash. The Initial Proposal included a request for a period of nine weeks for Mr. Bitove to conduct due diligence and conduct negotiations with Torstar.

[13] On February 25, 2020 Torstar established a Special Committee of Independent Directors (the “Special Committee”) chaired by Lead Director Linda Hughes, with a mandate to solicit independent proposals, supervise the negotiation of any sale transaction and make recommendations to the Board concerning proposals. The Special Committee hired a consultant, namely Marckenz Group Capital Partners (“Marckenz”), to initiate contact with purchasers and provide advice. Marckenz provided advice to the Special Committee that the price offered in the Initial Proposal was not acceptable.

[14] On March 18, 2020, Torstar received an updated non-binding proposal from Mr. Bitove for NordStar to acquire 100% of Torstar’s shares for \$0.63 per share in cash. On April 27, 2020 Torstar retained Blair Franklin Capital Partners and Marckenz to provide a fairness opinion in relation to the updated proposal. Both consultants agreed that the price offered by NordStar was fair.

[15] The Special Committee then met and recommended to the Board that shareholders vote in favour of a Special Resolution to approve the Arrangement. The Board met on May 26, 2020 and considered the recommendation of the Special Committee. The Board approved the Arrangement on the basis that it was fair and reasonable to shareholders and in the best interest of Torstar. The Board recommended that the shareholders vote in favour of the Arrangement.

[16] The Board’s determination to recommend the Arrangement was based on, among other considerations, a premium to market values, immediate liquidity, the fairness opinions, support for the “Atkinson Principles”, the ongoing ability to respond to Superior Proposals, fair treatment to stakeholders, dissenter’s rights and the requirement for court and shareholder approval.

[17] The Arrangement Agreement with NordStar was entered into on May 26, 2020 whereby NordStar would acquire all of Torstar’s shares for \$0.63 in cash subject to shareholder and court approval. Torstar issued a press release on May 26, 2020 announcing it had entered into an Arrangement Agreement with Nordstar at \$0.63 cash per share. Under the terms of the Arrangement Agreement any proposal from a competing bidder had to be submitted by July 13, 2020 in order for Torstar to issue a Superior Proposal Notice to NordStar.

[18] On June 18, 2020 Justice B. Conway issued an Interim Order directing Torstar to call a Special Meeting in accordance with the *OBCA* and its by-laws for the shareholders to consider whether to pass a resolution approving the Arrangement Agreement.

[19] On June 29, 2020 Torstar gave notice to its shareholders that the Special Meeting had been called for July 21, 2020 and issued a Management Information Circular in relation to the transaction.

[20] Following the notice to shareholders, Torstar received a new offer for \$0.72 in cash from CMMH. On July 3, 2020 the Board determined that this offer might be determined to be a Superior Proposal and subject to a competing match by NordStar. Torstar issued a press release on July 9, 2020 regarding the CMMH offer confirming that the Board continued to recommend acceptance of the Arrangement Agreement pending their assessment of the CMMH offer.

[21] On July 10, 2020 CMMH amended its offer to include a cash offer of \$0.72 per share and the issuance of one contingent value right per Share (“CVR”).

[22] On July 10, 2020 the Trust was approached by NordStar regarding a price increase to \$0.72 per share contingent on a hard lock-up voting support agreement with NordStar. The Trust and HWIC made a counter offer and the Arrangement Agreement was amended on July 11, 2020 to increase NordStar’s purchase price to \$0.74 per share in cash.

[23] On July 11, 2020 the Board was advised that the Trust and HWIC would not support the CMMH offer, and conditional on execution of Amendment No. 1 to the Arrangement Agreement with Nordstar, which included the cash price of \$0.74 offered, the Trust and HWIC would enter into the hard lock-up voting supporting agreement with Nordstar.

[24] Based on fairness opinions rendered by Blair Franklin and Marckenz, the Board determined that Amendment No. 1 was in the best interest of Torstar and recommended that shareholders vote in favour of Amendment No. 1.

[25] The Trust and HWIC, representing approximately 60% of the issued Shares, then entered into hard lock-up voting support agreements on July 11, 2020 and agreed to vote in favour of the amended Arrangement Agreement price of \$0.74 per share. Once the lock-up agreements were signed, no competing bid could be accepted as it would not have had sufficient shareholder votes.

[26] On July 11, 2020 Torstar issued a Press Release which publicly disclosed the amended Arrangement Agreement. The Press Release specifically states that the Trust and HWIC did not intend to support the CMMH offer and that the Board had determined that the CMMH offer could not be considered a Superior Proposal because of undue delay to the NordStar transaction and the hard lock up agreement with the Trust and HWIC which was a condition to the amended Arrangement Agreement.

[27] After the amendment to the Arrangement Agreement was announced, CMMH made a further unsolicited proposal on July 20, 2020 to acquire all of the shares for \$0.80 in cash without a CVR. This was an 8.1% premium to NordStar’s offer of \$0.74.

[28] In response to this offer, the Board met on July 20, 2020. After consulting with its legal and financial advisors, the Board determined unanimously that the late offer could not be considered for the same reasons that previous offer was not recommended. That is, it could not constitute a Superior Proposal due to the hard lock up agreement and it would cause undue delay

to the amended Arrangement Agreement. The Board continued to recommend that shareholders vote in favour of the amended Arrangement Agreement for a cash price of \$0.74 per share.

[29] At the July 21, 2020 Special Meeting of shareholders, the Arrangement was approved overwhelmingly by the shareholders with 81.9% of votes cast by shareholders excluding those held by members of the Trust and HWIC.

## THE ISSUES AND THE LAW

[30] The Arrangement in this case is an “Arrangement”, as defined under Section 182(1) of the *OBCA*:

- (a) An exchange of securities of the corporation held by security holders for other securities, money or other property of the corporation or securities, money or other property of another body corporate that is not a takeover bid as defined in Part XX of the *Securities Act*;
- (b) any other reorganization or scheme involving the business or affairs of the corporation or of any or all of the holders of its securities or of any options or rights to acquire any of its securities that is, at law, an arrangement; and
- (c) any combination of the foregoing.

[31] Where the Arrangement will result in fundamental changes to the corporation and stakeholders’ rights, court approval must be obtained. As per *BCE Inc. and Bell Canada*<sup>1</sup> (“*BCE*”), in order to obtain court approval, the onus is on the Applicant to demonstrate to the court that:

- a. The statutory procedures have been met;
- b. The Application is made in good faith, and;
- c. The Arrangement is fair and reasonable.

[32] The court’s role in determining whether approval should be given to an Arrangement is set out in *BCE*. The Supreme Court of Canada’s guidance requires that courts:

- a. Make a reasonable decision in light of the specific circumstances of each case;
- b. Refrain from substituting their views of what they consider the “best” arrangement; and

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<sup>1</sup> 2008 SCC 69 at para 46.

- c. Conduct a careful review of the transaction keeping mind that Board decisions are not subject to microscopic examination with the perfect vision of hindsight.<sup>2</sup>

[33] Turning to the specific elements of the test for approval as set out in *BCE*, I am satisfied that the statutory procedures have been met. The Respondents did not seriously contest this element of the test. Further, the Applicant was required to carry out certain court ordered requirements in accordance with the Order of Justice Conway dated June 18, 2020. There is no dispute that the Applicant has not complied with that Order.

[34] The Applicant must also demonstrate that the Application was brought in good faith. The process undertaken by Torstar was one which was guided by professional input and Board recommendations at each step. Proposals were entertained and ultimately Torstar entered into an initial agreement with NordStar at a purchase price of \$0.63 per share. The announcement of the initial agreement prompted the initial bid from CMMH which in turn resulted in an increase in NordStar's bid.

[35] The Board's Special Committee reviewed NordStar's increased Offer and the support of the Trust and HWIC by way of hard lock-up agreements. The Board obtained financial and legal advice as well as fairness opinions and determined that accepting Nordstar's offer was in the best interest of the shareholders. I am satisfied that the Application has been brought in good faith.

[36] The sole issue in this case is whether the Arrangement is fair and reasonable. In accordance with the test set out in *BCE*, in determining whether an Arrangement is fair and reasonable, the Court must consider whether the Arrangement has a valid business purpose and whether the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way.<sup>3</sup>

[37] CMMH submits that the business purpose should be questioned because the Arrangement was not necessary to the continued operation of Torstar which is a fully solvent and operating company. CMMH argues that the Board has not explained why it did not conduct a full and diligent process to obtain the highest value for its shareholders. CMMH alleges that Torstar was simply intent on a transaction with one buyer irrespective of the best value for shareholders.

[38] I disagree with CMMH and accept that Torstar wanted its business to continue under private ownership in order to maintain its business principles, better respond to changes in the media industry, and ensure positive value. Specifically, Torstar wanted to create options to unlock shareholder value given the impact of digital technologies on Torstar and the media industry as a whole in recent years. It retained consultants, and legal and financial advisors with respect to the sale of a public company to a private owner. Simply put, Torstar wanted to create certainty for its shareholders in uncertain times. I am satisfied that the Arrangement has a valid business purpose.

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<sup>2</sup> *Ibid* at para 155.

<sup>3</sup> *Supra* at para 138.

[39] In moving to the second part of the test, the Supreme Court of Canada in *BCE* requires consideration of the following factors:

- a. The vote by shareholders on the Arrangement;
- b. The impact on the rights of shareholders;
- c. The approval of the Arrangement by the corporation's directors, a Special Committee of Directors and the presence of a fairness opinion; and
- d. The access of shareholders to dissent and appraisal remedies.<sup>4</sup>

[40] On the issue of the vote by shareholders, it is acknowledged that while the outcome of a shareholder vote is not determinative of whether the Arrangement should receive court approval, it cannot be ignored as an important factor.<sup>5</sup> In this case, the Arrangement was overwhelmingly approved by 98.7% of all shareholders. I agree with Justice Blair in *Re St. Lawrence & Hudson Railway Co.*<sup>6</sup> that the "business judgment" of security holders in determining their own interests is to be given great weight. In giving credence to the decision making of shareholders in this regard, I infer that they have weighed the benefit of receiving \$0.74 per Share in cash and immediate liquidity against future possible losses or unknown risk.

[41] The Court must also examine the Board approval process and any advice received and considered by the Board in making its determinations. The Board entered into an arm's length robust process with the oversight of a Special Committee, legal advice and financial advisors. Once it became clear on July 11, 2020 that the Trust and HWIC would not support CMMH's offer and intended to enter into hard lock-up agreements with Nordstar, the Board took steps to obtain further legal and financial advice with respect to whether CMMH's offer could be considered a "Superior Proposal" under the Arrangement Agreement. The Board determined that it could not because the lack of support from the Trust and HWIC would not result in the minimum level of shareholder approval required by the Interim Order.

[42] The Board then obtained written fairness opinions from Blair Franklin and Marckenz which endorsed NordStar's offer at \$0.74 per share in cash as financially fair to the shareholders. It should be noted that the fairness opinions took into account CMMH's offer of \$0.72 per share in cash plus the CVR.

[43] It is important to add that the financial impact of NordStar's offer was not the only focus of the Board. NordStar made it clear to the Board that it intended to operate pursuant to the "Atkinson Principles," a set of beliefs established by the long-time former publisher of the Toronto Star, J.E. Atkinson. The Board was attracted by NordStar's intent to operate Torstar in a manner which would advance the newspaper's editorial principles of social justice, civil liberties and civic

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<sup>4</sup> *Supra* at paras 150 and 152.

<sup>5</sup> *Supra* at 150.

<sup>6</sup> [1998] O.J. No. 3934 (Gen. Div.).

engagement, among others. It can come as no surprise that Torstar wanted its operations to continue with the same business philosophy.

[44] I accept that the Board encouraged CMMH to “put its best foot forward” after NordStar increased its offer to \$0.72. CMMH did not. Rather, CMMH waited until the last minute when its offer was precluded from being considered because of the hard lock up and the shareholder block in support of the NordStar offer. CMMH now claims the process was not fair or transparent while having had every opportunity to present its best bid at a time when it would have had to have been considered.

[45] Turning to the objections of the Respondents, I note that they delivered their Notices of Appearance after the required deadline and as such their standing in this matter may be in question. However, if I am wrong on the question of standing I will address their concerns in turn.

[46] Mr. Collins is a former Executive Vice President of Newspapers of Torstar and a significant shareholder holding 1,187,667 Class B non-voting shares of Torstar. Mr. Collins complains that shareholders did not receive full disclosure of the details of CMMH’s bids and therefore could not adequately assess their value. Further, shareholders have been prejudiced by the lock up agreements which prevented them from attaining the best value for their shares.

[47] Specifically, Mr. Collins is concerned that the shareholders did not receive sufficient information concerning the CVR component of the first offer by CMMH. I do not agree. The Board obtained a fairness opinion in relation to the bid including the CVR component but chose NordStar’s cash bid. Further, it was made clear to CMMH that the Board preferred an all cash bid but CMMH did not alter its bid at that critical point. Finally, it must be emphasized that the CVR component is exactly that; it is a pure contingency.

[48] In terms of disclosure to shareholders about CMMH’s offers, CMMH argues that shareholders did not receive sufficient disclosure of their offers and were therefore not in a position to cast an informed vote on July 21, 2020. Specifically, CMMH makes the serious allegation that the Board acted to favour offers by NordStar and failed to adequately analyze CMMH’s better bids.

[49] I disagree. The Board issued a Press Release on July 9, 2020 informing the public of the new offer by CMMH at \$0.72 per share and that it would continue to consider the materials provided with the Offer.

[50] While it is true that the amendment to CMMH’s offer to include the CVR component was not included in the July 11, 2020 Press Release it is clear that the Board wanted liquidity for its shareholders and not a bid which contained a component with a possible future payment of an unknown amount. Further, it cannot be ignored that the Blair Franklin written fairness opinion obtained by the Board and dated July 11, 2020 included consideration of the CVR component which it described as “subject to the negotiation of definitive documentation”.<sup>7</sup>

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<sup>7</sup> Blair Franklin Report, p. 485 of the Application Record.



[51] CMMH complains that this was not a proper analysis of the comparative merits of CMMH's proposal as opposed to NordStar's. While CMMH may be critical of the fairness opinion, this court cannot undertake a complete critical analysis of professional opinions sought and relied upon by the Board in determining whether the Arrangement was fair and reasonable.

[52] CMMH argues that their initial bid was superior to that of NordStar because the CVR component added a further \$42,969,861 to the total value of their bid. However, their own material calls this amount an "estimate."

[53] Further, CMMH complains that in failing to describe to its shareholders how the CVR worked, the Board deprived shareholders of important information that was material in deciding what value the CVR may have added. I disagree. It would have been very difficult for the Board to give reliable information to its shareholders on the value of the CVR when CMMH itself only had an estimate of its value. Further, Torstar only had an obligation to disclose the final CMMH offer if it was a Superior Proposal. The Board concluded, as described above, that it was not and, as such, no disclosure was required.

[54] CMMH submits that after its initial bid Torstar ceased negotiations with CMMH. This is not the case. After receipt of the initial bid from CMMH, Torstar urged CMMH to increase the cash component of its offer to above \$0.72 per share. It chose not to do so.<sup>8</sup> CMMH cannot now blame Torstar for its business decision not to increase the cash component of its offer at that critical point.

[55] Mr. Collins complains that the lock up agreement prevented the shareholders from accepting the \$0.80 bid from CMMH. That is true, but the agreements were between a group of shareholders and NordStar as bidder. They are not subject to review by this Court in deciding whether to grant this application; rather they form part of the given factual context. I note in particular that none of those locked-up shareholders appeared to complain about disclosure by Torstar in the days and leading up to the improved NordStar offer and the lock ups or the consequential lack of ability to accept the CMMH offer. The timing of CMMH's bid has already been reviewed above but to reiterate, CMMH was advised after forwarding their bid on July 10, 2020 that Torstar preferred an all cash bid. CMMH chose not to react. In the interim NordStar had moved quickly to increase their cash bid and approach the Trust and HWIC about a hard lock up agreement.

[56] Both Mr. Collins and CMMH submit that the hard lock up agreement effectively ousted CMMH from the auction process. However, for the reasons expressed above, there were other considerations which went beyond mere price including the promotion of the Atkinson principles by NordStar. This was a friendly takeover and not an adversarial one. While the Court in *BCE* has discouraged courts using the business judgment rule to defer entirely to the Board's judgment when assessing whether an Arrangement is fair and reasonable, the Court cannot ignore the

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<sup>8</sup> Affidavit of Linda Hughes dated July 21, 2020, para 25.

Board's recommendation to accept a cash bid in uncertain times with respect to both the media business and the impacts of the ongoing pandemic.<sup>9</sup>

[57] CMMH is critical of the Board's permissive approach to the hard lock up arrangement with NordStar. It submits that these tactics combined with the Non-Disclosure Agreement ("NDA") which it was required to enter into made it impossible for CMMH to speak out against Torstar's tactics or inaccurate statements. However, the case law cited by CMMH relates to lock up arrangements in hostile merger circumstances (*Growthworks Canadian Fund Ltd. et al.*<sup>10</sup> and *Fixation des action de Fibrek inc.*<sup>11</sup>) with very different factual circumstances.

[58] The issue of disclosure to the shareholders has also been raised by both Mr. Collins and CMMH. The specific concern is that CMMH's final bid of \$0.80 per share in cash was not disclosed to the Torstar shareholders. However, the response to this concern once again goes back to timing. By the time CMMH made their final bid, the lock down agreements were in place and no further bid could have been considered. As such, disclosure of the bid was not required. Ms. Linda Hughes, Lead Director of Torstar, swore in her affidavit of July 21, 2020 that, contrary to subsequent media reports, she was not aware of any offer to pay \$0.80 in cash for the shares prior to the execution of Amendment No. 1. She was only aware of the \$0.72 in cash per share offer plus the CVR. It was only after Amendment No. 1 was publicly announced that CMMH increased their offer.<sup>12</sup>

[59] CMMH submits that shareholders were precluded from seeing the full CMMH offer because of the NDA it was required to sign and precluded it from fully disclosing their proposal to shareholders. I have reviewed the sealed and confidential material filed with the court and it does not change my conclusions. CMMH fails to advert to the fact that the Trust and HWIC voluntarily entered into hard lock down agreements which would preclude them from accepting a Superior Proposal. They had decided to negotiate exclusively with Nordstar. This Court is not prepared to interfere with a voluntary decision made by such a significant block of shareholders.

[60] Finally, CMMH submits that the Board twice refused to consider its financially superior bids. I disagree. Its first bid contained the CVR component which was considered in the Blair Franklin fairness opinion and contained a non cash component that was not attractive to the Board. The second bid was certainly superior from a cash perspective but, as described above, could not have been considered because it was just too late in the process.

[61] Therefore, having regard to all of the foregoing, I find that the Arrangement is fair and reasonable and should be approved by this Court.

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<sup>9</sup> *Supra* at para 140.

<sup>10</sup> 2011 ONSEC 17 (CanLII) paras 58-60

<sup>11</sup> 2019 QCCS 4003 at paras 405-406.

<sup>12</sup> Affidavit of Linda Hughes sworn July 21, 2020, para 25.

**ORDER**

[62] Given all of the above I make the following order:

- a. The Plan of Arrangement involving NordStar Capital LP and Torstar Corporation is hereby approved.



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C. Gilmore, J.

**Released:** July 27, 2020

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**REASONS ON APPLICATION**

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C. Gilmore, J.

**Released:** July 27, 2020